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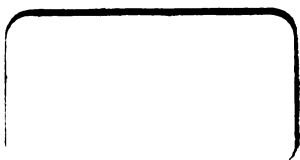




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THE  
MICHIGAN JUDICATURE  
AND  
MISCELLANEOUS PRACTICE  
ACTS  
WITH  
REVISED COURT RULES  
AND  
FORMS OF PLEADINGS

BY  
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LAW AND PROCEDURE IN PROBATE COURTS, ETC., AND ANNOTATOR OF  
THE MICHIGAN CONSTITUTION, RULE BOOK, ETC.

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SECOND EDITION

BY  
THE PUBLISHER'S EDITORIAL STAFF  
UNDER THE SUPERVISION OF GEORGE M. SAYLES  
OF THE DETROIT BAR

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1920  
DETROIT  
FRED S. DRAKE



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JUN 10 1921

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## PUBLISHER'S NOTE

A second edition of Cummins and Beecher's Michigan Judicature and Other Practice Acts would seem to be necessary, not so much from the fact that the Compiled Laws of 1915 has been issued since the appearance of the first edition, to which reference should be made, as to the fact that, so many of the sections have been amended or construed, that so many useful practice acts have been enacted since or were omitted from the former edition, and to the fact that the Court Rules as amended to date, as well as Forms of Pleadings, should be included.

It should be borne in mind that, at the time of the issue of the first edition, the cases in the notes to that edition had all been handed down previous to the passage of the Judicature Act, and that an entirely new theory of practice has been enacted. This means that the former decisions are of vastly less importance than those since the Act was enacted. The classification of these later decisions so as to make them accessible, the inclusion of all amendments to date, as well as all practice Acts of a general nature, together with the Court Rules and Forms, is the task of this edition.

Some idea of the development of practice under the Judicature Act may be obtained from the fact that during the last five years the necessary additions of cases and amendments, condensed into the smallest space consistent with clearness and exhaustiveness, now occupies more than half the type space used in any other edition of this Act.

These additions, together with the other added subjects, included to meet the demands of the profession, and make this work helpful, contain the following subjects not found in any other publication:

All Amendments made by the Legislatures of 1917, 1919 and 1919 Extra;

All Constructions by the Supreme Court from the enactment of the act to November 1st, 1920;

All Practice Acts of a general nature, other than the Judicature Act, as amended or construed to date;

All Rules of the Supreme Court, Circuit Court and the Probate Court as amended to this date;

All Forms of Pleadings deemed necessary.

In this new edition there are one or two suggestions which should be made to the reader by which his attention is called to important features designed to improve the usefulness of this publication. For instance, wherever an amendment to

a section has occurred, all added matter included in such amendment has been set in italics, so that the reader can at once distinguish what has been included in the amendment and how much of the section remains unchanged. Again, an important feature in the notes has been the placing under a black letter title information as to all the changes in practice made by the Judicature Act. It will be advisable to observe that wherever there is a note under a black letter title, such note is important because nowhere else has any suggestion of change in practice been given. The practitioner is informed of what the practice has been and how it has been changed by such a section, the plan of typography challenging his attention.

It has been found necessary to publish this new edition in two volumes in order that everything of value relating to practice may be found in the one publication. Following out this suggestion we have included in volume One all those statutes which relate to practice in the Supreme Court, Circuit Courts of Law, Circuit Courts in Chancery and matters before Circuit Court Commissioners, each with a separate index.

In Volume Two is included all statutes relating to practice in the Probate Courts, Justice Courts, Miscellaneous Practice Acts other than the Judicature Act, to which is added a revised edition of the Court Rules, and Forms of Pleading, each with a separate index.

The indexes in each volume are usually inclusive of the subjects found in that volume, but where it is necessary to refer to subjects found in the other volume, the reference includes the proper volume in front of the section number. Where no volume number is given it can be taken for granted that the subject can be found in the volume in hand.

We wish to acknowledge our indebtedness to the editors of the *Compiled Laws of '15*, as we have combined the best of their annotations with those of our first edition, bringing them up to date.

We are indebted to a large number of the profession in this state for valuable suggestions which they have frequently given us. The consensus of such suggestions has determined our plan to make separate indexes for each division of practice, and to include the subjects as given. We hope that this feature will be found of merit and undoubtedly it will be appreciated by the Bar.

PUBLISHER.

November 1, 1920.

## PREFACE OF FIRST EDITION

The legislature of Michigan in 1913 provided for the appointment of a commission whose duty, among other things, should be to prepare a bill to revise and consolidate the laws relating to civil practice and procedure. The commission appointed in pursuance of the provisions of this Act in November, 1914, reported to the governor a proposed bill for transmission to the legislature at the next session. The proposed bill, as provided in the act above mentioned together with the commission's report accompanying the same, was printed, and copies were placed in the hands of the members of the state bar association and of such other persons as made application for them. The result was that many suggestions as to additional changes, and some criticisms of the changes proposed, were received by the commission. As the result of such suggestions and criticisms, before the bill was introduced in the legislature a number of further changes were made. The legislature itself also made some modifications. One or two important changes proposed by the commission were eliminated. One very important matter was embodied in an independent act, namely the provisions relating to the entry of judgment notwithstanding a verdict in certain cases. Provisions much more radical than those recommended by the Commission were adopted relating to reversals of judgments by the Supreme Court. In the main, the act as passed is as recommended by the commission.

By reason of the fact that "The Judicature Act of 1915" is a consolidation of all the existing law on the subject covered, regardless of whether or not any change was made, the act is a voluminous one and the busy practitioner, unless aided in some way, will find himself wasting much valuable time looking for changes in the law where none have been made.

The purpose of Part One of this work is to aid the practitioner to readily find these changes and to save him from this waste of time in looking for changes where there are none. The aim has been to provide a brief summary of the substantial changes in the practice, both those made by the Judicature Act and those made by other Acts.

The Judicature Act contains numerous changes in phraseology. Many provisions have been eliminated as obsolete and many sections, containing similar provisions, have been merged. In order not to thwart the very purpose which the work is designed to accomplish, it has been deemed best to avoid all references to changes not substantial.

The author of the commentaries will deem himself amply rewarded for the time spent in their preparation if the work shall be found to have accomplished the purpose indicated.

Lansing, February, 1916.

A. M. CUMMINS.

The Judicature Act makes up Part II, the Other Practice Acts comprise Part III, and the New Judicature Act Forms make up Part IV of this work. Each section retains its original number, both in the various chapters of the Judicature Act and in the parts of the Other Practice Acts. But again each section is numbered consecutively from the beginning to the end of the work and appropriately entitled in bold faced type, so as to make the whole a uniform book upon the statutory practice in Michigan.

The Judicature Act is thoroughly annotated as to the sources from which the various sections have been taken, which is so essential, and important for the practitioner to know.

The object of the case-annotations has been to give in each event a decision directly construing the section, and then having the other cases gathered around the same. In instances where sections have been combined, merged and superseded, wherever possible, the cases construing these different sections have been collated so that a general survey may be had of their bearing, if any, upon the new section.

New sections taken from the Federal Rules or from the statutes of foreign jurisdictions have been annotated with the decisions construing them in their respective jurisdictions.

The Other Practice Acts have also been annotated wherever possible. The New Judicature Act Forms are those which have been recently adopted by our Supreme Court.

The official copy of the Judicature and Other Practice Acts was not received until September last, which fact may account for the delay and any shortcomings in not bringing out the work sooner.

Many thanks are due the publisher's editorial staff for assisting in preparing the annotations and section titles, in order to rush the work to completion for the purpose of satisfying the insistent demand of the profession.

FRANKLIN A. BEECHER.

Detroit, February, 1916.

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## PART ONE—THE JUDICATURE ACT

### ANNOTATED

AN ACT to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms of civil actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act.

*The People of the State of Michigan enact:*

#### (12004). The Act, How Known.

SECTION 1. This act shall be shown [known] and may be cited as "The judicature act of nineteen hundred fifteen."

HISTORY: This is a new section.

COMPILERS' NOTE: Decisions given in the notes to the various sections of this act which refer to former acts, repealed or superseded and re-enacted without material change by this act, are frequently given in the notes under the head note "Cited" or "Construed," although the case merely cites or construes the former act. Care also should be used on the part of the individual using the decisions given in the notes to the various sections of this act, in ascertaining whether the old section or act construed has been materially changed by this act so as to render such decision of but little more than historical value. In the majority of cases of this kind, the reader's attention to such change is directly challenged in the note. However in a few instances the question of whether the rule as laid down in the decision still applies to the section as changed, being purely a judicial one, was not deemed within the power of the compilers to state whether the rule remained the same or that the decision had been rendered of no value because of the change in the section as re-enacted in this act. It is for this reason therefore, that in cases like the above, the rule is stated or the case cited construing the old section or act without further comment.

TAKING EFFECT: Cases determined that (12004) et seq., or Act

No. 314, P. A. '15, known as Judicature Act of Nineteen Hundred Fifteen, became operative January 1st, 1916. *Guthrie v. Leelanau Circuit Judge*, 197 Mich. 324, 163 N. W. 25; *Couple-Gear Freight Wheel Co. v. Lake Shore & M. S. R. R.*, 196 Mich. 432, 163 N. W. 25; *In re Haslick's Estate*, 195 Mich. 442, 161 N. W. 965.

(12005). **Rule of Construction.**

SEC. 2. This act is hereby declared to be remedial in character, and as such shall be liberally construed to effectuate the intents and purposes thereof.

HISTORY: This is a new section.

CONSTRUCTION: Act given liberal construction. *Detroit & Northern Michigan Building and Loan Ass'n v. Oram*, 200 Mich. 492, 167 N. W. 52; *McMillan v. School District No. 2, Portsmouth Township*, 200 Mich. 284, 167 N. W. 49.

## CHAPTER I

### OF THE ORGANIZATION AND POWERS OF THE SUPREME COURT

(12006). **The Number of Justices.**

SECTION 1. The supreme court shall consist of a chief justice, and seven associate justices, to be chosen by the electors of this state. The present justices of said court shall be justices thereof, until the expiration of their respective terms of office.

HISTORY: Supersedes Sec. 1 of Act No. 146 of P. A. '57, being C. L. '57, (3365); C. L. '71, (4884); How. 6382; As Amended P. A. '87, Act No. 6, Imd. Eff. Feb. 5; C. L. '97, (177); As Amended '03, Act No. 250, Eff. Sept. 17, a new section but remains substantially unchanged.

See Beecher's Annotated Constitution of Michigan, '08, Art VII, Sec. 2.

FORMER LAW CITED: P. A. '03, Act No. 250 was cited in *Scott v. Sullivan*, 164 Mich. 468, 129 N. W. 864.

(12007). **When Election to Be Held.**

SEC. 2. At the election to be held in the several townships and cities of this state, on the first Monday of April, nineteen hundred and seventeen, and every two years thereafter, there shall be elected two justices of the supreme court, to hold

their offices respectively for the term of eight years from and after the first day of January next succeeding such election.

**HISTORY:** Supersedes Sec. 2 of Act No. 146 of '57, being C. L. '57, (3366); C. L. '71, (4885); How. 6383; C. L. '97, (178); also supersedes Sec. 3 of Act No. 146 of '57, being C. L. '57, (3367); C. L. '71, (4886); How. 6384; As amended by P. A. '87, Act No. 6, Imd. Eff. Feb. 5; C. L. '97, (179); As Amended by P. A. '03, Act No. 250, Eff. Sept. 17, a new section but remains substantially unchanged.

**CONSTITUTIONALITY; TIME OF ELECTION:** See Beecher's Annotated Constitution of Michigan, '08, VII, 2.

**CONSTRUED:** A majority of the five justices of the Supreme Court who decide a case may settle the formal decree. Scott v. Sullivan, 164 Mich. 467, 129 N. W. 864.

**FORMER LAW CITED:** Case v. Commissioners, 151 Mich. 507, 115 N. W. 454.

#### (12008). Ballot and Laws Applicable to Election.

**SEC. 3.** Such justices shall be voted for on the same ballot as circuit judges and regents of the university, and all the provisions of law then existing relating to election of circuit judges, so far as applicable, and the making of the county and state canvasses therefor, and certifying the result thereof, shall be applicable in the case of justices of the supreme court.

**HISTORY:** Supersedes Secs. 7, 8, 9 and 10 of Act No. 146, of '57, being C. L. '57, (3371)-(3374); C. L. '71, (4890)-(4893); How. 6386-9; C. L. '97, (181)-(184), a new section but remains unchanged.

**ELECTION OF CIRCUIT JUDGES:** The manner of electing judges is provided for in the election laws, see C. L. '15 (3673) et seq; see also P. A. '71, Act No. 203, as Amended by P. A. '19, Acts No. 42, 45, 61, 266 and P. A. '19, Extra Session, Act No. 2, a new Section.

#### (12009). The Filling of Vacancies.

**SEC. 4.** Whenever a vacancy shall happen in the office of justice of the supreme court, it shall be filled by appointment of the governor, and a successor shall be elected at the next general April or November election.

**HISTORY:** Supersedes and re-enacts in part Sec. 4 of Act 146 of '57, being C. L. '57, (3368); C. L. '71, (4887); How. 6385; C. L. '97, (180), which remains substantially unchanged.

See Beecher's Annotated Constitution of Michigan, Act VII, Sec. 20 and note.

**CONSTITUTIONALITY; VACANCY:** See Const. VII, 20. As to the filling of a vacancy in the office of judge of probate, see People v. Lord, 9 Mich. 226.



**(12010). Quorum-Oral Hearing-Rehearing-Duties of Chief Justice.**

SEC. 5. Five justices shall be sufficient to form a quorum for the hearing of cases and for the transaction of business, and the court shall have the jurisdiction and powers conferred by the constitution and laws of this state. Parties to proceedings pending in the supreme court shall be entitled to an oral hearing in all calendar causes and upon all motions involving constitutional questions and personal liberty. Whenever there shall be filed a dissenting opinion in a case heard by a quorum of five justices only, the parties therein shall have a right to a rehearing before the entire bench upon making a proper application therefor. The powers and duties appertaining to the office of chief justice of the supreme court shall devolve, from time to time, upon the two justices of that court whose term of office shall soonest expire by its own limitations; the justice having served the longest time in said court shall discharge such duties during the year next preceding the last year of his term, and the justice having served the shortest time in said court shall discharge such duties during the last year of his said term: *Provided, however,* In case the said two justices have served the same length of time in said court, then the justice senior in years shall discharge such duties during the year next preceding the last year of his term, and the justice junior in years shall discharge such duties during the last year of his term. Four terms of the supreme court shall be held annually, commencing Tuesday after the first Monday of January, April, June and October, which shall be called respectively the January, April, June and October terms of said court. All the terms of said court shall be held at the supreme court room in the city of Lansing, in the county of Ingham. The court may hold special or adjourned terms, and shall continue its sessions a sufficient number of days at each term to hear all the causes ready for hearing, and all causes and questions not decided at the term when the same are submitted shall be determined early in the next succeeding term.

HISTORY: Supersedes in part Sec. 13 of Act 146 of '57, being C. L. '57, 3377; As Am. '59, p. 505, Act 179, Eff. May 18; C. L. '71 (4896); As Am. '73, p. 174, Act 126, Eff. July 31; As Am. '75, p. 4, Act 6, Imd. Eff. Feb. 4; C. L. '97, (185); As Am. '03, p. 414, Act 250, Eff. Sept. 17, remains substantially unchanged.

**CONSTITUTIONALITY:** As to the terms held by the supreme court, see Beecher's Annotated Constitution of '08, VII, Secs. 2 and 3.

**CONSTRUED:** A judgment, rendered when less than a quorum had heard the argument of the case, was held irregular. *Jagger v. Coon*, 5 Mich. 31. A decision by four justices of the supreme court in a case heard by seven, establishes the law. *Dolph v. Norton*, 158 Mich. 417, 123 N. W. 13. A majority of the five justices of the supreme court who decide a case may settle the formal decree. *Scott v. Sullivan*, 164 Mich. 467, 129 N. W. 864.

**(12011). Salary of Justices.**

**SEC. 6.** Each justice of the supreme court shall receive an annual salary of seven thousand dollars, payable out of the moneys of the state treasury, belonging to the general fund, not otherwise appropriated.

**HISTORY:** Re-enacts part of Sec. 14 of Act 146 of '57, being C. L. '57, (3378); C. L. '71, (4897); As Am. '73 p. 1, Act 1, Imd. Eff. Jan. 16; How. 6393; As Am. '87, p. 111, Act 96, Eff. Sept 28; As Am. '93, p. 287, Act 182, Eff. Aug. 28; C. L. '97, (186); As Am. '13, p. 175, Act 102, Eff. Aug. 14 remains substantially unchanged.

**(12012). One Justice to Be at Seat of Government.**

**SEC. 7.** At least one justice shall at all times be at the seat of government, and all justices who have their residences elsewhere than in Lansing, shall pay their own traveling expenses between their homes and Lansing.

See note to (12011).

**(12013). Oath Required.**

**SEC. 8.** Before entering upon the discharge of their duties, the several justices shall take and subscribe the oath required by the constitution.

**HISTORY:** Re-enacts Sec. 15 of Act 146 of '57, being C. L. '57 (3379); C. L. '71, (4898); How. 6394; C. L. '97, (187), unchanged.

**CONSTITUTIONALITY:** See Beecher's Annotated Constitution of '08, XVI, 2.

**(12014). Jurisdiction.**

**SEC. 9.** The supreme court shall have a general superintending control over all inferior courts, to prevent and correct errors and abuses therein, where no other remedy is expressly provided by law, and shall have also jurisdiction of suits, actions and matters brought before it by writ of certiorari or writ of error, when the same shall be allowed by law to

any inferior court, to magistrates and other officers, as well in cases of prosecution for any offense, misdemeanor or penalty, in the name of the people of this state, as in other cases, and by certificate of any circuit judge of any cause pending or tried before him, or by a case made and agreed upon by the parties or their attorneys, in any circuit court, and certified by the clerk of such circuit court, and shall have power to issue writs of error, certiorari, habeas corpus, mandamus, quo warranto, procedendo, prohibition, supersedeas, and all other original and remedial writs which may be necessary for the due execution of the law and the administration of justice, and the full and perfect exercise of its jurisdiction, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only.

**HISTORY:** Re-enacts Sec. 2 of Act 93 of '51, being C. L. '57, (3382); C. L. '71, (4904); How. 6404; C. L. '97 (191), unchanged. See Beecher's Annotated Constitution of Michigan, Art. VII, Sec. 4.

**CONSTITUTIONALITY:** See Const. 1850, VI, 3, and notes. Const. 1908, VII, 4. As to the jurisdiction of the supreme court under the Constitution of '35, see *Hiney v. Cade*, 1 Mich. 164.

**CONSTRUED:** See *Mich. Mutual Fire Ins. Co. v. Wayne Circuit Judge*, 112 Mich. 270, 70 N. W. 582; *Clark v. Mayor*, 112 Mich. 283, 70 N. W. 581; *Baker v. Board of State Canvassers*, 111 Mich. 378, 69 N. W. 656.

**CONTROL OVER INFERIOR COURTS:** No provision being made for an appeal from the decision of the state court of mediation, its attempt to review a decision on rehearing may be restrained by writs of prohibition and mandamus. *Renaud v. State Court of Mediation*, 124 Mich. 648, 83 N. W. 620. See *People v. Farrell*, 146 Mich. 271, 109 N. W. 440; *Silver v. Hamilton Township Board* 146 Mich. 394, 109 N. W. 664; *Wells v. Montcalm Circuit Judge*, 141 Mich. 58, 104 N. W. 318; *Hick's Case*, 20 Mich. 129.

**(12015). Appellate Jurisdiction to Be Exercised at General Term.**

**SEC. 10.** At any of the general terms of said court, it shall exercise its appellate jurisdiction in suits in equity and at law, and in probate cases originating in any part of this state.

**HISTORY:** Re-enacts Sec. 6 of Act 93 of '51, being C. L. '57, (3384); C. L. '71, (4906); How. 6405; C. L. '97, (192), unchanged.

**(12016). Order Arguments at Any Term—No Decision on Points Not Raised Unless Argued.**

**SEC. 11.** Upon all questions arising under the exercise of such jurisdiction, when argument of counsel may be desired

or intended by the parties, or may be requested by the court, the court may order such arguments to be had at any of said terms. And after the arguments of any cause, or when the same is submitted on briefs, if the court is of opinion that [a] certain point or legal proposition is involved which is material to the decision of the case, and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until both counsel have had an opportunity to argue the same before the court.

**HISTORY:** Re-enacts Sec. 7 of Act 93 of '51 being C. L. '57, (3385); C. L. '71, (4907); As Am. '83, p. 37, Act 45, Eff. Sept. 8; How. 6406; C. L. '97, (193), unchanged.

**QUESTIONS NOT RAISED BELOW:** A question not raised below and as to which the available testimony is not included in the bill of exceptions, will not be considered. *Gadd v. Detroit*, 142 Mich. 685, 106 N. W. 210. But where the record contains all the facts necessary for the consideration of a point raised by the supreme court, it will be considered, though not raised or passed upon by the court below. *Aud. Gen. v. Bolt*, 147 Mich. 286, 111 N. W. 74.

**FORMER LAW CITED:** *Dahrooge v. Insurance Co.*, 177 Mich. 456, 143 N. W. 608. *Gadd v. City of Detroit*, 142 Mich. 685, 106 N. W. 210.

#### (12017). Duty of Clerk to Open Court.

**SEC. 12.** If neither of said justices shall attend on the first day of any term of said court, it shall be the duty of the clerk thereof, at any time after four o'clock in the afternoon of such day, to open the said court by proclamation, and immediately to adjourn the same to the next day; and so to open and adjourn the said court from day to day, until the judges thereof, or one of them, shall appear, when the court shall proceed to business, if a quorum be present, as if it had been opened and adjourned by a judge thereof.

**HISTORY:** Re-enacts Sec. 8 of Act 93 of '51, being C. L. '57, 3386; C. L. '71, (4908); How. 6407; C. L. '97, (194), unchanged.

#### (12018). Quorum of Justices.

**SEC. 13.** If a quorum of said justices shall not attend, the justice or justices attending may, in his or their discretion, adjourn the said court from day to day, until a quorum shall be present; or, if it be deemed proper, the said court may be adjourned without day; and if no justice shall attend

before the expiration of the third day in term, the clerk shall adjourn said court without day.

**HISTORY:** Re-enacts Sec. 9 of Act 93 of '51, being C. L. '57, (3387); C. L. '71, (4909); How. 6408; C. L. '97, (195), unchanged.

**(12019). Power to Establish Rules of Practice.**

**Sec. 14.** The justices of the supreme court shall have power, and it shall be their duty, by general rules to establish, and from time to time thereafter to modify and amend, the practice in such court, and in all other courts of record, in the cases not provided for by any statute; and they shall, once at least in every two years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice:

1. The abolishing of distinctions between law and equity proceedings, as far as practicable;
2. The abolishing of all fictions and unnecessary process and proceedings;
3. The simplifying and abbreviating of the pleadings and proceedings;
4. The expediting of the decisions of causes;
5. The regulation of costs;
6. The remedying of such abuses and imperfections as may be found to exist in the practice;
7. The abolishing of all unnecessary forms and technicalities in pleading and practice;
8. To effectually prevent the defeat or abatement of any civil suit, ex contractu, for either any nonjoinder or misjoinder of parties, where the same can be done consistently with justice;
9. To provide for all necessary amendments of process, pleadings or other proceedings in such case; and
10. To provide the manner by which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit and brought in to answer thereto, if within the jurisdiction of the court.

**HISTORY:** Re-enacts Sec. 12 of Act 93 of '51 being C. L. '57, (3390); C. L. '71, (4912); How. 6409; C. L. '97, (196), remains substantially unchanged, omitting clause relating to the time the first set of rules should be established.

**CONSTITUTIONALITY:** See Beecher's Annotated Constitution of '08, VII, 5.

**CONSTRUED:** The circuit court cannot adopt rules conflicting with those prescribed by the supreme court, or covering matters of other than mere local concern. *Detroit, Grand Rapids & Western Rd. Co. v. Eaton* Circuit Judge, 128 Mich. 497. A failure to comply strictly with the rules of court is an irregularity.—*Goodspeed v. Smith*, 161 Mich. 688.

**SUBDIVISION 8: MISJOINDER:** A misjoinder of defendants in an action *ex contractu*, will not in view of this section and circuit Court Rule 43 '16 operate to abate the suit, though all were joined in a single count.—*Durgin v. Smith*, 115 Mich. 243.

*Joy v. Ingham* Circuit Judge, 204 Mich. 41; 169 N. W. 917.

Circuit Court Rule 27 makes it possible to carry out the provisions of this section, for it not only gives court power to formulate general rules to establish the practice of the circuit courts in civil suits *ex contractu*, but also, provides the manner by which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit and brought in to answer thereto, if within the jurisdiction of the court. *Pruner v. Detroit United Railway*, 173 Mich. 149. See *Detroit, etc., R. Co. v. Circuit Judge*, 128 Mich. 497; 87 N. W. 641; *Griffin v. Wattles*, 119 Mich. 348; 78 N. W. 122; *Ismond v. Scougale*, 119 Mich. 501; *Wright v. Reinelt*, 118 Mich. 638.

It has been said that "the circuit court rule 27 was adopted with a view of preventing a mistrial in just such cases, and is founded upon the authority of this section which confers power upon this court to adopt rules having the purpose to prevent the defeat or abatement of any civil suit or contract for either misjoinder or non-joinder of parties, where the same can be done consistently with justice." *Durgin v. Smith*, 115 Mich. 243, 73 N. W. 361.

The rule applies to actions of tort, as well as to actions *ex contractu*, *Pruner v. Detroit United Ry.*, 173 Mich. 149, 139 N. W. 48. See also *Munn v. Haynes*, 46 Mich. 145, 9 N. W. 140; *Winslow v. Herrick*, 9 Mich. 381; *Yawkey v. Richardson*, 9 Mich. 531. Does not apply to cases originating in justice's courts, *Wright v. Reinelt*, 118 Mich. 638, 77 N. W. 246.

**FORMER LAW CITED:** *Griffin v. Wattles*, 119 Mich. 348, 78 N. W. 122; *Ismond v. Scougale*, 119 Mich. 503, 78 N. W. 546.

### (12020). The Style of Process.

**SEC. 15.** All writs and process issuing out of said court shall be styled "In the Name of the People of the State of Michigan," and shall run into and be executed in any county of the state; and the seal of said court affixed thereto, or impressed upon any writ or process, in any suit or proceeding therein, shall be conclusive evidence that such writ or process was issued by said court, in all cases where such writ or process may be lawfully issued.

**HISTORY:** Re-enacts Sec. 13 of Act 93 of '51, being C. L. '57, (3391); C. L. '71, (4913); How. 6410; C. L. '97, (197), unchanged.

**CONSTITUTIONALITY:** Beecher's Annotated Michigan Constitution, Art. VII. Sec. 22.

**(12021). The Forms of Process.**

**SEC. 16.** The supreme court shall have authority to prescribe from time to time, the forms of all process to be issued out of the circuit courts at law and in chancery, and until other forms are prescribed, those now in use may be continued, so far as they may be applicable.

**HISTORY:** Re-enacts Sec. 39 of R. S. '46, Ch. 90, being C. L. '57, (3493); C. L. '71, (5075); How. 6629; C. L. '97, (451), inserting "at law and," remains substantially unchanged.

**(12022). Power of Discovery.**

**SEC. 17.** The supreme court shall have power, in all such cases as shall be deemed proper, to compel any party to a suit pending therein, to produce and discover books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein.

**HISTORY:** Re-enacts Sec. 14 of Act 93 of '51, being C. L. '57, (3392); C. L. '71, (4914); How. 6411; C. L. '97, (198) remains unchanged.

**CONSTRUED:** This section, and the five following, do not abrogate the usual proceedings for contempt of court. *Metheany v. Kent Circuit Judge*, 142 Mich. 630, 106 N. W. 147. See Circuit Court Rule 49 '16; also (12268)-(12298).

**(12023). General Rules for Cases Where Discovery May Be Compelled.**

**SEC. 18.** The court shall, by general rules, prescribe the cases in which such discovery may be compelled, where the same are not herein provided, and the costs of such proceedings shall always be awarded in the discretion of the court.

**HISTORY:** Re-enacts Sec. 15 of Act 93 of '51, being C. L. '57, (3393); C. L. '71, (4915); How. 6412; C. L. '97, (199), remains unchanged.

**(12024). Presentation of Petition for Discovery.**

**SEC. 19.** To entitle a party to any such discovery, he shall present a petition to the court, or to any justice in vacation, verified by oath, upon which an order may be granted by the

court or such justice, for the discovery sought, or that the party against whom the same is sought show cause why the prayer of such petition should not be granted.

**HISTORY:** Re-enacts Sec. 16 of Act 93 of '51, being C. L. '57, (3394); C. L. '71, (4916); How. 6413; C. L. '97, (200), changing "judge" to "justice," which change is made throughout the chapter, remains substantially unchanged.

**(12025). Vacation of Order.**

**SEC. 20.** Every such order may be vacated by the justice granting the same or by the court:

1. Upon satisfactory evidence that the same ought not to have been granted;
2. Upon the discovery sought being made;
3. Upon the party required to make the discovery denying, on oath, the possession or control of the books, papers or documents ordered to be produced.

**HISTORY:** Re-enacts Sec. 17 of Act 93 of '51, being C. L. '57, (3395); C. L. '71, (4917); How. 6414; C. L. '97, (201), unchanged.

**(12026). General Rules for the Staying of Proceedings in Cases of Discovery.**

**SEC. 21.** The court shall provide, by general rules for the staying of proceedings in any case where such discovery shall have been ordered, until such order shall have been complied with or vacated.

**HISTORY:** Re-enacts Sec. 18 of Act 93 of '51, being C. L. '57, (3396); C. L. '71, (4918); How. 6415; C. L. '97, (202), unchanged.

**(12027). Remedies for Disobedience to the Order.**

**SEC. 22.** In case any party refusing or neglecting to obey any such order for discovery within such time as may be deemed reasonable, the court may nonsuit him, or may strike out any plea or notice he may have given, or may debar him from any particular defense in relation to which such discovery is sought; and the power of the court to compel such discovery shall be confined to the remedies herein provided, and shall not extend to authorize any other proceeding against the person or property of the party so refusing or neglecting.

**HISTORY:** Re-enacts Sec. 19 of Act 93 of '51, being C. L. '57 (3397); C. L. '71, (4919); How. 6416; C. L. '97, (203), unchanged.



**(12028). The Effect of the Production of Books, etc.**

**SEC. 23.** The books, papers and documents produced under any order made in pursuance of the preceding sections, shall have the same effect, when used by the party requiring them, as if produced upon notice, according to the practice of the court.

**HISTORY:** Re-enacts Sec. 20 of Act 93 of '51, being C. L. '57, (3398); C. L. '71, (4920); How. 6417; C. L. '97, (204), unchanged.

**(12029). Prescribe Rules for Practice in Circuit Courts.**

**SEC. 24.** The supreme court shall, amongst other things, regulate and prescribe the practice therein, and in the circuit courts, where the same is not prescribed by any statute, in relation to bills of exceptions, cases made by the parties, special verdicts, granting new trials, motions in arrest of judgment, taxation of costs, giving notice of special motions, and of such other proceedings as the court may think proper; staying proceedings when necessary to prevent injustice, and the hearing of motions, imposing terms, in their discretion, on granting such motions.

**HISTORY:** Re-enacts Sec. 21 of Act 93 of '51, being C. L. '57, (3399); C. L. '71, (4921); C. L. '97, (205), and remains unchanged.

**BILL OF EXCEPTIONS:** See (12633)-(12638). As to the time for settling a bill of exceptions, see *Harper v. Wayne Circuit Judge*, 155 Mich. 544, 119 N. W. 913 *Hayes v. Ionia Circuit Judge*, 125 Mich. 277, 84 N. W. 141.

**NEW TRIAL:** The granting of a new trial is a matter of discretion with the trial judge, over which the supreme court has no jurisdiction, except in case of abuse of discretion. *Detroit Tug & Wrecking Co. v. Gartner*, 75 Mich. 360, 42 N. W. 968. The ruling of the court thereupon is not the subject of appellate review, *Minkinen v. Quincy Mining Co.*, 172 Mich. 407, 137 N. W. 716. A new trial on the merits may be granted though the judgment has been affirmed by the supreme court. *Parkey v. Galloway*, 147 Mich. 693, 111 N. W. 348. But see *National Surety Co. v. Grant*, 177 Mich. 348, 143 N. W. 5; *Minkinen v. Quincy Mining Co.*, 169 Mich. 279; *Goldsmith v. Detroit, Etc., Ry.*, 165 Mich. 177, 130 N. W. 647. As to the time within which the motion for a new trial may be made: See *Hayes v. Ionia Circuit Judge*, 125 Mich. 278, 84 N. W. 141.

**CASE MADE:** See (13752).

**(12030). Prescribe General Rules for Circuit Court to Grant Order to Stay Proceedings.**

**SEC. 25.** In cases not otherwise provided for, the supreme court shall have power, from time to time, by general rules,

to prescribe the cases in which the circuit courts, or any judge thereof, or circuit court commissioner, may grant orders to stay proceedings in causes and matters pending in the circuit courts, and upon process issued therefrom, the effect of such orders, and the terms and conditions on which they shall be granted.

**HISTORY:** Re-enacts Sec. 22 of Act 93 of '51 being C. L. '57, (3400); C. L. '71 (4922); How. 6419; C. L. '97, (206), unchanged.

**STAY OF EXECUTION:** Ismond v. Scougale, 119 Mich. 501, 504.

**(12031). Justice Equally Divided in Opinion Judgment Below Affirmed.**

**SEC. 26.** When the justices of the supreme court shall be equally divided in opinion upon any case submitted to them, brought before said court by appeal, certiorari, or writ of error, the judgment or decree of the court below shall be affirmed.

**HISTORY:** Re-enacts Sec. 23 of Act 93 of '51, being C. L. '57, (3401); C. L. '71, (4923); How. 6420; C. L. '97, (207), unchanged.

**DIVIDED COURT:** A verdict directed by the trial court will be affirmed, in the event that four of the eight justices of the supreme court decide that the verdict should be directed, even if the grounds are different than those taken by the trial court. *Scharman v. Bay County Bridge Commission*, 158 Mich. 77. Thus, it is manifest that where the supreme court is divided in opinion, the judgment will be affirmed, or exceptions overruled. *McPherson v. Ryan*, 59 Mich. 32; *Dutch Reform Church Cases*, 52 Mich. 329; *Nester v. Nester*, 50 Mich. 42; *Mitchel v. Mitchel*, 49 Mich. 68; *Rose v. French*, 39 Mich. 136; *Sands v. Finan*, 38 Mich. 616; and *Whiting v. Butler* 29 Mich. 145; 38 Mich. 616; *Marquette and O. R. Co. v. Taft*, 28 Mich. 289; *Hoffman v. Harrington*, 28 Mich. 90; *Michigan Central R. Co. v. Leahey*, 10 Mich. 193; *Penniman v. Perce*, 9 Mich. 509. But a divided court does not establish the law for other cases. *City of Kalamazoo v. Crawford*, 154 Mich. 53. Although in the event that seven justices sit in a case and four of them concur in an opinion, the decision establishes the law. *Dolph v. Norton*, 158 Mich. 417. The effect of the affirmance of a decree upon an equal division of the court is equivalent to the affirmance of a judgment under the usual course of proceeding. *People ex rel. Lyon v. Ingham Circuit Judge*, 37 Mich. 377; But see *People v. Regents*, 18 Mich. 483; *State Tax Law Cases*, 54 Mich. 444.

**(12032). Justices Not to Practice as Attorneys.**

**SEC. 27.** No justice of the supreme court shall practice as attorney or counselor in any court of this state.

**HISTORY:** Re-enacts Sec. 25 of Act 93 of '51, being C. L. '57, (3402); C. L. '71, (4924); How. 6421; C. L. '97, (208), unchanged.

**(12033). Seals.**

**SEC. 28.** The seals of the supreme court now in use shall continue to be used therein; and with such other seals as may be devised for that purpose according to law, shall be the seals of said court.

**HISTORY:** Re-enacts Sec. 26 of Act 93 of '51, being C. L. '57, (3403); C. L. '71, (4925), How. 6422; C. L. '97, (209), unchanged.

**(12034). The Court May Order Oral Testimony.**

**SEC. 29.** The supreme court may, at any time, in accordance with and for the speedy furtherance of justice in any suit, either at law or in equity, call upon the parties to such suit, or any witness thereto, to testify orally in open court; and said court may, by rule, provide for a similar practice in the circuit courts. But no party or witness whose evidence may not be received under the statutes of the state shall be called upon to testify under the provisions of this section.

**HISTORY:** Re-enacts Sec. 28 of Act 93 of '51, being C. L. '57, (3405); C. L. '71, (4927); How. 6424; As Am. 1887, p. 164, Act 151, Eff. Sept. 28; C. L. '97, (211), unchanged.

**TESTIMONY IN OPEN COURT:** See Compilers' Section (11428); Hamilton v. Hamilton, 37 Mich. 606; Eaton v. Knowles, 61 Mich. 633; Note to Rice v. Rice, 104 Mich. 387. A circuit judge has authority to require the defendant in a pro confesso divorce case to appear and testify. Rosecrance v. Rosecrance, 127 Mich. 322. Judd v. Judd et al 192 Mich. 198, 158 N. W. 948. Bauer v. Bauer, 177 Mich. 170; Spry Lumber Co. v. Steam Barge, 76 Mich. 322. Eaton v. Knowles, 61 Mich. 633. Hamilton v. Hamilton, 37 Mich. 606.

It lies entirely within the discretion of the court to call witnesses.

**CITED:** Park Association v. P. M. R. R. Co., 172 Mich. 188. See also note to Schroeder v. Boyce, 127 Mich. 36.

**(12035). Decisions of the Court to Be in Writing and Signed.**

**SEC. 30.** The decisions of the supreme court, with the reasons therefor, shall be in writing, and signed by the justices concurring therein. Any justice dissenting therefrom shall give the reasons of such dissent in writing, over his signature; and such opinions shall be filed in the office of the clerk of the supreme court, and copies thereof shall at the same time be delivered to the reporter of said court.

**HISTORY:** New Section. This section merges and supersedes

Secs. 30 and 31 of Act 93 of '51, being C. L. '57, (3407-8); C. L. '71, (4929)-(4930); How. 6426-7; C. L. '97, (213)-(214), changed in regards to delivering decisions to court reporter.

**DECISIONS:** The matter which is *obiter dictum* in an opinion is entitled to no greater weight than would be given it as an expression of an opinion of the justice writing the opinion. Detroit Lumber Co. v. Yacht "Petrel," 153 Mich. 530. Where certain expressions in a case even supposed to be at variance with the court's construction in another case, it is manifest that these expressions have no effect as precedent where the subject to which they related was not material to the decision and was not decided. Ellsworth v. Hall, 48 Mich. 409. The language used in deciding cases can rarely be separated from the specific matter contemplated by the court, without leading to results completely at variance with the principle with which the expressions were meant to harmonize.

The propositions which appear correct in view of the actual case as shaped by the record, do not require their limitations, or the conditions which would not be suited to them, set forth in guarded terms, for it is supposed that they will not be read as abstractions, but as propositions inseparably bound up with the particular issue and matters before the court. Holcomb v. Bonnell, 32 Mich. 8. In Larzelere v. Starkweather, 38 Mich. 100, Justice Marston said: "The reasoning in an opinion is not that of the court, but of the judge who prepares and delivers it. It may or may not be considered sound and unanswerable and as such is the subject of criticism.

The conclusion arrived at and announced upon the several questions discussed and essential to a proper disposition of the case, is that of the court, and in concurring in such conclusion it is not generally supposed or understood that everything contained or said in the opinion is therefore unqualified and unquestionably adopted as the opinion of the court. In the preparation of an opinion, the facts of the case are in mind. It is prepared with reference to such facts, and when considered in connection therewith, will generally be satisfactory. When, however, an attempt is made to pick out particular parts of sentences, and apply them indiscriminately in other cases, nothing but confusion and disaster will be likely to follow. In other words, the opinion and decision of a court must be read and examined as a whole in the light of the facts upon which it was based. They are the foundation of the entire structure which cannot with safety be used without reference to them."

#### OF THE CLERK OF THE SUPREME COURT.

#### (12036). Appointment of Clerk and His Duties.

**Sec. 31.** The supreme court may appoint a clerk of said court who shall hold his office during the pleasure of said court. Such clerk shall take the constitutional oath of office and shall perform such duties as may be required by law or by the court. It shall be the duty of the clerk to collect all fees of his office provided for either by statute or the rules of court,

and pay the same monthly into the state treasury, taking the treasurer's receipt therefor, which receipt the clerk shall file in his office. The bond required by law to be given by said clerk, when approved, shall be filed in the office of the secretary of state and the cost thereof shall be paid by the board of state auditors. Said clerk shall be an attorney duly admitted to practice before the bar of said court.

**HISTORY:** Supersedes and re-enacts Sec. 1. Act. 250, '09 p. 434, Eff. Sept. 1, though such section was not expressly repealed by this act, unchanged.

**CLERK:** A court will take judicial notice of its own officers, but not of those of another court. *Norvell v. McHenry*, 1 Mich. 233.

**(12037). Salary of Clerk.**

**SEC. 32.** The clerk of the supreme court shall receive a salary of five thousand dollars per annum and his actual and necessary expenses for clerk hire, to be fixed by the court. He may also appoint a deputy with the approval of the court who shall receive such salary as the court may fix. Said deputy shall be an attorney duly admitted to practice before the bar of said court. The compensation of such clerk, together with the other expenses of the office as herein provided, shall be paid monthly out of the general fund in the state treasury on vouchers to be approved by a justice of the court.

**HISTORY:** Supersedes Sec. 2. Act 250 of '09, p. 434, Eff. Sept. 1, and Sec. 3, of said Act repeals Secs. 18, 19, 20, 22, of R. S. '46, Ch. 95, being C. L. '57, (4002)-(4003)-(4004)-(4005)-(4006); C. L. '71, (5614)-(5615)-(5616)-(18); How. 7165-67-69; C. L. '97, (215)-(216)-(217)-(218)-(219), and Sec. 2 of R. S. '46, Ch. 150, as Am. '69, p. 149, Act 83, Imd. Eff. Mar. 30; C. L. '71, (7431); How. 9007; C. L. '97, (11216), changed.

**(12038). Clerk to be Custodian.**

**SEC. 33.** The clerk of the supreme court shall have the care and custody of all the records, seals, books and papers appertaining to his said office, and filed or deposited therein; and shall perform all such other duties relating to his office as are required of him by law, or by the rules and practice of the court.

**HISTORY:** Re-enacts Sec. 21 of R. S. '46, Ch. 95, being C. L. '57, (4005); C. L. '71, (5617); How. 7168; C. L. '97, (218), unchanged.

**(12039). Absence of Clerk—Duties Performed by Deputy.**

**SEC. 34.** Whenever the clerk of the supreme court shall be

absent from his office, or from the place where any official duty is required to be performed by him, or shall be incapable of performing the duties of his office, and whenever his office shall be vacant, his deputy so appointed and qualified may perform the duties of such office, during such absence, inability or vacancy.

**HISTORY:** Re-enacts Sec. 23 of R. S. '46, Ch. 95, being C. L. '57, (4007); C. L. '71, (5619); How. 7170; C. L. '97, (220), unchanged.

**(12040). Clerk to Provide Books.**

**Sec. 35.** The clerk of the supreme court shall provide such books for entering proceedings in said court as the justices thereof shall direct.

**HISTORY:** Re-enacts in part Sec. 25 of R. S. '46, Ch. 95, being C. L. '57, (4009); C. L. '71, (5621); How. 7172; C. L. '97, (222), remains practically the same. The duties of the clerk remain unchanged.

**(12041). Clerk to Give Bond.**

**Sec. 36.** The clerk of the supreme court of this state before entering upon the duties of his office, and within ten days after his appointment to such office, shall give a bond to the people of the state of Michigan, in the penal sum of five thousand dollars, to be approved by the chief justice of the supreme court, for the faithful discharge of the duties of his office. Such bond shall be in each instance for the period of five years, and shall be renewed at all events at the expiration of that time, but the supreme court may require a new or additional bond at any time.

**HISTORY:** Re-enacts Sec. 1 of Act 65 of '83, being How. 7172a; C. L. '97, (223), unchanged.

**(12042). Condition of the Bond.**

**Sec. 37.** The condition of such bond shall be in substance as follows:

**WHEREAS,** The above bounden, ..... hath been duly appointed by the supreme court to the office of clerk of the supreme court: **Now,** therefore, the condition of the above obligation is such, that if the said ..... shall for the period of five years, if he shall so long continue in office, faithfully, truly and impartially enter and record all orders, decrees, judgments, and proceedings of said supreme

court, and shall faithfully and impartially perform all other duties of his said office, and shall pay over all moneys that may come into his hands as such clerk, and shall deliver over to his successor in office, all the books, records, papers, seals and other things belonging to said office, then the above obligation to be void, otherwise to remain in full force.

**HISTORY:** Re-enacts Sec. 2 of Act 65 of '83 being How. 7172b; C. L. '97, (224), unchanged.

OF THE STATE REPORTER.

(12043). **Appointment.**

SEC. 38. The supreme court shall appoint, as often as any vacancy shall occur, a prson of known integrity, experience, and learning in the law, reporter of the decisions thereof, to be called the state reporter, who shall hold his office during the pleasure of said court.

**HISTORY:** Re-enacts Sec. 1 of Act 174 of '71, being C. L. '71, (5651); How. (7197); C. L. '97, (225), unchanged.

(12044). **Qualifications.**

SEC. 39. The state reporter, before entering upon the duties of his office, shall take and subscribe the constitutional oath of office before one of the justices of said court, who shall cause the same to be filed in the office of the secretary of state, and shall give his bond to the state, with two sufficient sureties, to be approved by said court, in the sum of three thousand dollars, conditioned for the faithful performance of his official duties with correctness and impartiality.

**HISTORY:** Re-enacts Sec. 2 of Act 174 of '71, being C. L. '71, (5652); How. 7198; C. L. '97, (226), unchanged.

(12045). **Duties.**

SEC. 40. It shall be the duty of the state reporter to faithfully and correctly prepare all the decisions of such court for publication in volumes of not less than seven hundred nor more than seven hundred and fifty pages each, and cause the same to be published as often as sufficient matter for such volume shall be filed by such court. and within sixty days after the filing of the same, and he shall report and publish in such volumes the decisions of the court, and any dissenting opinions that may be

filed, together with a brief statement of the facts of each case, and the points made and authorities cited by counsel therein.

**HISTORY:** Re-enacts a part of Sec. 4 of Act 174 of '71, being C. L. '71, 5654; As Am. '77, p. 14, Act 20, Imd. Eff. Mar. 7; How. 7200; As Am. '89, p. 363, Act 242, Imd. Eff. June 29; C. L. '97, (228), omitting that part of the section relating to the duty of the reporter to attend the sessions of the court, and also that part of the section relating to the employment of clerks to bring up back work.

**(12046). Salary and Expenses.**

**Sec. 41.** The state reporter shall receive an annual salary and his actual necessary expenses for clerk hire, to be fixed by the supreme court from time to time as the needs of his office demand; which salary and expenses for clerk hire shall be paid monthly, upon a warrant of the auditor general upon the state treasurer, approved by the chief justice of the supreme court, and shall be paid out of the general fund. Whenever any state reporter shall be removed from office or shall resign, his successor in office shall have the right of possession of all books and papers in the hands of such reporter, by virtue of his office, at the date of such removal, or at the time such resignation shall take effect.

**HISTORY:** New section. This section re-enacts in part and supersedes Sec. 8 of Act 174 of '71, being C. L. '71, (5658); As Am. '73, p. 184, Act 137, Eff. July 31; How. 7202; As Am. '91, p. 59, Act 58, Imd. Eff. May 6; C. L. '97, (230); As Am. '07, p. 262, Act 193, Eff. Sept. 28, modified as regards salary and expenses.

**OF THE CRIER.**

**(12047). The Appointment.**

**Sec. 42.** The supreme court may appoint a crier for said court, who shall hold his office during the pleasure of the court. He shall have sole charge of the supreme court room and of the rooms assigned to the justices of the supreme court in the capitol, and shall perform such other duties as shall from time to time be required by the said court. The said crier, may with the consent of the court appoint an assistant crier, and shall perform such duties as shall be prescribed by the court. Said crier and assistant crier shall receive such salary as may be fixed by the justices of the supreme court, to be paid at the same time and in the same manner as the salaries of other state officers are paid.

**HISTORY:** Supersedes Sec. 1, Act 135, '09, p. 295, Imd. Eff. May



26; Which superseded Sec. 1 of Act 66 of 1861, being C. L. '71, (4933); As Am. '67, p. 72, Act 52, Eff. June 27; As Am. '79, p. 51, Act 57, Imd. Eff. May 1; As Am. '81, p. 214, Act 179, Imd. Eff. May 31; How. 6399 C. L. '97, (231), though the Act of '09 was not expressly repealed by this Act; Secs. (231)-(232), C. L. '97, were expressly repealed by Act 240 of '15, p. 406, Eff. Aug. 24; see Compilers' Section (69), changed. See Beecher's Michigan Annotated Constitution, Art. VII, Sec. 6.

**(12048). Bond and Duties.**

SEC. 43. The person so appointed crier, shall, upon filing with the clerk of said court such bond as is required by law to be given by sheriffs, to be approved by the chief justice of said court, have power to serve all orders, processes or writs issued from said court, and shall collect for such service the fees allowed by law to sheriffs. Any and all fees collected by the crier shall be paid into the state treasury to be accredited to the general fund.

HISTORY: Supersedes Sec. 2, Act 135, p. 295, '09, Imd. Eff. May 26, which superseded Sec. 2 of Act 66 of '61, as added in '75, p. 230, Act 199, Imd. Eff. May 1, being How. 6400; C. L. '97, (232), though such section was not expressly repealed by this act, unchanged.

**(12049). Salaries.**

SEC. 44. The salary of the crier and of the assistant crier shall be paid by the state treasurer monthly out of any money in the general fund in the state treasury not otherwise appropriated, in the manner provided for the payment of salaries of other state officers. The auditor general shall incorporate in the state tax for the year nineteen hundred sixteen and every year thereafter a sufficient amount to reimburse the general fund in the state treasury for the amounts appropriated by this section.

HISTORY: Supersedes and re-enacts Sec. 3, Act 135, '09, p. 295, Imd. Eff. May 26, without material change. Though such section was not expressly repealed by this act, unchanged.

OF CLERICAL HELP.

**(12050). Employment of Help by Justices.**

SEC. 45. Each of the justices of the supreme court is hereby authorized to employ necessary clerical help to assist him in the performance of such clerical work in connection with his office as he may deem expedient.

**HISTORY:** Re-enacts Sec. 1 of Act 157 of '91, being C. L. 97. (233); As Am. P. A. 199, Act No. 271, Eff. Sept 23; Am. P. A. '17. Act No. 375. Imd. Eff. May 11, changed.

**(12051). Manner of Paying Salaries.**

**SEC. 46.** *Such help shall receive as salary such sum as may be fixed by the justices of the Supreme Court, and in no case shall there be paid for clerical help for each justice more than fifteen hundred dollars in any one year. Such salaries shall be paid at the same time and in the same manner as the salaries of other State officers are paid.*

**HISTORY:** Re-enacts Sec. 2 of Act 157 of '91, being C. L. '97, (234); As Am. P. A. '17. Act No. 375. Imd Eff. May 11, changed as to amount of salary.

**(12052). Appropriation.**

**SEC. 47.** *The salaries so fixed by the justices of the Supreme Court shall be paid by the State Treasurer monthly out of any money in the general fund in the State treasury not otherwise appropriated in the manner provided for the payment of salaries of other State officers. And the Auditor General shall incorporate in the state tax for the year nineteen hundred eighteen and every year thereafter a sufficient amount to reimburse the general fund in the State treasury for the amounts appropriated by this section.*

**HISTORY:** New section. This section supersedes Sec. 3 of Act 157 of '91, being C. L. '97, (235); As Am. '99, p. 459, Act 271, Eff. Sept. 23; As Am. '05, p. 7, Act 4, Imd. Eff. Feb. 8; P. A., 17, Act No. 375. Imd. Eff. May 11, changed as to manner of paying clerical help.

OF ATTORNEYS AND COUNSELORS.

**(12053). Designation of Attorneys.**

**SEC. 48.** All licensed practitioners before the courts of this state shall be hereafter designated as "attorneys and counselors."

**HISTORY:** The effect of this section is to drop the term "solicitor," and is a new section.

**CONSTITUTIONALITY:** As to the constitutionality of Act 205 of '95, see *In re Alexander*, 167 Mich. 495.

**FORMER LAWS:** The following cases cited are in relation to former laws on the same subject. The word, "attorney" when used in connection with the proceedings of courts and the authority to conduct business in them, as well as when employed in a general

sense with reference to the transaction of legal business, has a fixed and universal signification. It has reference to a class of persons who are by license constituted officers of courts of justice, and who are empowered to appear and prosecute and defend, and upon whom peculiar duties, responsibilities and liabilities are devolved by law in consequence. *People v. May*, 3 Mich. 605.

**SOLICITORS AND COUNSELORS:** All solicitors in chancery are also counselors. *Henry v. Gregory*, 29 Mich. 69. "Solicitor in Chancery."

Hereafter the practitioner representing of record a party to a suit in chancery should be designated as *attorney* for the plaintiff or defendant rather than as solicitor as heretofore.

**(12054). Foreign Attorneys for a Certain Case.**

**SEC. 49.** Any practicing attorney resident of another state or territory of the United States or of a foreign country may be admitted on motion, by the court, to try a certain case in such court; but shall not be admitted to the general trial of cases in such court or to the general practice of the law in this state without complying with the provisions of this chapter.

**HISTORY:** Re-enacts Sec. 1, Act 163, '13, p. 281, Eff. Aug. 14, which Act (Sec. 8) repeals and supersedes Act 205, '95, as amended by Act 93 of '97, and being C. L. '97, (1119)-(1120)-(1121)-(1122)-(1123)-(1124)-(1125) incl.

**(12055). Admission of Foreign Attorneys.**

**SEC. 50.** Any person being a citizen of this state or a citizen of one of the other states or territories of the United States who proves to the satisfaction of the board of examiners that it is his intention to maintain an office in this state for the practice of law and to practice in this state, who has been admitted and licensed to practice in the court of last resort of a state or territory of the United States, or in the District of Columbia, and whose principal business for three years or more immediately preceding his application for admission has been the practice of the law in the courts of record in such state, territory or district, may be admitted to the general practice of the law in this state on complying with the terms of this section as follows: He shall file his application with the board of examiners showing his qualifications as above prescribed together with the written recommendation of one of the judges of one of the courts named above in this section as to character, education and ability, and a certified copy of the certificates, affidavits and other papers not including examination questions and answers which were submitted

upon his application for admission in such aforesaid state or territory. He shall pay to said board at the time of filing his application the same fee required by other applicants under this chapter. On the filing of such application, together with such recommendation, such board of examiners shall make an independent investigation into the qualifications of such applicant, mental and moral, and his standing as a citizen and an attorney in the state or territory in which he was so admitted to practice law, and if the board is satisfied that the applicant has been so admitted and is licensed to practice in such court or courts above mentioned and is of good moral character and has practiced law for three years prior to the filing of such application and possesses the qualifications as to general education and good moral character required for the practice of law in this state as provided in section fifty-three of this chapter, such board shall certify its findings to the supreme court of this state, and the supreme court may, in its discretion, on the filing of such certificate of such board of examiners and on motion made by some member of the bar of said court, if said supreme court is satisfied as to the qualifications of such applicant, admit him to the general practice of law in all the courts of this state.

**HISTORY:** Re-enacts without material change Sec. 2, Act 163, '13, p. 281, Eff. Aug. 14, unchanged.

**(12056). Board of Examiners.**

**SEC. 51.** There shall be a board of law examiners, consisting of five members, to be constituted as follows: The governor shall on the nomination by the supreme court and on or before the first day of July in each year appoint a member of said board for the term of five years. The board of examiners now in existence shall continue and the terms of the members thereof shall expire as provided in the act under which they were severally appointed. Such board shall meet at the capitol, in the city of Lansing, at least once in each year during the session of the supreme court, and also at other times and places in the state, if the supreme court shall so direct, for the purpose of examining all applicants for admission to the bar as to their general education, legal learning and general qualifications to practice in the several courts of this state as attorneys and counselors, and upon such examination being had, the board shall issue to each of the applicants who shall pass the required examination a certificate

of qualification stating his standing and recommending his admission to the bar. Such board shall elect from its members a secretary and a treasurer, and shall make rules and regulations relative to such examination and to the conduct and performance of its duties under this chapter, which rules shall take effect upon approval by the supreme court. The president of said board shall be the member whose term of office shall first expire. Three members of the board shall constitute a quorum for the transaction of business. The present rules of the board shall remain in effect until altered as provided herein.

**HISTORY:** Re-enacts (excepting the omission of the words "solicitors and counselors in chancery") with the change to "Attorneys and Counselors" to conform with Sec. 48, Supra. Sec. 3, Act 163, '13, p. 282, Eff. Aug. 14, unchanged.

**CONSTRUED:** As to the power of the board of examiners to establish rules covering the examination of applicants, see *Mitchell v. Board of Examiners*, 155 Mich. 452.

(12057). **Requisites for Admission.**

**SEC. 52.** Any person of legal age, who is a resident and citizen of the United States, who has had the general education prescribed in section fifty-three of this chapter and who is of good moral character, may be admitted to practice as an attorney and counselor in all the courts of record of this state on motion made in the supreme court or any circuit court of the state, but the applicant shall first produce the certificate provided for in section fifty-one of this chapter, from the board of examiners that he possesses sufficient learning in the law, good moral character and ability to enable him to properly practice as an attorney and counselor in the courts of this state: *Provided*, That in case of admission to practice by the circuit court the clerk of said court shall forthwith send a transcript of the record of such admission to the clerk of the supreme court, whose duty it shall be to enter the name of the attorney so admitted on the roll of attorneys of said court. No person shall be entitled to practice as an attorney and counselor in this state until he shall be licensed to do so by said courts. No person shall be denied admission to practice as an attorney and counselor on account of sex.

**HISTORY:** Re-enacts Sec. 4, Act 163, '13, p. 283, Eff. Aug. 14, unchanged.



**(12057). Requisites for Admission.**

Section 52. Any person of legal age who is a resident and citizen of the United States, who has the general education prescribed in section fifty-three of this chapter, and who is of good moral character, may be admitted to practice as an attorney and counselor in all the courts of record of this State, on motion made in the Supreme Court, or any circuit court of the State, but the applicant shall first produce the certificate provided for in section fifty-one of this chapter, from the board of examiners, that he possesses sufficient learning in the law, good moral character and ability to enable him to practice properly as an attorney and consider in the courts of this State. ( \* \* \* )<sup>1</sup>

*In case of admission to practice otherwise than on motion made in the Supreme Court, no person shall be entitled to practice as an attorney and counselor in the courts of this State until he files with the clerk of the Supreme Court his affidavit showing his name, residence, citizenship and the court by which he was admitted to practice in this State, together with a certified copy of the order upon which the admission was made, but in case of inability to furnish a certified copy of the order upon which the admission was made, then such applicant for enrollment may furnish in lieu thereof the affidavit of two enrolled members of the bar and the certificate of a circuit judge before whom he has practiced, such affidavit and such certificate showing that said applicant had been in the active practice of the law in this State for three years immediately preceding the making of such affidavit or certificate. The clerk of the Supreme Court shall prepare and keep a register of attorneys and counselors authorized to practice law in this State, as appears from the records in his office, and shall file and preserve the affidavits herein provided for, and enter from time to time on the said official register the names of persons who have complied with the terms of this act, and have become attorneys and counselors entitled to practice law in this State. Any person whose name does not appear on the records of the Supreme Court, who has heretofore been duly admitted to practice under the laws of this State, and who is an attorney in good standing, may file the affidavit with the clerk of the Supreme Court as herein provided, and become entitled to have his name entered on the official register of attorneys and counselors kept by the clerk of the Supreme Court. Said register of attorneys and counselors is declared to be a public record, and after January one, nineteen hundred twenty-five, shall be conclusive evidence that the persons therein named (and none others) are attorneys and counselors in the courts of record in this State. No person shall be denied admission to practice as an attorney and counselor on account of sex.*

**HISTORY:** Amendment of P. A. '23, Act No. 103; approved May 2nd, 1923.

1. The words omitted are: "Provided, That in case of admission to practice by the circuit court the clerk of said court shall forthwith send a transcript of the record of such admission to the clerk of the supreme court, whose duty it shall be to enter the name of the attorney so admitted on the roll of attorneys of said court. No person shall be entitled to practice as an attorney and counselor in this state until he shall be licensed to do so by said courts."

**FORMER LAWS:** The following cases give the prerequisites to admission under the former laws. The prerequisites necessary to admission at the bar, are, first, that the applicant shall be approved by the court for his good moral character; and, second, that he possesses sufficient legal learning to discharge the duties of the office. *Matter of Mills*, 1 Mich. 393. Attorneys are licensed because of their learning and ability, so that they may not only protect the rights and interests of their clients, but be able to assist the court in the trial of the cause. They are required to be of good moral character, so that as agents and officers of the court, which they are, may not bring discredit upon the due administration of the law. *Cobb v. Grand Rapids Superior Court Judge*, 43 Mich. 291. As to the eligibility of a woman to the office of prosecuting attorney, see *Atty. Genl. v. Abbott*, 121 Mich. 540.

(12058). Qualifications for Admission to the Bar.

SEC. 53. Satisfactory evidence, as prescribed by the rules of the board of examiners, shall be produced by the applicant of his name, residence, citizenship, good moral character and the possession of a general education including the completion of a four years' high school course, or equivalent work, and that he has been a resident student for the period of three years in a duly incorporated college or university organized under the laws of this or any other state, or four years in a law office under the supervision of a reputable attorney in good standing, who shall prescribe and direct the course of study of such applicant, examining him at regular intervals and certifying as to the work done, the books studied and the proficiency attained by the applicant. A fee to be fixed by a rule of the board of not more than fifteen dollars shall accompany the application. Proof of the possession of the general education hereinbefore prescribed may be made by presenting a diploma of graduation from the liberal arts or corresponding department of any reputable college or university, or of a state normal school of this state, or of a high school of this state requiring four years' course including at least fifteen units of work of the high school grade, or of a reputable institution of similar character and with equivalent requirements of this or any other state. Graduates of reputable law schools (or others who have completed the regular course of study in such schools) requiring a three years' course for graduation and a four years' high school course, or its equivalent, for admission, may in lieu of the foregoing certificates present a certificate from the law school from which the applicant has been graduated,



which certificate shall show in detail the high school work, or its equivalent, upon which said applicant was admitted to said law school, or that the applicant before admission was examined by said law school as to his preliminary education, and that the same was found upon such examination to be in fact equal to four years' high school course or its equivalent. The applicant shall be required to submit to a written examination prepared by said board, and also to such oral examination as the board may think proper. The subjects upon which applicants shall be examined shall be determined and published by the said board of law examiners, who shall also make and publish rules and regulations concerning the conduct of said examination and the scholarship grades to be obtained. No person who has not completed the regular course of study of a reputable law school with a three years' course shall be eligible to the examinations for admission to the bar, unless at least four years before he takes such examinations he has filed with the secretary of the board of law examiners a statement supported by his affidavit, and that of the attorney under whom he proposes to study, to the effect that he is beginning the study of law with said preceptor, giving the name and address of the same, and that he proposes to apply for admission to the bar when eligible: *Provided*, That any person actually enrolled in the department of law of the University of Michigan, Detroit College of Law or the law department of the University of Detroit prior to the fifteenth day of August, nineteen hundred thirteen, and who shall have completed the full prescribed law course in and have been graduated from the law department of any of the above mentioned institutions shall be admitted to practice at the bar of all the courts of this state upon the production of a diploma authenticated by the proper officers and duly sealed by the said University of Michigan, Detroit College of Law or the University of Detroit: *Provided further*, That a student may enter any reputable law school without credits for a full high school course or its equivalent if he is deficient not more than twenty-five per cent of such high school course or its equivalent, and he makes up such deficiency before the beginning of the third year of his law course.

**HISTORY:** Re-enacts Sec. 5, Act 163, '13, p. 283, Eff. Aug. 14, unchanged.

**PRELIMINARY QUALIFICATIONS:** See *In re Alexander*, 167 Mich. 495.

**(12059). Examination Papers to be Kept on File.**

**SEC. 54.** The examination papers shall be kept on file in the office of the secretary of the board, and a record of such application and the name of the applicant and his qualifications and general standing as ascertained by each examination, and the secretary of the board shall furnish each applicant with a card, showing the proficiency he has attained in each branch or subject upon which he has been examined, whether a certificate is issued or not. Any applicant failing to pass the examination may again apply after six months by showing to the board that he has diligently pursued the study of law six months prior to the examination, and he shall not be required to pay an extra fee for the second examination. For each subsequent examination the applicant shall pay to the said board a fee of ten dollars. No person shall be eligible to more than three examinations within a period of three years.

**HISTORY:** Re-enacts Sec. 6, Act 163, '13, p. 284, Eff. Aug. 14, unchanged.

**(12060). Compensation of Board of Examiners.**

**SEC. 55.** The board of examiners shall receive as compensation for their services twenty-five dollars per day for the time actually spent and their necessary expenses incurred in the discharge of their duties as examiners in going to, holding and returning from such examinations; and the other necessary expenses of the board shall also be paid, all to be audited and certified by the clerk or one of the justices of the supreme court: *Provided, however,* That all compensation for services or expenses of the members of the board shall not exceed the amount received as fees from applicants. Any excess of fees received from applicants over the amount necessary to pay any sums for the future compensation and expenses of the members of said board and the expenses of said board, shall be turned into the state treasury by the treasurer of said board on the first day of July of each year.

**HISTORY:** Re-enacts Sec. 7, Act 163, '13, p. 285, Eff. Aug. 14, unchanged.

**(12061). Qualifications.**

**SEC. 56.** Every person admitted to practice as an attorney and counselor shall take the constitutional oath of office in open court, and subscribe the same in a roll or book to be kept by the clerk for that purpose.

**HISTORY:** Re-enacts Sec. 30 of R. S. '46, Ch. 95, being C. L. '57, (4012); C. L. '71, (5624); How. 7175; C. L. '97, (1126), omitting "at law", unchanged.

**(12062). May Practice in Every Court in the State.**

**SEC. 57.** Every person licensed to practice as an attorney and counselor in the supreme court, shall be authorized to practice in every court of law in this state.

**HISTORY:** Re-enacts Sec. 31 of R. S. '46, Ch. 95, being C. L. '57, (4013); C. L. '71, (5625); How. 7176; C. L. '97, (1127); remains unchanged.

**FORMER LAW CITED:** Atty. Gen. v. Abbott, 121 Mich. 569.

**(12063). Removal and Suspension.**

**SEC. 58.** Attorneys and counselors may be removed or suspended by the supreme or circuit courts in which they shall be authorized to practice.

**HISTORY:** Supersedes Sec. 33 of R. S. '46, Ch. 95, being C. L. '57, (4015); C. L. '71, (5627); How. 7178; C. L. '97, (1128), omitting "solicitor", remains unchanged.

**REMOVAL:** One of the principal powers possessed by courts for the protection of the public and to maintain the high standing character and reputation of the bar, is the right to expel members who have been shown guilty of immoral acts, thus rendering them unworthy to longer retain their position as officers of the court. Cobb v. Judge, 43 Mich. 291. See also In re Radford, 168 Mich. 174, 488. Id. 159 Mich. 91.

**(12064). Causes for Removal or Suspension.**

**SEC. 59.** Any attorney and counselor may be removed or suspended, who shall be guilty of any deceit, malpractice, crime or misdemeanor; but not until a copy of the charges against him shall have been delivered to him by the clerk of the court in which the proceedings shall be had, and an opportunity shall have been given to him to be heard in his defense.

**HISTORY:** Re-enacts Sec. 34 of R. S. '46, Ch. 95, being C. L. '57,

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**(12063). Removal and Suspension.**

Section 58. Attorneys and counselors may be removed or suspended by the Supreme or circuit courts in which they shall be authorized to practice. *Proceedings to remove or suspend instituted in any circuit court shall be in the circuit where the accused resides or where the misconduct so complained of was committed.*

HISTORY: Amendment of P. A. '23, Act No. 4. Approved March 6, 1923.

**(12064). Causes for Removal.**

Section 59. Any attorney and counselor may be removed or suspended, who shall be guilty of deceit, malpractice, crime, misdemeanor or wilful malfeasance; but not until the charges made against such attorney shall have been filed in writing with the Attorney General of the State of Michigan, verified by the party making them, that he believes the charges to be true. The Attorney General shall, after investigation, file such charges with the clerk of the Supreme Court, or the clerk of the circuit court having jurisdiction. Upon application of the Attorney General, the justices of the Supreme Court or the presiding judge of the circuit court where such charges are filed, shall issue an order, directing the attorney so complained of, to show cause, within fifteen days from the service of such order, why he should not be removed as prayed for; a copy of the charges preferred against him together with a copy of all exhibits and affidavits shall be attached to such order served upon him. Such service may be made by delivering to the person so complained of a copy of such order to show cause together with a copy of the petition, affidavits or exhibits, which may be attached to the original petition, if such person can be found and, if not, by leaving such copies at the last known place of residence of such person with some person of suitable age, if such person can be found, and, if not, by posting such copies in some conspicuous place upon his last known place of residence. When the proceedings brought under this act are held in any circuit court of this State, on the request of the Attorney General, it shall be the duty of the presiding judge of said State to appoint three circuit judges of said State to sit and hear the evidence in said proceedings and determine the rights of the party so complained of: Provided, That in no case shall the circuit judge of the circuit where the party complained against resides, be so appointed or sit and hear the evidence presented or make any order in said cause other than the order to show cause. After the cause is at issue or default entered, it may be brought on for hearing by either party by giving at least fifteen days' notice of the time and place where testimony will be taken in said cause. Any person feeling himself aggrieved by the determination of the judges hearing said cause, may have the proceedings reviewed by the Supreme Court of this State on application thereto for a writ of certiorari under the regular rules of said court.

HISTORY: Amendment of P. A. '23, Act. No. 4. Approved March 6, 1923.

(4016); C. L. '71, (5628); How. 7179; C. L. '97, (1129), omitting "solicitor", remains unchanged.

**DECEIT; MALPRACTICE:** The words "deceit" and "malpractice" have direct reference to the conduct of an attorney as such attorney. *Matter of Mills*, 1 Mich. 394.

**CAUSES FOR REMOVAL:** Courts may remove or suspend an attorney for other causes than those mentioned in the statute, which is not construed as restrictive of the general powers of the court over its officers, which powers exist independently of the statute. *Matter of Mills*, 1 Mich. 392. Perjury is good cause for removal. *Id.* 398. Conviction of an infamous crime. *Matter of McCarthy*, 42 Mich. 71. Fraud and gross abuse of confidence. *Matter of Wool*, 36 Mich. 299. False charges of conspiracy and corruption against the circuit judge. *In re Maine*, 121 Mich. 603. See also *In re Radford*, 159 Mich. 91. *In re Alexander* 167 Mich. 495; *Cobb v. Judge of Superior Court*, 43 Mich. 291.

**PROCEEDINGS:** Proceedings to disbar, while not strictly a criminal prosecution, are of that nature and the charges preferred should be clearly supported by the evidence to warrant a conviction. *Matter of Baluss*, 28 Mich. 507. The charges must be specific, so as to give respondent an opportunity of answering them. *Matter of Mills*, 1 Mich. 392, 398; *Dickinson v. Dustin*, 21 Mich. 565. An order to show cause why an attorney should not be disbarred may properly be based upon or incorporated in, a decree establishing a charge of fraud against him. *Matter of Wool*, 36 Mich. 299. As settling several questions of procedure. see *In re Shepard*, 109 Mich. 636; *In re Radford*, 168 Mich. 474, 159 Mich. 91.

### (12065). Effect of Removal or Suspension.

**Sec. 60.** The removal or suspension of any attorney and counselor by any court of competent jurisdiction, shall operate as a removal or suspension in every court of this state, and any person so removed or suspended, who shall, while such liability exists, hold himself out to the public or represent himself to any person as authorized to practice in any of the courts of this state, or who shall practice or attempt to practice, or appear as attorney or counselor for any party other than himself in any of said courts, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not more than three months, or by both such fine and imprisonment, in the discretion of the court.

**HISTORY:** Re-enacts Sec. 35 of R. S. '46, Ch. 95, being C. L. '57, (4017), C. L. '71, (5629), How. 7180; As Am. '91, p. 12, Act 11, Eff. Oct. 2; C. L. '97 (1130), omitting "solicitor," remains unchanged.

**EFFECT OF REMOVAL:** Disbarred attorneys can no longer appear as attorneys in any court of record, and it is equally clear that they

would have no right to appear and should not be permitted to represent any person in court, either as attorneys, agents or otherwise. *Cobb v. Judge*, Superior Court of Grand Rapids, 43 Mich. 291. See also *In re Radford*, 168 Mich. 488.

(12066). **Persons Not to Represent Themselves as Attorneys.**

SEC. 61. It shall be unlawful for any person who is not a regularly licensed attorney and counselor of this state, or who is suspended or disbarred from practice, *to practice law or to engage in the law business*; or to represent himself as an attorney at law, or to use any sign, letter head, return envelope, or writing, printing or advertising of any kind whatever in or by which he designates or represents his place of business as a law office or himself as a lawyer, attorney at law, counselor, or in any way represent to the public that he is an attorney at law, or his place of business a law office; or to make any representations to any person or persons either spoken or written, intended to lead such person or persons to believe that the person making such representations is an attorney at law: Provided, That this section shall not apply to licensed attorneys of other states while temporarily in this state.

HISTORY: Re-enacts in part and supersedes Sec. 1, Act 232, '11, p. 402, Eff. Aug. 1; As Am. '12, (2nd Ex. Sess.), p. 57, Act 5, Eff. July 10; as Am. P. A. '19, Act No. 314, Eff. Aug. 15. However, the section as amended in '12 omitted the clause, "and not suspended or disbarred from practice," because of the double negative contained therein, whereas that clause is enacted above changing the phraseology so as to eliminate the objection of the double negative otherwise unchanged.

(12067). **Penalty for Misrepresentation.**

SEC. 62. Any person violating the provisions of the preceding section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty dollars and not more than five hundred dollars and costs of prosecution, or by imprisonment in the county jail for a period of not exceeding six months, or by both such fine and imprisonment, in the discretion of the court.

HISTORY: Re-enacts Sec. 2, Act 232, '11, p. 402, Eff. Aug. 1, remains unchanged.

(12068). **Substitution.**

SEC. 63. When an attorney shall die, be removed or sus-

pending, or cease to act as such, the person for whom he was acting shall be notified to appoint another attorney at least thirty days before any proceeding shall be had against such person, in the matter wherein such attorney was acting for him.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 95, being C. L. '57, (4018); C. L. '71, (5630); How. 7181; C. L. '97, (1131), omitting "Or solicitor," remains unchanged in substance.

**SUBSTITUTION OF ATTORNEYS:** This section does not apply to a case where a practicing attorney for any reason declines to go on with a particular case, while still continuing in practice. The plain meaning of the statute is to provide for cases in which the attorney or solicitor, by reason of death, disability or other cause, has ceased to practice in the court. *Coon v. Plymouth Plank Road Co.*, 32 Mich. 250. Notice of the substitution of an attorney must be duly served upon the opposite attorney before any other proceedings can be taken by the attorney who has been substituted. *Comfort v. Stockbridge*, 38 Mich. 342. A solicitor may not complain of a substitution of solicitors if the order of substitution preserves his lien. *Wipfler v. Warren*, 163 Mich. 189.

**PRESUMPTION OF AUTHORITY:** When an attorney of the court appears and answers for a party in a court of record, it will be assumed, in the absence of evidence to the contrary, that he is duly authorized to appear. *Arnold v. Nye*, 23 Mich. 292. See also *Dehn v. Dehn*, 170 Mich. 407.

### (12069). Guilty of Deception.

**SEC. 64.** Any attorney, or counselor who shall be guilty of any deceit or collusion, or shall consent to any deceit or collusion, with intent to deceive the court or any party, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail not exceeding six months, or both, in the discretion of the court, and shall also be liable to the party injured by such deceit or collusion, in treble damages sustained, to be recovered in a civil action.

**HISTORY:** Re-enacts Sec. 37, R. S. '46, Ch. 95, being C. L. '57, (4019); C. L. '71, (5631); How. 7182; C. L. '97, (1132), omitting "solicitor," unchanged.

**DECEIT OR COLLUSION:** Attorneys, solicitors and counselors are sworn officers of the court, appointed to aid the courts in which they are employed in the administration of impartial justice, and not only the character with which they are thus invested, but the positive laws of the state, require that they shall not be guilty of any deceit or collusion, with intent to deceive the court, or any party, and the statute makes the violation of this duty a misdemeanor, punishable by fine and imprisonment, and subjects the guilty to a civil action and treble damages for the injury. *Backus v. Byron*, 4 Mich. 552.



**(12070). Wilfully Delays Client's Suit.**

SEC. 65. If any attorney or counselor shall wilfully delay his client's suit, with a view to his own gain, or shall wilfully receive any money or allowance for, or on account of any money which he has not laid out or become accountable for, he shall be liable to the party injured in treble damages.

HISTORY: Re-enacts Sec. 38, R. S. '46, Ch. 95, being C. L. '57, (4020); C. L. '71, (5632); How. 7183; C. L. '97, (1133), omitting "solicitor," remains unchanged.

**(12071). Liability for Process Made Out in His Name.**

SEC. 66. If any attorney shall knowingly permit any person, not being his general law partner or a clerk in his office, to sue out any process, or to prosecute or defend any action in his name, such attorney, and every person who shall so use the name of any attorney, shall severally be liable to the party against whom such process was sued out, or such action prosecuted or defended, in the sum of fifty dollars damages.

HISTORY: Re-enacts Sec. 39, R. S. '46, Ch. 95, being C. L. '57, (4021); C. L. '71, (5633); How. 7184; C. L. '97, (11343), omitting "or solicitor," remains unchanged.

UNAUTHORIZED ACTION: Notices given or any proceedings taken in a cause by one who is not an attorney or solicitor therein may be disregarded and testimony taken under such notice may properly be suppressed. *McClintock v. Laing*, 22 Mich. 212.

**(12072). Claims not to be bought for purpose of Suing.**

SEC. 67. No attorney or counselor shall, directly or indirectly, buy, or be in any manner interested in buying, any bond, promissory note, bill of exchange, book debt or other thing in action, with the intent and for the purpose of bringing any suit thereon.

HISTORY: Re-enacts Sec. 40, R. S. '46, Ch. 95, being C. L. '57, (4022); C. L. '71, (5634); How. 7185; C. L. '97, (1135); omitting "solicitor," remains unchanged.

CONSTRUED: Prior to the enactment of Act 58, '67, superseded in part by Compilers' Section (12079), it was held that an agreement between an attorney and client for the prosecution of an ejectment suit, the attorney to receive a share of the property or its value in money in case of success, but nothing in case of failure, was void for champerty. *Backus v. Byron*, 4 Mich. 535. This section does not prevent an attorney from buying a chattel from one person and then suing another in replevin to get possession of it. *Town v. Tabor*, 34 Mich. 267. Nor prohibit transfers to agents or attorneys for convenience of suit. *Herbstreit v. Beckwith*, 35 Mich. 95; *Smedley v.*

Dreggs, 101 Mich. 201. Nor does it apply to an assignment to an attorney of mechanics' liens for the purpose of collection and to avoid expense and multiplicity of suits. *Smedley v. Dregge*, 101 Mich. 200. As to whether the supreme court will take judicial notice that the complainant in a bill to enforce a judgment is the same person as the one bearing the same name who is an attorney of the court, see *Belden v. Blackman*, 118 Mich. 448, 450. The transfer of a claim to attorneys or agents for convenience of suit or by way of security is not prohibited by this statute if the plaintiff does not appear to have bought the claim with intent to prosecute it for profit. *Tidey v. Kent Circuit Judge*, 179 Mich. 580. An attorney may contract with a client to take a case on a contingent basis and may advance costs of suit. *Lehman v. Geer*, 180 Mich. 363; *Beagle v. Pere Marquette Railroad*, 184 Mich. 17.

(12073). **Penalty for buying Claims.**

SEC. 68. Every attorney or counselor who shall violate the last preceding section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or both, in the discretion of the court; and he shall be removed from office in the several courts in which he is authorized to practice.

HISTORY: Re-enacts Sec. 42, R. S. '46, Ch. 95, being C. L. '57, (4024); C. L. '71, (5636); How. 7187; C. L. '97, (1137), omitting "solicitor," remains unchanged.

CONSTRUED: *Backus v. Byron*, 4 Mich. 552.

(12074). **What Attorneys May Accept for Payment.**

SEC. 69. Nothing contained in either of the two last preceding sections shall be construed to prohibit the receiving in payment, by any attorney or counselor, any bond, promissory note, bill of exchange, book debt, or anything in action, for any estate, real or personal, or for services actually rendered, or for a debt antecedently contracted; or from buying or receiving any bill of exchange, draft, or other thing in action, for the purpose of remittance, and without any intent to violate either of the two last preceding sections.

HISTORY: Re-enacts Sec. 43, R. S. '46, Ch. 95, being C. L. '57, (4025); C. L. '71, (5637); How. 7188; C. L. '97, (1138); omitting "solicitor," remains unchanged.

CONSTRUED: Notice of this defense must be given. *Randall v. Baird*, 66 Mich. 315.

CITED: *Beagle v. Pere Marquette Railroad*, 184 Mich. 17.

## PROCEEDINGS BY DEFENDANT.

## (12075). Notice of Defense.

SEC. 70. The defendant in any suit to be brought upon any demand which shall have been bought, sold or received in violation of the foregoing provisions, may give notice with his plea, in addition to any other matter of defense, that on the trial of the cause he will insist and prove that the demand on which such action is founded has been bought and sold contrary to law, without setting forth any other particulars.

HISTORY: Re-enacts Sec. 44, R. S. '46, Ch. 95, being C. L. '57, (4026); C. L. '71, (5638); How. 7189; C. L. '97, (1139), remains unchanged.

## (12076). Examination Under Oath.

SEC. 71. On the trial of the cause in which such notice shall have been given, if the defendant shall require it, the plaintiff, and his attorney and counsel, and any other person who may be interested in the recovery in such cause, shall be examined on oath touching the matters set forth in such notice.

HISTORY: Re-enacts Sec. 45, R. S. '46, Ch. 95, being C. L. '57, (4027); C. L. '71, (5639); How. 7190; C. L. '97, (1140), remains unchanged.

## (12077). Certain Persons as Witnesses.

SEC. 72. The defendant in such suit may cause the persons mentioned in the preceding section to be summoned as witnesses, to attend the trial; and if the plaintiff, or any other person interested in the recovery in such cause, and duly served with a subpoena for that purpose, shall fail to attend, unless such failure shall be accounted for to the satisfaction of the court; or shall refuse to answer on oath such questions as shall be pertinent to show a violation of the provisions of this chapter; or if, on such examination, it shall appear that the cause of action on which such suit was founded has been bought or procured contrary to the true intent of the provisions of this chapter, the plaintiff in such action shall be non-suited.

HISTORY: Re-enacts Sec. 46, R. S. '46, Ch. 95, being C. L. '57, (4028); C. L. '71, (5640); How. 7191; C. L. '97, (1141), remains unchanged.

**(12078). Evidence—Admissible on Criminal Prosecution.**

**SEC. 73.** No evidence derived from the examination of any such attorney or counselor shall be admitted in proof on any criminal prosecution against him, for violating any of the provisions of this chapter.

**HISTORY:** Re-enacts Sec. 47, R. S. '46, Ch. 95, being C. L. '57, (4029); C. L. '71, (5641); How. 7192; C. L. '97, (1142), remains unchanged.

**ATTORNEYS—AGREEMENT FOR COMPENSATION.****(12079). Parties May Make.**

**SEC. 74.** All existing laws, rules and provisions of law restricting or controlling the right of a party to agree with an attorney or counselor for his compensation are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties; but any agreement by which any attorney or counselor is to receive any percentage or portion of the recovery in any cause, in consideration of his services therein, or in consideration of his having advanced or paid all, or any portion of the expenses of such cause, shall be wholly void if such employment shall have been induced by the solicitation of such attorney or counselor, or any one acting in his behalf, or at his request, without such services having been first solicited by such party.

**HISTORY:** New Section. The first part of this section down to the semicolon is taken from the first part of Sec. 1 of Act 58 of '67, as Am. '69, p. 32, Act 28, Eff. July 5; being C. L. '71, (7427); How. 9004; C. L. '97, (11254), and the latter part of the section supersedes Sec. 41, R. S. '46, Ch. 95, being C. L. '57, (4023); C. L. '71, (5635); How. 7186; C. L. '97, (1136), unchanged except phraseology.

**AGREEMENT WITH ATTORNEY:** The object of this act is to settle and declare the laws of compensation for skill and services in suits at law in the circuit court; and that comprehends the question of compensation as between lawyer and client, as well as between parties. The act is valid. *Inkster v. Carver*, 16 Mich. 484. If the common law doctrine of Champerty was in force in this state previous to the passage of this act, it was repealed by its passage and no longer exists in this state. *Wilkey v. Crane*, 63 Mich. 724. But a contract between a wife and her solicitors in advance of a decree of divorce and allowance of alimony, giving the solicitors one-half of such alimony, is void as against public policy. *Jordan v. Westerman*, 62 Mich. 170. On the subject of agreement with attorney, see, also, *Smedley v. Dregge*, 101 Mich. 202; *Potter v. Hunt*, 68 Mich. 242; *Wells v. Elsam*, 40 Mich. 218; *Culley v. Badgley*, 196 Mich. 423. An

agreement to undertake litigation upon a contingent fee is lawful. In re Service's Estate, 155 Mich. 187. And the attorney may advance the costs of suit. *Lehman v. Detroit G. H. & M. Railway*, 180 Mich. 363. See, also, *Beagle v. Railroad*, 184 Mich. 17.

#### ATTORNEYS—ACTS PROHIBITED.

##### (12080). Bail or Security in Criminal Cases.

SEC. 75. No practicing attorney or counselor shall become security or bail for the appearance of any person charged with crime, in any criminal action, and any such security or bail for appearance, taken by a judge, circuit court commissioner, justice of the peace, or other officer authorized by law to take the same, shall be void.

HISTORY: Re-enacts Sec. 1 of Act 61 of '65, being C. L. '71, (5645); How. 7196, C. L. '97, (1143), omitting "at law," remains unchanged except in designation of attorneys.

##### (12081). No Person can Appear as Attorney—When.

SEC. 76. No person shall be employed or allowed to appear as counsel or attorney, before any court, in any suit which shall have been previously determined before himself, as a judge or justice of the peace.

HISTORY: Re-enacts Sec. 27, R. S. '46, Ch. 96, being C. L. '57, (4073); C. L. '71, (5686); How. 7254; C. L. '97, (1118); remains unchanged except in designation of Attorney.

##### (12082). Attorneys Who are Notaries Must not Administer Oath in Their Own Causes.

SEC. 77. It shall not be lawful for notaries public who are attorneys and counselors to administer oaths in causes in which they may be professionally engaged.

HISTORY: Re-enacts Sec. 1 of Act 6 of '77, being How. 637; C. L. '97, (2640), omitting "at law or solicitors in chancery," remains unchanged except in designation of attorneys.

CONSTRUED: It was not unlawful until the passage of Act 6 of '77, C. L. '97, (2640), *Snyder v. Hemmingway*, 47 Mich. 553. See *Bradley v. Andrews*, 51 Mich. 100; *Sullivan v. Hall*, 86 Mich. 11. As to waiver or the objection, see *Germaine v. Muskegon*, 105 Mich. 216. A notary has no authority to administer an oath where affiant is his co-partner, and the matter is one in which the firm is interested. *Smalley v. Bodinus*, 120 Mich. 363. See, also, *Thomas E. Lynch Co. v. Wayne Circuit Judge*, 129 Mich. 111. A claim against a city for injuries is not invalid under this section, though the notary before whom the claim was verified subsequently commenced a suit for in-

juries, as attorney for the plaintiff. *Allen v. West Bay City*, 140 Mich. 111, 114.

A statement of a subcontractor's lien, sworn to before the attorney who prepared it as notary public, was properly verified under the above section where the attorney was not engaged in the cause brought to enforce the lien. *Zillz v. Wilcox*, 190 Mich. 486; 23 D. L. N., 24; 157 N. W. 77.

This does not apply to the wives of attorneys. *Timm v. Des Voignes*, Circuit Judge, 192 Mich., 508; 23 D. L. N., 518; 158 N. W., 1028.

## CHAPTER II.

### OF THE ORGANIZATION AND POWERS OF THE CIRCUIT COURTS.

#### Judicial Circuits.

##### (12083). The First Circuit.

**SECTION 1.** The state shall be subdivided into forty judicial circuits to be numbered consecutively from one to forty, and composed of the following counties, to-wit: The first circuit shall be composed of the county of Hillsdale.

**HISTORY:** New Section. This section supersedes Sec. 1 of Act 186 of '97, being C. L. '97, (236), as modified by Act 75 of '07, unchanged except as to number of circuits.

**JUDICIAL CIRCUITS:** Sec. 1 of Act 157 of '51, C. L. '57, (3411); C. L. '71, (4937); How. 6432, defining the limits, jurisdiction and powers of the circuit courts, provided for eight circuits. The acts amendatory of that section (Act 5 of '58 and 92 of '59) provided for ten circuits. Act 150 of '63 abolished the district court of the upper peninsula and created the eleventh circuit. (See Const. XIX '50, and Sched., Sec. 26) Act 28 of '65 created the twelfth circuit; Act 360 of '65, the thirteenth; Act 15 of '67, the fourteenth; Act 30 of '69, the fifteenth; Act 42 of '69, the sixteenth; Act 43 of '71, the seventeenth; Act 44, of '71, the eighteenth; Act 23 of '73, the nineteenth; Act 42 of '73, the twentieth; Act 48 of '75, the twenty-first; Acts 35 and 183 of '77, the twenty-third; skipping the twenty-second; Act 15 of '79, the twenty-second and twenty-fourth. The amendatory act of '81 provided for twenty-six circuits. Although Act 183 of '77 virtually amended Sec. 1 of Act 157 of '51, prescribing the limits of the circuits, it is in form an original act, entitled "An act to reorganize the judicial circuits of this state, and to create the twenty-third judicial circuit"; but the Act of '81 specifically amends the law of '51. Act 32 of '81 reorganized the eleventh and twelfth circuits and created the twenty-fifth in the same form in which they appear in Act 114. Act 165 of '81 (How. 6444-51) creates the twenty-seventh circuit; Act 217 of '81 (How. 6452-58), the twenty-eighth. Act 15 of '83 (How. 6458a), transfers Benzle county from the nineteenth to the twenty-eighth. Act 174 of '89 (How. 6458a3-a7)) creates the twenty-ninth; Act 6 of '91, the thirtieth; Act 30 of '91, the thirty-first (see *In re Sanborn's Estate*, 96 Mich. 608); Act 65 of '91, the thirty-second; Act 110 of '91, the thirty-third; Act 144 of '93, the thirty-fourth; and Act 125 of '95, the thirty-fifth. These acts, so far as the organization of circuits is con-

cerned, were superseded by Act 186 of '97, which was repealed and superseded by this act.

**FORTIETH CIRCUIT:** See Compilers' Section (12122).

**(12084). The Second Circuit.**

**SEC. 2.** The second circuit shall be composed of the county of Berrien.

**HISTORY:** Re-enacts Sec. 1 of Act 61 of '65, being C. L. '71, (5645); How. 7196, C. L. '97, (1143), omitting "at law," unchanged.

**(12085). The Third Circuit.**

**SEC. 3.** The third circuit shall be composed of the county of Wayne.

**HISTORY:** Re-enacts Sec. 3 of Act 186 of '97, being C. L. '97, (238), unchanged.

**(12086). The Fourth Circuit.**

**SEC. 4.** The fourth circuit shall be composed of the county of Jackson.

**HISTORY:** Re-enacts Sec. 4 of Act 186 of '97, being C. L. '97, (239), unchanged.

**(12087). The Fifth Circuit.**

**SEC. 5.** The fifth circuit shall be composed of the counties of Barry and Eaton.

**HISTORY:** This section supersedes Sec. 5 of Act 186 of '97, being C. L. '97, (240), as modified by Act 40 of '01, unchanged.

**(12088). The Sixth Circuit.**

**SEC. 6.** The sixth circuit shall be composed of the county of Oakland.

**HISTORY:** Re-enacts Sec. 6 of Act 186 of '97, being C. L. '97, (241), omitting the county of Lapeer, which by Compilers' Section (12122) is made into the 40th circuit, unchanged.

**(12089). The Seventh Circuit.**

**SEC. 7.** The seventh circuit shall be composed of the county of Genesee.

**HISTORY:** Re-enacts Sec. 7 of Act 186 of '97, being C. L. '97, (242), unchanged.



**(12090). The Eighth Circuit.**

SEC. 8. The eighth circuit shall be composed of the counties of Ionia and Montcalm.

HISTORY: Re-enacts Sec. 8 of Act 186 of '97, being C. L. '97, (243), unchanged.

**(12091). The Ninth Circuit.**

SEC. 9. The ninth circuit shall be composed of the county of Kalamazoo.

HISTORY: Re-enacts Sec. 9 of Act 186 of '97, being C. L. '97, (244), as Am. '99, p. 18, Act 15, Imd. Eff. March 18, unchanged.

**(12092). The Tenth Circuit.**

SEC. 10. The tenth circuit shall be composed of the county of Saginaw.

HISTORY: Re-enacts Sec. 10 of Act 186 of '97, being C. L. '97, (245), unchanged.

**(12093). The Eleventh Circuit.**

SEC. 11. The eleventh circuit shall be composed of the counties of Chippewa, Schoolcraft, Luce and Alger.

HISTORY: Re-enacts Sec. 11 of Act 186 of '97, being C. L. '97, (246), unchanged.

**(12094). The Twelfth Circuit.**

SEC. 12. The twelfth circuit shall be composed of the counties of Baraga, Houghton and Keweenaw.

HISTORY: Re-enacts Sec. 12 of Act 186 of '97, being C. L. '97, (247), unchanged.

**(12095). The Thirteenth Circuit.**

SEC. 13. The thirteenth circuit shall be composed of the counties of Antrim, Charlevoix, Grand Traverse and Leelanau.

HISTORY: Re-enacts Sec. 13 of Act 186 of '97, being C. L. '97, (248), unchanged.

**(12096). The Fourteenth Circuit.**

SEC. 14. The fourteenth circuit shall be composed of the counties of Muskegon and Oceana.

**HISTORY:** Re-enacts Sec. 14 of Act 186 of '97, being C. L. '97, (249), unchanged.

**(12097). The Fifteenth Circuit.**

**SEC. 15.** The fifteenth circuit shall be composed of the counties of Branch and St. Joseph.

**HISTORY:** Re-enacts Sec. 15 of Act 186 of '97, being C. L. '97, (250), unchanged.

**(12098). The Sixteenth Circuit.**

**SEC. 16.** The sixteenth circuit shall be composed of the county of Macomb.

**HISTORY:** Re-enacts Sec. 16 of Act 186 of '97, being C. L. '97, (251), unchanged.

**(12099). The Seventeenth Circuit.**

**SEC. 17.** The seventeenth circuit shall be composed of the county of Kent.

**HISTORY:** Re-enacts Sec. 17 of Act 186 of '97, being C. L. '97, (252), unchanged.

**(12100). The Eighteenth Circuit.**

**SEC. 18.** The eighteenth circuit shall be composed of the county of Bay.

**HISTORY:** Re-enacts Sec. 18 of Act 186 of '97, being C. L. '97, (253), unchanged.

**(12101). The Nineteenth Circuit.**

**SEC. 19.** The nineteenth circuit shall be composed of the counties of Lake, Manistee, Mason and Osceola.

**HISTORY:** Re-enacts Sec. 19 of Act 186 of '97, being C. L. '97, (254), unchanged.

**(12102). The Twentieth Circuit.**

**SEC. 20.** The twentieth circuit shall be composed of the counties of Allegan and Ottawa.

**HISTORY:** Re-enacts Sec. 20 of Act 186 of '97, being C. L. '97, (255), unchanged.

**(12103). The Twenty-first Circuit.**

SEC. 21. The twenty-first circuit shall be composed of the counties of Clare, Isabella and Midland.

HISTORY: Re-enacts Sec. 21 of Act 186 of '97, being C. L. '97, (256), unchanged.

**(12104). The Twenty-second Circuit.**

SEC. 22. The twenty-second circuit shall be composed of the county of Washtenaw.

HISTORY: Re-enacts Sec. 22 of Act 186 of '97, being C. L. '97, (257); as Am. '01, p. 342, Act 220, Eff. Sept. 5, unchanged.

**(12105). The Twenty-third Circuit.**

SEC. 23. The twenty-third circuit shall be composed of the counties of Alcona, Iosco and Oscoda.

HISTORY: Re-enacts Sec. 23 of Act 186 of '97, being C. L. '97, (258), unchanged.

**(12106). The Twenty-fourth Circuit.**

SEC. 24. The twenty-fourth circuit shall be composed of the counties of Huron, Sanilac and Tuscola.

HISTORY: Re-enacts Sec. 24 of Act 186 of '97, being C. L. '97, (259), unchanged.

**(12107). The Twenty-fifth Circuit.**

SEC. 25. The twenty-fifth circuit shall be composed of the counties of Marquette, Delta, Menominee, Iron and Dickinson.

HISTORY: Re-enacts Sec. 25 of Act 186 of '97, being C. L. '97, (260), unchanged.

**(12108). The Twenty-sixth Circuit.**

SEC. 26. The twenty-sixth circuit shall be composed of the counties of Alpena, Presque Isle and Montmorency.

HISTORY: Re-enacts Sec. 26 of Act 186 of '97, being C. L. '97 (261), unchanged.

**(12109.) The Twenty-seventh Circuit.**

SEC. 27. The twenty-seventh circuit shall be composed of the counties of Mecosta and Newaygo.

**HISTORY:** Re-enacts Sec. 27 of Act 186 of '97, being C. L. '97, (262), unchanged.

**(12110). The Twenty-eighth Circuit.**

**SEC. 28.** The twenty-eighth circuit shall be composed of the counties of Kalkaska, Missaukee, Wexford and Benzie.

**HISTORY:** Re-enacts Sec. 28 of Act 186 of '97, being C. L. '97, (263), unchanged.

**(12111). The Twenty-ninth Circuit.**

**SEC. 29.** The twenty-ninth circuit shall be composed of the counties of Gratiot and Clinton.

**HISTORY:** Re-enacts Sec. 29 of Act 186 of '97, being C. L. '97, (264), unchanged.

**(12112). The Thirtieth Circuit.**

**SEC. 30.** The thirtieth circuit shall be composed of the county of Ingham.

**HISTORY:** Re-enacts Sec. 30 of Act 186 of '97, being C. L. '97, (265), unchanged.

**(12113). The Thirty-first Circuit.**

**SEC. 31.** The thirty-first circuit shall be composed of the county of St. Clair.

**HISTORY:** Re-enacts Sec. 31 of Act 186 of '97, being C. L. '97, (266), unchanged.

**(12114). The Thirty-second Circuit.**

**SEC. 32.** The thirty-second circuit shall be composed of the counties of Gogebic and Ontonagon.

**HISTORY:** Re-enacts Sec. 32 of Act 186 of '97, being C. L. '97, (267), unchanged.

**(12115). The Thirty-third Circuit.**

**SEC. 33.** The thirty-third circuit shall be composed of the counties of Mackinac, Emmet and Cheboygan.

**HISTORY:** Re-enacts Sec. 33 of Act 186 of '97, being C. L. '97, (268), unchanged.

**(12116). The Thirty-fourth Circuit.**

SEC. 34. The thirty-fourth circuit shall be composed of the counties of Arenac, Crawford, Gladwin, Ogemaw, Roscommon and Otsego.

HISTORY: Re-enacts Sec. 34 of Act 186 of '97, being C. L. '97, (269), unchanged.

**(12117). The Thirty-fifth Circuit.**

SEC. 35. The thirty-fifth circuit shall be composed of the counties of Shiawassee and Livingston.

HISTORY: Re-enacts Sec. 35 of Act 186 of '97, being C. L. '97, (270), unchanged.

**(12118). The Thirty-sixth Circuit.**

SEC. 36. The thirty-sixth circuit shall be composed of the counties of Van Buren and Cass.

HISTORY: Re-enacts Sec. 36 of Act 15 of '99, p. 18, Imd. Eff. March 8, unchanged.

**(12119). The Thirty-seventh Circuit.**

SEC. 37. The thirty-seventh circuit shall be composed of the county of Calhoun.

HISTORY: This section supersedes Secs 1 and 2, Act 40, '01, p. 63, Imd. Eff. April 14. See C. L. '97, (240), which provided that the fifth circuit should be composed of the counties of Barry, Calhoun and Eaton, unchanged.

**(12120). The Thirty-eighth Circuit.**

SEC. 38. The thirty-eighth circuit shall be composed of the county of Monroe.

HISTORY: Supersedes Sec. 37 of Act 220, '01, p. 342, Eff. Sept. 5, unchanged.

**(12121). The Thirty-ninth Circuit.**

SEC. 39. The thirty-ninth circuit shall be composed of the county of Lenawee.

HISTORY: Supersedes Sec. 1 of Act 75, '07, p. 74, Eff. Sept. 28, unchanged.

**(12122). The Fortieth Circuit.**

**SEC. 39a.** The fortieth circuit shall be composed of the county of Lapeer.

**HISTORY:** This section detaches the county of Lapeer from the Sixth Circuit, which was formerly composed of the counties of Oakland and Lapeer. See Act 303 of '15, Compilers' Section (14555) et seq, which provides for the detaching of the county of Lapeer from the Sixth Judicial Circuit and the forming of the Fortieth Circuit. Such act also provides for the nomination and election of a circuit judge in such circuit.

This section rests upon the following sources: 1. C. L. '97, (236), as amended by P. A. '07, No. 75; How. Stat. (2nd Ed.), 11718. 2. C. L. '97, (237), as amended by P. A. 1899, No. 15; How. Stat. (2nd Ed.), 11719. 3. C. L. '97, (238); How. Stat. (2nd Ed.), 11720. 4. C. L. '97, (239); How. Stat. (2nd Ed.), 11721. 5. C. L. '97, (240), as amended by P. A. 1901, Act 40; How. Stat. (2nd Ed.), 11722. 6. C. L. '97, (251); How. Stat. (2nd Ed.), 11733. 17. C. L. '97, (252); How. Stat. (2nd Ed.), 11724. 8. C. L. '97, (243); How. Stat. (2nd Ed.), 11725. 9. C. L. '97, (244); as amended by P. A. 1899, No. 15; How. Stat. (2nd Ed.), 11726. 10. C. L. '97, (245); How. Stat. (2nd Ed.), 11727. 11. C. L. '97, (246); How. Stat. (2nd Ed.), 11728. 12. C. L. '97, (247); How. Stat. (2nd Ed.), 11729. 13. C. L. '97, (248); How. Stat. (2nd Ed.), 11730. 14. C. L. '97, (249); How. Stat. (2nd Ed.), 11731. 15. C. L. '97, (250); How. Stat. (2nd Ed.), 11732. 16. C. L. '97, (251); How. Stat. (2nd Ed.), 11733. 17. C. L. '97, (252); How. Stat. (2nd Ed.), 11734. 18. C. L. '97, (253); How. Stat. (2nd Ed.), 11735. 19. C. L. '97, (254); How. Stat. 11736. 20. C. L. '97, (255); How. Stat. (2nd Ed.), 11743. 27. C. L. '97, (262); How. Stat. (2nd Ed.), 11738. 22. C. L. '97, (257), as amended by P. A. 1901, No. 220; How. Stat. (2nd Ed.), 11739. 23. C. L. '97, (258); How. Stat. (2nd Ed.), 11740. 24. C. L. '97, (259); How. Stat. (2nd Ed.), 11741. 25. C. L. '97, (260); How. Stat. (2nd Ed.), 11742. 26. C. L. '97, (261); How. Stat. (2nd Ed.), 11743. 27. C. L. '97, (262); How. Stat. (2nd Ed.), 11744. 28. C. L. '97, (263); How. Stat. (2nd Ed.), 11745. 29. C. L. '97, (264); How. Stat. (2nd Ed.), 11746. 30. C. L. '97, (265); How. Stat. (2nd Ed.), 11747. 31. C. L. '97, (266); How. Stat. (2nd Ed.), 11748. 32. C. L. '97, (267); How. Stat. (2nd Ed.), 11749. 33. C. L. '97, (268); How. Stat. (2nd Ed.), 11750. 34. C. L. '97, (269); How. Stat. (2nd Ed.), 11751. 35. C. L. '97, (270); How. Stat. (2nd Ed.), 11752. 36. C. L. '97, (270); How. Stat. (2nd Ed.), 11754. 37. P. A. 1901, No. 40; How. Stat. (2nd Ed.), 11756-7. 38. P. A. 1901, No. 220; How. Stat. (2nd Ed.), 11755. 39. P. A. 1907, No. 75; How. Stat. (2nd Ed.), 11767-8, unchanged.

**ELIGIBILITY TO OFFICE OF CIRCUIT JUDGE.****(12123). Qualifications.**

**SEC. 40.** No person shall be eligible to the office of circuit judge in this state, unless he be a regularly licensed attorney

and counselor, duly admitted to practice in all the courts in this state.

**HISTORY:** New section.

(12124). Number of Judges in Judicial Circuit in Which Wayne County is Situated.

SEC. 41. *There shall be...*

(12124). Number of Judges in Judicial Circuit in which Wayne County is Situated.

Section 41. There shall be, beginning on the first day of September, nineteen hundred twenty-three, fourteen circuit judges for the third judicial circuit in which the city of Detroit is situated. ( \* \* \* )<sup>1</sup>

HISTORY: Amendment of P. A. '23, Act No. 251. Approved May 24, 1923.

1. The words omitted refer to the time of election of the judges added by the former law, viz., P. A. '17, Act No. 346.

as Am. '95, p. 84, Act 28, Am. by Act No. 314, P. A. '15, Compilers' Section (12124), Am. by Act No. 346, P. A. '17, Eff. Aug. 11 amended to increase the number of judges to ten.

**(12125). Appointment of Clerk for the Circuit.**

SEC. 42. In any circuit where there are three or more judges the governor of the state may upon the recommendation of said judges appoint a clerk who may be removed in like manner and his successor appointed. The business of said clerk shall be to render such assistance as said judges may require in arranging the business of said courts. He shall receive a salary of two thousand five hundred dollars per annum, to be paid in monthly installments by the county or counties composing the circuit.

**HISTORY:** Re-enacts a part of Sec. 2 of Act 25 of '87, being How. 6480b; as Am. '95, p. 232, Act 113, Imd. Eff. May 4; C. L. '97, (272); as Am. '99, p. 158, Act 109, Imd. Eff. June 9; as Am. '03, p. 408, Act 248, Imd. Eff. June 18; as Am. '07, p. 32, Act 29, Imd. Eff. March 27, unchanged.

(12126). Number of Judges in Judicial Circuit in Which Kent County is Situated.

**SEC. 43.** There shall be three circuit judges in the judicial

circuit in which the county of Kent is, or may be situated, the same now being the seventeenth judicial circuit.

**HISTORY:** Re-enacts a part of Sec. 1 of Act 97 of '89, being How. 6480r; as Am. '91, p. 87, Act 82, Imd. Eff. May 16; as Am. '97, p. 8, Act 4, Imd. Eff. Jan. 28; C. L. '97, (285); as Am. '11, p. 303, Act 179, Eff. Aug. 1, unchanged.

**FORMER ACT CONSTRUED:** The legislature may not by an act providing for an additional Circuit Judge fix the expiration of his term beyond the time of the next general election or until his successor is elected and has qualified; *People v. Burch*, 84 Mich. 408. The law does not provide for separate and distinct courts; *People v. Salisbury*, 134 Mich. 540.

**(12127). Number of Judges in Judicial Circuit in Which Saginaw County is Situated.**

**SEC. 44.** There shall be two circuit judges in the judicial circuit in which the county of Saginaw is or may be situated, the same now being the tenth judicial circuit.

**HISTORY:** This section supersedes Sec. 1 of Act 75 of '89, being How. 6480i; C. L. '97, (276), has been changed so as to be uniform with the other sections.

**(12128). Number of Judges in Judicial Circuit in Which Ingham County is Situated.**

**SEC. 45.** There shall be two circuit judges in the judicial circuit in which the county of Ingham is, or may be situated, the same now being the thirtieth judicial circuit.

**HISTORY:** This section supersedes Sec. 1, Act 136, '09, p. 296, Eff. Sept. 1, unchanged.

**(12129). Number of Judges in Judicial Circuit in Which St. Clair County is Situated.**

**SEC. 46.** There shall be two circuit judges in the judicial circuit in which the county of St. Clair is or may be situated, the same now being the thirty-first judicial circuit.

**HISTORY:** This section supersedes Sec. 1 of Act 90, '99, p. 130, Imd. Eff. May 20, changed.

**(12129a). Number of Judges in Judicial Circuit in Which Jackson County is Situated.**

**SEC. 46 (a)** *There shall be one additional judge in the judicial circuit in which the county of Jackson is or may be*



*situated, the same now being the fourth judicial circuit. The additional office of circuit judge created by this act shall be deemed vacant from and after the day when this act shall take effect, and such vacancy shall be filled by appointment of the governor until the general election in November, nineteen hundred eighteen and until a successor is elected and qualified. The judge so appointed shall qualify and enter upon the discharge of his duties within ten days after his appointment and continue until his successor shall be elected and qualified.*

Chap. 2 of Act No. 314, P. A. '15, Am. P. A. '17, Act No. 216, by adding Sec. 46a, providing for an additional Circuit Judge for Jackson county.

**(12129b). Number of Judges in Judicial Circuit in which Genesee County is Situated.**

*SEC. 46 (b). There shall be one additional judge in the judicial circuit in which the county of Genesee is or may be situated, the same now being the seventh judicial circuit. The additional office of circuit judge created by this act shall be deemed vacant from and after the day when this act shall take effect, and such vacancy shall be filled by appointment of the Governor until the general election in November, nineteen hundred eighteen, and until a successor is elected and qualified. The judge so appointed shall qualify and enter upon the discharge of his duties within ten days after his appointment and continue until his successor shall be elected and qualified.*

*This act is ordered to take immediate effect.*

Chap. 2 of Act No. 314, P. A., '15, Am. P. A., '17, Act No. 200, by adding Sec. 46b, providing for an additional Circuit Judge for Genesee county.

**(12129c). Duties and Compensation of Stenographers for the County of Genesee.**

*SEC. 46 (c). The official stenographer of the seventh judicial circuit shall be the stenographer to attend upon the proceedings before the additional circuit judge in the judicial circuit in which the county of Genesee is or may be situated, as provided in section forty-six b of this act, his duties and compensation as such stenographer for said additional circuit*

*judge to be as now provided by law for regularly appointed stenographers for additional circuit judges.*

Chap. 2 of Act No. 314, P. A. '15, Am. P. A. '19, Act No. 357, by adding Sec. 46c, prescribing duties of stenographer before additional Circuit Judge of Seventh Judicial Circuit.

**(12129d). Number of Judges in Judicial Circuit in Which Oakland County is Situated.**

*SEC. 46 (d). There shall be one additional judge in the judicial circuit in which the county of Oakland is or may be situated, the same now being the sixth judicial circuit. The additional office of circuit judge created by this act shall be deemed vacant from and after the day when this act shall take effect and such vacancy shall be filled by appointment of the Governor until the general election in November, nineteen hundred twenty and until a successor is elected and qualified. The judge so appointed shall qualify and enter upon the discharge of his duties within ten days after his appointment and continue until his successor shall be elected and qualified.*

Chap. 2 of Act No 314, P. A. '15, Am. P. A. '19 Act No. 54 by adding Sec. 46d, which provides for one additional Judge for Oakland county.

**(12130). Laws and Rules to Apply to Judges.**

**SEC. 47.** In all judicial circuits where there is more than one circuit judge, except as otherwise provided by law, all the laws and rules of court, relative to circuit courts and the terms thereof, and the powers and duties of circuit judges shall apply to each of said judges, and the courts held by him.

**HISTORY:** Re-enacts Sec. 3 of Act 75 of '89, being How. 6480k; C. L. '97, (278), making the section applicable to all circuits having additional judges, unchanged.

**(12131). Judges to Have Equal Co-ordinate Powers and Duties.**

**SEC. 48.** Each of said judges shall have equal co-ordinate powers and duties, and one of them shall constitute a quorum for the transaction of business.

**HISTORY:** Re-enacts a part of Sec. 4 of Act 75 of '89, being How. 6480L; C. L. '97, (279), making the section applicable to all circuits having additional judges, unchanged.

**FORMER LAW CITED:** Beach v. Kent, 142 Mich. 366; Bliss v. Caille Brothers Co., 149 Mich 609.

**(12132). Reservation of Decision of Question at Law for Full Court.**

SEC. 49. In circuits having more than two circuit judges, either of said judges may reserve for the decision of the full court any question of law arising before such judge, and it shall be the duty of the judges of said court to sit together on at least one day during each term and hear and decide upon such questions as may be so reserved.

HISTORY: Re-enacts Sec. 7 of Act 25 of '87, being How. 6480g; C. L. '97, (275), making the section general for all circuits having more than two circuit judges, unchanged.

**(12133). Concurrence of a Majority Sufficient.**

SEC. 50. In circuits having more than two circuit judges, when sitting together, a concurrence of a majority of such judges shall be sufficient.

HISTORY: New Section.

**(12134). Judges May Sit Together.**

SEC. 51. In all circuits where there are two judges they may, if they shall deem the same necessary, sit together in the hearing of trials, or causes, or on all questions coming before them, and either may reserve for the consideration of the other, any question of law arising upon the trial, or hearing, or that otherwise may be submitted. When sitting together the findings, orders, rulings, decisions, judgments or decrees shall be made by the judge to whom the cause was assigned, and the other shall be advisory only.

HISTORY: Re-enacts a part of Section 4 of Act 136 of '09, p. 296, Eff. Sept. 1; making the section, however, general in its effect, unchanged.

**(12135). Presiding Judge.**

SEC. 52. In judicial circuits where there are more than two judges, the judges thereof shall from term to term designate one of their number to act as presiding judge, and in judicial circuits where there are only two judges, they shall alternate as presiding judge, either from term to term, or from year to year, as they may order.

HISTORY: Re-enacts a part of Sec. 1 of Act 25 of '87, being How. 6480a; as Am. '93, p. 195, Act 120, Imd. Eff. May 25; C. L. '97, (271);

as Am. '99, p. 54, Act 38, Imd. Eff. April 17, making the section, however, general in its effect, unchanged.

**(12136). Presiding Judge to Assign and Apportion Business.**

**SEC. 53.** The presiding judge shall assign and apportion the business of the court during his term as such presiding judge, and each judge shall proceed to hear, try and dispose of the business so assigned to him with the same force and effect as if he was the only judge of said circuit, and subject to and with the power and authority conferred by all the rules of practice, and of law applicable to circuit courts having only one judge, and thereupon said judge may proceed with the trial or hearing or other business so assigned to him in the principal court room, or in a separate room attended by the clerk or one of his deputies, and by the sheriff, or one or more of his deputies, by a stenographer, and by jurymen not engaged in the trial of other causes, if it be a cause to be tried by a jury, and each judge, while so sitting for the transaction of business, shall have all the powers of any circuit judge sitting in any circuit court in this state, and the proceedings shall be regarded as proceedings of the circuit court had in open court and at a session of the said circuit court. If a sufficient number of jurymen shall not be in attendance upon the court, and not engaged on the trial of other causes, said judge may direct talesmen to be summoned as in other cases. The said judges may make rules from time to time, in relation to the making up of the trial docket and as to the disposition of the business of the court, not inconsistent with any general laws of the state.

**HISTORY:** Re-enacts Sec. 5 of Act 75 of '89, being How. 6480m; C. L. '97, (280), making the section, however, general in its effect, remains unchanged except with the addition of the provision relating to the assignment and apportionment of business.

**(12137). Disability of Judge.**

**SEC. 54.** In case of the absence, illness or inability from other cause, of either judge to do any of the business assigned him, the same shall be done by one of the others.

**HISTORY:** Re-enacts Sec. 6 of Act 25 of '87, being How. 6480n; C. L. '97, (281), making the section, however, general in its effect, unchanged.

**FORMER LAW CITED:** Beach v. Kent, 142 Mich. 355; Bliss v. Calle Bros. Co., 149 Mich. 610.

**(12138). Keeping of the Record.**

SEC. 55. The record of the proceedings before each of the judges shall be entered in the journal of the court in the usual manner, and said journals may for convenience, at the option of said judges, be kept in separate books, appropriately marked, and said records shall be verified by the signature of the judge before whom the business is transacted. Whenever the signature of a judge of the court shall be required to any bill of exceptions or decree or other evidence of proceeding, or for the approval or verification of any act, the signature of the judge or judges before whom the proceedings were had shall be deemed sufficient. Orders and decrees entered in the chancery record shall be verified by the signature thereto of the judge or judges making such order or decree.

**HISTORY:** This section merges and supersedes Sec. 7 of Act 25 of '87, being How. 6480o; C. L. '97, (282), and Sec. 3 of Act 97 of '89, being How. 6480t; as Am. '91, p. 88, Act 82, Imd. Eff. May 16; C. L. '97, (287); as Am. '11, p. 304, Act. 179, Eff. Aug. 1, making the section, however, general in its effect, unchanged.

**JUDGMENT OPENED OR VACATED:** Where judgment was entered after verdict, and later judgment was rendered on motion on a reserved decision, the first judgment will be taken as the true record, and the second judgment vacated. *Wulff v. Bossler*, 199 Mich. 78.

**(12139). State of Proceedings.**

SEC. 56. No stay of proceedings shall be directed or ordered by any one of the said circuit judges in any cause or proceeding excepting when the order or decree under which the proceedings are stayed shall have been made by such judge, except that where the judge making such order or decree on which the proceedings are sought to be stayed shall be absent or unable to act, then an order staying proceedings on such order or decree may be made by either of the said circuit judges, and no order or decree shall be set aside or vacated except by the judge making the same, unless such judge shall be absent or unable to act.

**HISTORY:** Re-enacts Sec. 4 of Act 97 of '89, being How. 6480u; C. L. '97, (288); as Am. '11, p. 304, Act 179, Eff. Aug. 1, unchanged.

**(12140). Provision for Additional Court Room.**

SEC. 57. Such additional court room and facilities shall be provided by the boards of supervisors of the respective coun-

ties, having more than one circuit judge, as shall be requisite for the prompt and decent dispatch of business.

**HISTORY:** Re-enacts Sec. 9 of Act 75 of '89, being How. 6480q; C. L. '97, (284), making the section, however, general in its effect, unchanged.

### Salaries of Judges.

#### (12141). Compensation in Full.

**SEC. 58.** Each circuit judge and each of the judges of the recorder's and of the superior court shall receive an annual salary of *five thousand dollars*. \* \* \* The amount herein provided shall be compensation in full for all services performed by each of said judges in this State, unless the board of supervisors shall have, or at any regular session hereafter shall vote to pay the circuit judge regularly holding court in such county or unless the common council shall vote or shall have voted to pay the judges of the recorder's or superior court, an amount in addition to the salary herein designated: *Provided, That whenever a judge of any circuit shall hold court in any other circuit he shall not be paid by the State any extra or other compensation than is herein provided.*

**HISTORY:** Re-enacts in part Act 60 of '09, p. 97, Eff. Sept. 1, P. A. '19, Act No. 143, amending C. L. '15, (12141) as amended by P. A. '09, Act No. 218; Sec. 58, Chap. 2 of Act No. 314, P. A. '15, relative to salaries of judges of courts of record, as amended by Act No. 143, P. A. '19. Remains substantially unchanged, except as to amount of salary.

The words omitted here are "payable out of any moneys in the state treasury belonging to the general fund, not otherwise appropriated," making the section more general in effect.

**SALARY:** As to the validity of the increase of the salary of the judge of the Superior Court of Grand Rapids, during his term of office, see *Dunham v. Tilma*, June, 1916, 191 Mich. 688.

#### (12142). Judges to be Reimbursed from State Treasury.

**SEC. 59.** Every circuit judge shall be reimbursed from the state treasury, upon the warrant of the auditor general, his actual expenses incurred by him in holding court in any county other than that in which he may reside.

**HISTORY:** Re-enacts and supersedes Sec. 1, Act 218, '05, p. 317, *Imd. Eff. June 13*. \* Sec. 2 of that act is the only part of the act to be repealed by the repealing section of the Judicature Act, changed.

**(12143). Certificate of Expense.**

SEC. 60. Each circuit judge, entitled to reimbursement under the provisions of the preceding section, shall make a certificate of the expenses incurred by him in so holding court, and the same shall be presented to the board of state auditors for allowance, and upon the allowance, the auditor general shall issue his warrant on the state treasury for the amount of the same to the person entitled thereto.

HISTORY: Re-enacts Sec. 2 of Act 218, '05, p. 317, Imd. Eff. June 13, unchanged.

**OF HOLDING COURTS BY JUDGES OF OTHER CIRCUITS.****(12144). Governor to Designate Judge of Some Other Circuit.**

SEC. 61. Upon proper showing and request made by the presiding judge of any of the circuit courts of this state, that the business of such court has increased beyond the capacity of the judge or judges of said circuit court to properly dispose of, or in case a vacancy shall exist in the office of the circuit judge in any judicial circuit, or by reason of the inability of any circuit judge to discharge the duties of his office, it shall be the duty of the governor to designate a judge or judges of some other circuit or circuits, whose official duties will permit for the time being, to hold the court temporarily for such time as he may deem advisable, and the judge or judges so designated shall perform the duties and hold court for such time in like manner and with like effect as they severally and respectively could have done if they had been elected to such office in the circuit where such duties as judge are performed.

HISTORY: This section supersedes and combines part of Secs. 1 and 3 of Act 152 of '95, being C. L. '97, (296); C. L. '97, (298); and Act 153 of '67; as Am. '69, p. 166, Act 98, Imd. Eff. Apr. 2; being C. L. '71, (5022); How 6462; C. L. '97, (300), unchanged.

CONSTITUTIONALITY: See Const. VII 8. The act which authorizes the governor to designate a judge of one circuit to act in another is constitutional. In re Bromley's Estate, 113 Mich. 53, 55.

CONSTRUED: Where such designation to fill vacancy has been made by the governor, process may be properly tested in the name of the judge designated. Howerter v. Kelly, 23 Mich. 337. See Toll v. Jerome, 101 Mich. 472.

FORMER LAW CITED: Beach v. Kent, 142 Mich. 356; Campbell v. Judge, 155 Mich. 327.

PRESIDING JUDGE: See Compilers' (14546) et seq.

**JUDGE DESIGNATING ANOTHER:** See Compilers' (12307) and note.

**CHANGE OF VENUE:** See Compilers' (12341).

**TRANSFER OF CAUSES:** Judge disqualified. See Compilers' (12342).

**(12145). Suitable Place for Such Judge to Hold Court.**

**SEC. 62.** Where a judge is delegated to assist in the work accumulated in another circuit, as provided in section sixty-one, it shall be the duty of the sheriff of the county, or of the county auditors, as the case may be, to provide a suitable place where such judge or judges so designated shall hold court, and all extra expense incurred for this purpose shall be a proper charge against the county where such court is held, and shall be audited and allowed by the board of auditors or supervisors, as the case may be, of such county.

**HISTORY:** Re-enacts Sec. 2 of Act 152 of '95, being C. L. '97, (297), with a slight change in phraseology.

**(12146). All Expense of Such Circuit Judge Paid.**

**SEC. 63.** All the necessary expenses of said circuit judges, or either of them so designated in going from their respective places of residence for the purpose of so holding court, and in returning thereto, and all their other necessary expenses for that purpose, not exceeding the sum of ten dollars for each day that either of such judges shall so hold court, shall at the end of the time or term for which said judges respectively shall be so designated, when duly certified by them, be allowed by said circuit court, and shall thereupon be audited and allowed by the board of county auditors or the board of supervisors, as the case may be, for the county, and shall be paid out of the county treasury of the county where such court is held.

**HISTORY:** Re-enacts Sec. 4 of Act 152 of '95, being C. L. '97, (299), unchanged.

**OF THE CLERKS OF CIRCUIT COURTS.**

**(12147). Appointment of Clerk.**

**SEC. 64.** The county clerk of each county, where there is more than one circuit judge, shall, with the approval of the judges of said court, appoint a sufficient number of deputy clerks to attend upon the proceedings before said judges.



**HISTORY:** Re-enacts Sec. 7, Act 97 of '89, as added '91, p. 88, Act 82, Imd. Eff. May 16, being C. L. '97, (289), making the section, however, general in its effect, unchanged.

**(12148). Register of Chancery Abolished—County Clerk.**

**SEC. 65.** The office and designation of register in chancery is hereby abolished. The county clerk of each county shall be the clerk of the circuit court for such county, both at law and in chancery, and shall attend every term thereof, and shall have the care and custody of all the records, seals, books and papers pertaining to the office of the clerk of such court, and filed or deposited therein, and shall provide such books for entering the proceedings in said court, as the judge thereof shall direct. Whenever in any statute of this state, the designation "register in chancery" occurs, it shall be deemed to apply to the clerk of the circuit court.

**HISTORY:** This section merges and supersedes parts of Secs. 24 and 25 of R. S. '46, Ch. 95, and Secs. 4-7, R. S. '46, Ch. 90, being C. L. '57, (4008)-(4009), (3458), (3461); C. L. '71, (5620)-(5621), 5040-43; How. 7171-2, 6594-7; C. L. '97, (221), (222), (416)-(419), unchanged.

**CONSTITUTIONALITY:** Beecher's Annotated Const. of Mich. '08, Art. VII, Sec. 11.

**CONSTRUED:** A court will take judicial notice of its own officers, but not of those of another court. *Norvell v. McHenry*, 1 Mich. 233. The duties of a clerk of a circuit court not being defined in the statutes or the constitution, he is subject to all the lawful orders of the court. *Smith v. Kent Circuit Judge*, 139 Mich. 463.

**REGISTER:** *Sherman v. Sanilac Suprs.*, 84 Mich. 111; *Mersereau v. Miller*, 112 Mich. 103. As to the status of the deputy register, see *Torrans v. Hicks*, 32 Mich. 310.

**REGISTER IN CHANCERY ABOLISHED BY JUDICATURE ACT:** The county clerk is made clerk of the circuit court in Chancery as well as at Law and should be so described in all papers and proceedings in said court. The title, register in chancery, is abolished.

**(12149). County Clerk to Account to County Treasurer.**

**SEC. 66.** Within ten days after the first day of each term of court, the county clerk shall pay over and account in detail to the county treasurer for all entry fees, jury fees and stenographer's fees, and any and all other sums of money or fees belonging to the county, and received by him during the preceding term.

**HISTORY:** This section supersedes Sec. 18 of Act 157 of '51, being C. L. '57, (3428); C. L. '71, (4954); How. 6475; C. L. '97, (316), unchanged.

**(12150). Moneys Deposited as Court Directs.**

**SEC. 67.** All moneys brought into the court for or by any suitor, and paid to the clerk, shall be deposited in such banks, or safely kept in such other manner as the court shall direct.

**HISTORY:** Re-enacts Sec. 8 of R. S. '46, Ch. 90, being C. L. '57, (3462); C. L. '71, (5044); How. 6598; C. L. '97, (420), changing "register" to "clerk," unchanged except in the designation of the register.

**CONSTRUED:** Registers are not liable to garnishment; Voorhees v. Sessions, 34 Mich. 99. As to the deposit of funds by a register, see Retan v. Union Trust Co., 134 Mich. 1.

**(12151). Clerk to Exhibit Accounts.**

**SEC. 68.** On the first day of the term of the court, the clerk, at the place where the same is held, shall exhibit the account kept by him of all such moneys, and also his bank account, in case such moneys shall have been deposited in a bank.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 90, being C. L. '57, (3463); C. L. '71, (5045); How. 6599; C. L. '97, (421), changing "register" to "clerk," unchanged except in the designation of the register.

**Construed:** As to the effect of the register's report to the court, see Retan v. Union Trust Co., 134 Mich. 1, 5.

**(12152). Certificate of Cashier.**

**SEC. 69.** Every such bank account shall be accompanied by a certificate of the cashier of the bank in which the deposit is made, that the total amount stated therein to be deposited, is actually in the bank, placed to the credit of such clerk, as clerk of said court in chancery of the proper county, and not mingled with any other account.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 90, being C. L. '57, (3464); C. L. '71, (5046); How. 6600; C. L. '97, (422), changing "register" to "clerk," unchanged except in the designation of the register.

**CONSTRUED:** Retan v. Union Trust Co., 134 Mich. 1, 6.

**(12153). No Money to be Paid Out Without Order of Court.**

**SEC. 70.** No money brought or paid into the court, and deposited in any bank to the credit of any officer of the court, shall be paid out by such bank, without the production of the order of the court, authenticated by the signature of the circuit judge.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 90, being C. L. '57, (3465); C. L. '71, (5047); How 6601; C. L. '97, (423), unchanged.

**CONSTRUED:** Retan v. Union Trust Co., 134 Mich. 1, 6.

**(12154). Circuit Judges May Cause Money to be Invested.**

**SEC. 71.** Each circuit judge may cause any moneys brought into court pursuant to any order made by him, to be invested or placed at interest, as he shall think proper; and the party bringing money into court pursuant to any order thereof, shall in all cases be discharged from all further liability to the extent of the money so brought into court.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 90, being C. L. '57, (3466); C. L. '71, (5048); How. 6602; C. L. '97, (424), unchanged.

**CONSTRUED:** Retan v. Union Trust Co., 134 Mich. 1, 6.

**(12155). Securities to be Taken in Name of Clerk.**

**SEC. 72.** All stocks and securities taken by order of the court for the benefit of suitors therein, shall, if directed to be taken in the name of any officer of the court, be taken in the name of the clerk of the court in which said suit is pending, and every such clerk shall keep just and full accounts of all moneys, stocks and securities which shall come to his hands by virtue of his office, and of all payments and investments made by him.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 90, being C. L. '57, (3467); C. L. '71, (5049); How. 6603; C. L. '97, (425), changing "register" to "clerk," unchanged except in the designation of the register.

**CONSTRUED:** As to the filing with the clerk of a certificate of deposit as security for costs, see Smith v. Kent Circuit Judge, 139 Mich. 463, 465.

**(12156). Securities to Vest in Successor.**

**SEC. 73.** On the death, removal from office, or resignation of a clerk, all stocks, mortgages and other securities vested in him at the time of such death, removal or resignation, by virtue of any of the proceedings of the court, shall vest in his successor in office in like manner as if such clerk had been a corporation sole, with right of succession.

**HISTORY:** Re-enacts Sec. 14 R. S. '46, Ch. 90, being C. L. '57, (3468); C. L. '71, (5050); How 6604; C. L. '97, (426), changing "register" to "clerk," unchanged except in the designation of register.

**(12157). Moneys. Transferred to Successor.**

**SEC. 74.** All moneys deposited in any bank, to the credit of such clerk, shall, upon his death, removal from office, or resignation, be carried to the account of his successor in office; and every such bank shall take notice thereof, and transfer such accounts accordingly.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 90, being C. L. '57, (3469); C. L. '71 (5051); How 6605; C. L. '97, (427), changing "register" to "clerk," unchanged.

**(12158). Rules and Regulations Relating to Moneys.**

**SEC. 75.** Each circuit judge may, from time to time, make such rules and regulations concerning such moneys, stocks and securities, as he shall deem just and reasonable; and all such rules and regulations shall be entered in the minutes of the court.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 90, being C. L. '57, (3470); C. L. '71, (5052); How 6606; C. L. '97, (428), unchanged.

**(12159). Securities to be Taken in Name of Clerk.**

**SEC. 76.** In all such cases, when it shall seem to the circuit judge necessary, or proper to do so, said circuit judge may require said clerk to file with the county treasurer bonds, in addition to his official bond, in such amount, and within such time as he may order, conditioned that said clerk shall, in all respects comply with the requirements of law, in the handling and management of such funds, and to faithfully account for the same.

**HISTORY:** This section merges and supersedes Secs. 5 and 6, R. S. '46, Ch. 90, being C. L. '57, (3459); as Am. '65, p. 79, Act 60, Imd. Eff. Feb. 20; C. L. '57, (3460); C. L. '71, (5041)-(5042); How. 6595-6; C. L. '97, (417)-(418), superseded by this section

**OF SHERIFFS AS COURT OFFICERS.****(12160). Court to Determine Number of Officers.**

**SEC. 77.** At any term of any court of record within this state, at which the sheriff or his deputies may by law be required to attend, such court shall have the power, and it shall be its duty, to fix, determine, and regulate from time to time, the number of such officers aforesaid as in the opinion of such court shall be necessary for the transaction of its

business, and no greater number shall attend such court and be paid for such attendance, than shall from time to time be fixed and determined as aforesaid, by the court.

**HISTORY:** Re-enacts Sec. 1 of Act 249 of '59, except for the striking out "or any constable," being C. L. '71, (5036); How. 6534a; C. L. '97, (317), changed.

**CRIER FOR KALAMAZOO:** Act 216 of '87, p. 257, (How. 6480x, y), authorized the judge of the Kalamazoo circuit court to appoint a crier, to hold office during the pleasure of the judge, at a compensation not exceeding \$3 per day, determined by the supervisors. He and his authorized assistants have the power of a deputy sheriff, except the service of civil or criminal process.

**COUNTY COURT FILES:** Act 75 of '53, p. 115, (C. L. '57, (3434); C. L. '71, (4960); How. (6477), transferred all the records, files, books, papers and judgments in the late county courts to the circuit courts of their respective counties, making them the records etc., of such circuit courts, and also provided "The said circuit courts shall be fully authorized to issue execution upon said judgments and make all needful and proper orders and rules in reference thereto, and in reference to said records, files, books, papers and judgments, in as full and ample a manner, as if the same had always been and remained in said circuit courts. Such executions shall be issued on the application of the plaintiff, his agent or attorney, ten days' notice being first given to the defendant, his agent or attorney, of the intention to apply for such execution, and requiring him to show cause, if any, why such execution should not issue."

**(12161). Sheriff's Officers of the Court.**

**SEC. 78.** The sheriffs of the respective counties shall be officers of the circuit court at law and in chancery, for the purpose of executing the process of the court; and the sheriff to whom any process of said court shall be directed, shall be amenable to the court in its execution, and may be punished for his disobedience or default therein, in the manner prescribed by law.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 90, being C. L. '57, (3471); C. L. '71, (5053); How. 6607; C. L. '97, (429), making the same applicable to both the law and chancery side of the court, unchanged.

**(12162). Sheriff to Attend and Execute Court's Orders.**

**SEC. 79.** The sheriff of the county and his deputies, in which any stated term may be held by the circuit judge, shall, upon pain of being fined in the discretion of the court, be bound to attend said court during its sitting, in such manner as the court shall direct; and such officers so attending may

execute all the lawful orders and process of the court in any county of this state.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 90, being C. L. '57, (3472) C. L. '71, (5054); How. 6608; C. L. '97, (430), changing "sheriffs" to "officers," and adding "and his deputies," substantially unchanged.

**SHERIFF'S FEES:** As to the fees allowed by the board of county auditors, where none are fixed by statute, to a sheriff for attendance at court, see *Chipman v. Wayne Co. Auditors*, 127 Mich. 490.

**FORMER LAW CITED:** *Turrill v. Walker*, 4 Mich. 180.

**(12163). Sheriff Not to Appear as Attorney.**

**SEC. 80.** No sheriff, deputy sheriff or coroner shall appear in any court as attorney or counsel for, or on behalf of any party in a suit; nor shall he draw, make or fill up any writ, declaration, plea or process, for any such party; nor shall he, with intent to procure himself to be employed in the collection of any demand, or the service of any process, advise or counsel any person to commence any suit or proceeding; and either of said officers, for a violation of any provision of this section, shall forfeit the sum of fifty dollars.

**HISTORY:** Re-enacts Sec. 80, R. S. '46, Ch. 14, being C. L. '57, (421); C. L. '71, (562); How. 590; C. L. '97, (2589). Although the Judicature Act does not expressly repeal said section, unchanged.

**CONSTRUED:** Such action on the part of the sheriff makes the writ or process void. *Garrison v. Hoyt*, 25 Mich. 509. See also *Van Dusen v. King*, 106 Mich. 133.

**(12164). Aid for Sheriff.**

**SEC. 81.** Any sheriff, deputy sheriff, coroner or constable, may require suitable aid in the service of process in civil or criminal cases, in preserving the peace, or in apprehending or securing any person for felony or breach of the peace, when such officer may have power to perform such duty; and when any such officer shall find resistance made against the execution of any process, or shall have good reason to believe that such resistance will be made, he may take the power of the county and proceed therewith in proper person to execute the process.

**HISTORY:** Re-enacts Sec. 81, R. S. '46, Ch. 14, being C. L. '57, (422); C. L. '71, (563); How. 591; C. L. '97, (2590), although the Judicature Act does not expressly repeal said section, unchanged.

See Compilers' Section (14987).

NOTE: Secs. 82 to 95 inclusive were omitted by the Legislature in numbering.

FORMER LAW CITED: *Firestone v. Rice*, 71 Mich. 380.

OF CIRCUIT COURT COMMISSIONERS.

(12165). Election of Circuit Court Commissioners.

SEC. 96. There shall be elected at the next general election to be held in this state, and every two years thereafter, one circuit court commissioner in each of the organized counties, who shall enter upon the discharge of their official duties on the first day of January succeeding their election, and shall hold their offices two years, and be vested with judicial powers not exceeding those of a judge of the circuit court at chambers: *Provided*, That in each county in this state wherein any census taken by the authority of this state, or of the United States, shall show a population of twenty thousand or more, there shall be elected at the general election next succeeding the taking of such census, and every two years thereafter, two such circuit court commissioners; except as otherwise provided by any existing local act.

HISTORY: Re-enacts Sec. 1 of Act 204 of '81, being How. 7136; C. L. '97, (1064), adding the last clause as above, unchanged.

CONSTITUTIONALITY: As to the nature, powers and jurisdiction of circuit court commissioners, see Const. '50, VI 16 and notes thereto. See also Beecher's Annotated Const. of Mich. '08, Art. VII, Sec 21.

(12166). Designation of Persons Elected to Succeed to Office.

SEC. 97. Whenever, in any county, two circuit court commissioners shall have been elected, it shall be the duty of the board of county canvassers to designate which of the persons so elected shall succeed to the office theretofore held by each circuit court commissioner: *Provided*, That if in any case the said board of county canvassers shall neglect or refuse to make such designation it may be made by the circuit judge of the judicial circuit of which such county constitutes the whole or a part.

HISTORY: Re-enacts Sec. 2 of Act 204 of '81, being How. 7137; C. L. '97, (1065), unchanged.

(12167). Circuit Court Commissioner Must be an Attorney.

SEC. 98. No person shall be elected a circuit court commissioner unless he be at the time an attorney and counselor.

**HISTORY:** Re-enacts Sec. 3 of Act 204 of '81, being How. 7138; C. L. '97, (1066), omitting "of the supreme Court," unchanged.

**CONSTRUED:** See *People v. May*, 3, Mich. 609.

**(12168). Take Oath of Office.**

**SEC. 99.** Every circuit court commissioner, before he shall enter upon the duties of his office, shall take and subscribe the oath of office prescribed by the constitution of this state, before some judge or clerk of a court of record, and cause the same to be filed by him in the office of the county clerk of his county.

**HISTORY:** Re-enacts Sec. 4 of Act 204 of '81, being How. 7139; C. L. '97, (1067), unchanged.

**(12169). Bond of Circuit Court Commissioner.**

**SEC. 100.** Each circuit court commissioner, before entering on the performance of the duties of his office, shall execute a bond to the people of this state, with sufficient surety or sureties to be approved by the circuit judge or clerk of his county, conditioned for the faithful performance of the duties required of him by law, in the penal sum of not less than three thousand nor more than five thousand dollars, in the discretion of the circuit judge or county clerk by whom the same may be approved; said bond, when approved, shall be filed with the county clerk of the proper county. Any circuit court commissioner shall renew his bond whenever required so to do by the circuit judge of his county.

**HISTORY:** Re-enacts Sec. 17 of Act 204 of '81, being How. 7152; C. L. '97, (1080). It also supersedes the last sentence in Sec. 18 of Act 204 of '81, being How. 7153; C. L. '97, (1081), changing "by this act prescribed" to "of his office," substantially unchanged.

**(12170). Duties of Circuit Court Commissioner.**

**SEC. 101.** Circuit court commissioners, qualified according to law, shall severally be authorized and required to perform all the duties and execute every act, power and trust which a judge of the circuit court may perform and execute out of court, according to the rules and practice of such court, and pursuant to the provisions of any statute, in all civil cases, except as herein otherwise provided; but when any power is given in express terms, by any statute, to a circuit judge or to circuit judges, without naming circuit court



commissioners in such statute, such commissioners shall not be authorized to exercise any such powers.

**HISTORY:** Re-enacts Sec. 5 of Act 204 of '81, being How. 7140; C. L. '97, (1068), unchanged.

**POWERS:** As to the powers of a circuit court commissioner see note to Const. '50, VI, 16. He may take bail. *Daniels v. People*, 6 Mich. 381. And discharge bail. *DeMayer v. McGoneral*, 32 Mich. 131. Entertain summary proceedings to recover possession of lands. *Streeter v. Paton*, 7 Mich. 341. Order the transfer of suits from one circuit to another. *Whipple v. Judge*, 26 Mich. 342. Act as probate judge in certain cases. *Kelley v. Edwards*, 38 Mich. 210. Act in proceedings for the condemnation of lands for a school house site. *Smith v. Sch. Dist.*, 40 Mich. 143. Allow writs of certiorari. *Zook v. Blough*, 42 Mich. 487; *Loder v. Littlefield*, 39 Mich. 374. Dissolve attachments. *Edgerton v. Hinchman*, 7 Mich. 352; *Albertson v. Edsall*, 16 Mich. 203; *Smith v. Collins*, 41 Mich. 173; *Schall v. Bly*, 43 Mich. 401. Prior to the amendment of '81, to 9360 C. L. '97, Compilers' Section 13461, circuit court commissioners could entertain applications for the writ of habeas corpus. As to the powers of commissioners in such cases under the old law, see *Rowe v. Rowe*, 28 Mich. 353; *Buddington's Case*, 29 Mich. 472; *Burger's Case*, 39 Mich. 203. But a circuit court commissioner cannot try the title to real estate. *Waldby v. Callendar*, 8 Mich. 430; *Case v. Dean*, 16 Mich. 12. Nor set aside the action of a circuit judge or court. *Boinay v. Coats*, 16 Mich. 411. Nor review the judicial action of any court in holding persons convicted of crime. *Burger's Case*, 39 Mich. 203. Nor issue the writ of ne exeat. *Bailey v. Cadwell*, 51 Mich. 217.

**(12171). Circuit Court Commissioner Cannot Order Stay of Proceedings.**

**SEC. 102.** No circuit court commissioner shall be authorized to grant any order to stay proceedings before judgment in any cause in which a verdict shall have been rendered; nor any order to stay proceedings on any *capias respondendum*.

**HISTORY:** Re-enacts Sec. 6 of Act 204 of '81, being How. 7141; C. L. '97, (1069), changing "*capias ad respondendum*" to "*capias respondendum*," unchanged.

**CONSTRUED:** Injunctions to stay proceedings at law cannot be granted without notice previously given to the adverse party. *Boinay v. Coats*, 17 Mich. 416. See *Cummins* and *Beecher's Michigan Rule Book*, Circuit Court Rule 54, Sec. 2, '16.

**(12172). Supreme Court Order Must Not be Suspended.**

**SEC. 103.** When the supreme court shall have made any order in reference to a matter, such order shall not be suspended, or in any manner affected, by an order granted by a circuit court commissioner.

**HISTORY:** Re-enacts Sec. 11 of Act 204 of '81, being How. 7146; C. L. '97, (1074), unchanged.

**CONSTRUED:** Nor can a commissioner set aside or rescind any order of the circuit judge or court. *Boinay v. Coats*, 17 Mich. 416.

**(12173). Refusal of Order—No Application to be Made to Other Commissioner.**

**SEC. 104.** If an application for any order be made to any justice of the supreme court, judge of a circuit court, or circuit court commissioner, and such order be refused, in whole or in part, or granted conditionally or on terms, no subsequent application in reference to the same matter and in the same stage of the proceedings shall be made to any other circuit judge or circuit court commissioner; and if upon a subsequent application any order be made by a circuit judge or circuit court commissioner, it shall be revoked by such judge or commissioner, or by any justice of the supreme court, upon due proof of the facts.

**HISTORY:** Re-enacts Sec. 12 of Act 204 of '81, being How. 7147; C. L. '97, (1075), unchanged.

See *Compilers'* (12263).

**(12174). Persons Making Subsequent Application Shall be Punished.**

**SEC. 105.** Every person making such subsequent application contrary to the foregoing provisions, with knowledge of any previous application and refusal, shall be liable to be punished by fine and imprisonment by the court in which such matter may be pending.

**HISTORY:** Re-enacts Sec. 13 of Act 204 of '81, being How. 7148; C. L. '97, (1076), unchanged.

See *Compilers'* (12263).

**(12175). Commissioner Incompetent to Act When Partner Interested.**

**SEC. 106.** No circuit court commissioner having a law partner in whose name the business of the co-partnership shall be carried on, shall be competent to perform any act authorized by law in any suit or proceeding in which such partner shall be in anywise interested.

**HISTORY:** Re-enacts Sec. 14 of Act 204 of '81, being How. 7149; C. L. '97, (1077), changing "in this act" to "by law," unchanged.

**CONSTRUED:** See *Brown v. Byrne*, Walk. 453; *Heyn v. Farrar*, 36 Mich. 258.

**(12176). Supreme Court to Prescribe Cases in Which Commissioner Shall Not Grant Orders.**

**SEC. 107.** The supreme court shall have power, by general rules, to prescribe any other cases in which circuit court commissioners shall not be authorized to grant any orders in relation to suits, and to prescribe the terms and conditions upon which orders may be granted in any specified class of cases; and also, by order in any particular case to forbid the interference of any such commissioner.

**HISTORY:** Re-enacts Sec. 15 of Act 204 of '81, being How. 7150; C. L. '97, (1078), unchanged.

**(12177). Commissioners Competent to Discharge the Duties of Master in Chancery.**

**SEC. 108.** The several circuit court commissioners shall, within their respective counties, be competent to discharge all such duties as have formerly been performed by masters in chancery in this state, according to the practice in chancery proceedings, and all such other powers as shall be conferred upon them by the several circuit courts according to law, and shall be amenable to the circuit courts within the jurisdiction and under the orders of which they may respectively act: *Provided, however,* That testimony to be used in any circuit court in chancery may be taken before a justice of the peace or notary public, if the parties interested, their agents or attorney, shall enter into a stipulation to that effect, in writing, and file the same with the clerk of the circuit court of the proper county.

**HISTORY:** Re-enacts Sec. 16 of Act 204 of '81, being How. 7151; C. L. '97, (1079), changing "heretofore" to "formerly," unchanged.

**TAKING PROOFS:** Either party, during the period allowed by the rules for taking proofs, has the right to take his testimony in any order he may choose. The commissioner has no right to reject testimony; it is for the court to decide upon its admissibility. *Brown v. Brown*, 22 Mich. 246. Whether the evidence is taken before a commissioner or in open court, all objections made to the competency, materiality or relevancy of the testimony offered must be reserved until the final hearing. *Collins v. Jackson*, 43 Mich. 561. But the commissioner is justified in refusing to take testimony that is grossly improper, as a physician's testimony as to facts learned in the treatment of a patient. *Storrs v. Scougale*, 48 Mich. 395-6. See also *Page v. Page*, 51 Mich. 90. And he ought, also, to refuse to take down unprofessional statements made by counsel and scandalous objections. *Rea v. Rea*, 53 Mich. 40. And proofs bearing on the question of permanent alimony

ought not to be taken, until it has been determined by the court whether a divorce shall be decreed. *Id.*

**MANDAMUS:** Mandamus lies to compel a circuit court commissioner to proceed on an order of reference tendered to him. *Warner v. Randall*, 37 Mich. 473.

**TAKING TESTIMONY BY CONSENT:** Testimony may always be taken by consent, in chancery, as well before as after an issue in fact is joined. *Woods v. Monroe*, 17 Mich. 242. When the usual order to take proofs in sixty days has been entered, a subsequent stipulation for taking proofs before a justice of the peace, commencing at a certain time and to continue from day to day until completed, does not preclude the entry of a common order closing the proofs at the expiration of the time fixed. *Damouth v. Klock*, 29 Mich. 292.

#### (12178). Powers and Duties.

**SEC. 109.** Each circuit court commissioner shall be authorized and empowered to do and perform, within the county in which he shall reside, all the duties formerly performed by injunction masters under such restrictions and regulations as the supreme court may prescribe: *Provided*, That when any circuit court commissioner shall have granted or refused to grant any injunction, or shall have made or refused to make any order in reference to any matter or proceeding, such injunction or order shall not be affected by any order or proceeding in relation thereto, made by any other circuit court commissioner while the commissioner making or refusing such order, or granting or refusing such injunction, shall be competent to act in the premises. And any commissioner refusing to grant any order or injunction, shall indorse his refusal upon the application for the order, or bill of complaint, as the case may be.

**HISTORY:** Re-enacts Sec. 19 of Act 204 of '81, being How. 7154; C. L. '97, (1082), unchanged.

**POWERS:** See note to Compilers' Section (12170). Circuit Court Commissioner has no power to issue a writ of ne exeat. *Balley v. Cadwell*, 51 Mich. 217.

#### (12179). Records and Files of Predecessor to be Turned over to Successors.

**SEC. 110.** Every circuit court commissioner shall be entitled to all the records and files pertaining to the office of his predecessor, and to suits or proceedings pending and undetermined before such predecessor, and shall be authorized to hear, try, determine and dispose of any undetermined suit or proceeding, and fully to conclude the same, and to enforce

his determination in the same manner and by the like process as if such suit or proceeding had been originally commenced before him; and also to issue all proper and suitable process for enforcing any judgment or determination of his predecessor or predecessors.

HISTORY: Re-enacts Sec. 20 of Act 204 of '81, being How. 7155; C. L. '97, (1083), unchanged.

**(12180). Commissioner of Adjoining County May Act.**

SEC. 111. In all cases where by law any duties are required to be performed by a circuit court commissioner of any county, and there shall be no such commissioner who is not legally disqualified to act by reason of interest, connection with the matter or controversy, or for any other cause, the same may be performed by any circuit court commissioner of an adjoining county not disqualified; or if the same pertain to a matter, cause or proceeding pending in any circuit court, by a commissioner specially appointed by the judge of said court for the purpose.

HISTORY: Re-enacts Sec. 21 of Act 204 of '81, being How. 7156; C. L. '97, (1084), omitting, however, the last clause which was as follows: "or, on the written stipulation of the party interested, by any notary public who is an attorney of the supreme court," unchanged.

**(12181). Proof Necessary.**

SEC. 112. Before any circuit court commissioner of an adjoining county shall enter upon the performance of any such duties, proof shall be made and presented to him by affidavit that there is no circuit court commissioner of the proper county, competent and qualified to discharge such duties, and stating the ground of disqualification; and such proof shall in all cases accompany the acts and form part of the proceedings of the commissioner discharging such duties.

HISTORY: Re-enacts Sec. 22 of Act 204, '81, being How. 7157; C. L. '97, (1085), unchanged.

**(12182). Duties to be Performed by Whom When Commissioner Absent or Disqualified.**

SEC. 113. Whenever any process shall have been issued by or any matter shall have been referred to any circuit court commissioner, and on any day set for the return or hearing

thereof, such commissioner shall be absent or otherwise disqualified from acting therein, it shall be lawful for any other circuit court commissioner or other officer having authority to perform the like duty in the same county, to assume jurisdiction thereof and to proceed therein, and to hear, try and determine the same, and to make all orders, certificates, reports and returns, and to take and approve all bonds and recognizances, and to make and issue all further papers or process therein with like effect in all respects as if the original process had been issued by, or the matter had originally been referred to him; or he may in his discretion adjourn the same from time to time, and on the adjourned day proceed therein, or on said adjourned day the circuit court commissioner who issued said process, or to whom said matter was referred, if not then disqualified, may assume jurisdiction of the said matter or proceeding, and proceed in all respects therein as if the said adjournment or adjournments had been made by himself.

**HISTORY:** Re-enacts Sec. 23 of Act 204, of '81, being How. 7158; C. L. '97, (1086), unchanged.

**CONSTRUED:** See *Bishop v. Williams*, Walk. 423.

**(12183). Sale of Property When Commissioner Disqualified or Absent.**

**SEC. 114.** Whenever any such commissioner shall have advertised property for sale in pursuance of a decree of a court, and on the day when the sale is so advertised to take place, or on any day to which the same may be adjourned, the said commissioner shall be absent or otherwise disqualified from acting in the premises, the other circuit court commissioner of the county, if there be one who is not disqualified from acting, and if not, then a circuit court commissioner of an adjoining county may proceed and make the sale, and thereafter make and execute the deed or deeds for the property sold, and make his report of the same to the proper court, and may proceed in all respects as if he had originally advertised the said property for sale; or he may in his discretion adjourn the sale from time to time and publish notices of adjournment in his own name, and make the sale on the adjourned day, unless the commissioner who advertised the same shall then be present and competent to proceed therewith, in which case he shall be entitled at his election to do so.

**HISTORY:** Re-enacts Sec. 24 of Act 204 of '81, being How. 7159; C. L. '97, (1087), unchanged.

**(12184). Sale of Real Estate When Term of Office Expires.**

**SEC. 115.** In all cases where any circuit court commissioner shall have advertised real estate for sale under and by virtue of any decree or order of any court of this state, and his term of office shall expire before the sale shall be consummated, it shall be competent and lawful for him to proceed to complete the sale and report thereof, and do all things necessary to perfect the same, as if his term of office had not expired; and for such purpose his power and authority shall continue until all such business is fully closed.

**HISTORY:** Re-enacts Sec. 25 of Act 204 of '81, being How. 7160; C. L. '97, (1088), unchanged.

**(12185). Suspension of Commissioner by Circuit Judge.**

**SEC. 116.** Any circuit court commissioner may be suspended by the circuit judge of his county, from the exercise of the powers and duties of his office, in cases of misconduct therein, after due notice and a full opportunity of making his defense shall have been given him; and the circuit judge of the county shall immediately report such suspension, with the reasons therefor, to the governor, who may remove him from office.

**HISTORY:** Re-enacts Sec. 26 of Act 204 of '81, being How. 7161; C. L. '97, (1089), unchanged.

**(12186). Filling of Vacancy.**

**SEC. 117.** Whenever a vacancy shall occur, for any cause, in the office of circuit court commissioner of any county, the governor may fill such vacancy by the appointment of a person eligible to such office, who shall, upon taking the official oath and executing and filing the bond, as provided in section one hundred of this chapter, be authorized and required to discharge all the duties of circuit court commissioner, and shall be liable to all the provisions of law touching said office, and shall hold the same until his successor shall be duly elected and qualified.

**HISTORY:** Re-enacts Sec. 27 of Act 204 of '81, being How. 7162; C. L. '97, (1090), making a necessary change in phraseology in referring to another section, unchanged.

(12187). Commissioner to Continue in Office for Remainder of Term.

SEC. 118. Circuit court commissioners heretofore elected or appointed, and now in office, shall continue to perform the duties of their respective offices, as provided by law, during the remainder of the term for which they were elected or appointed.

HISTORY: Re-enacts Sec. 28 of Act 204 of '81, being How. 7163; C. L. '97, (1091), unchanged.

(12188). ~~Proceedings Before Circuit Court~~

(12188a). Authorizing Processes.

Section 119-a. In all countries where the circuit court commissioner or circuit court commissioners have a clerk or clerks, such clerks or regularly appointed deputy clerks, may sign all summonses, subpoenas, citations, dockets and process for the collection of costs, and are hereby authorized to sign the name of the circuit court commissioner upon all such summonses, subpoenas, citations, dockets and process for the collection of costs, and the same when so signed, shall have the same force and effect as if signed by the circuit court commissioner of such court; such documents and papers to be signed by said clerk, clerks or deputies in the following manner:

-----  
 Circuit court commissioner,  
 By.....  
 Clerk (or deputy clerk)

HISTORY: New section enacted by P. A. '23, Act. No. 31. Approved April 26, 1923.

HISTORY: Re-enacts Sec. 8, R. S. '46, Ch. 103, being C. L. '57, (4350); C. L. '71, (5977); as Am. '97, p. 37, Act 41, Imd. Eff. April 18; As Am. '81, p. 55, Act 65, Imd. Eff. April 1; How. 7554; C. L. '97, (318), unchanged.

RETURN OF JURORS: For further provisions as to return of jurors, see Compilers' Section 12214. It is no ground of challenge to the array that the jury lists were not returned until after the time designated by law. *Thomas v. People*, 39 Mich. 309, 311; *People v. Coffman*, 59 Mich. 1, 7; *People v. Coughlin*, 67 Mich. 470; Nor because no list was returned from one township. *People v. Coffman*, 59 Mich. 1, 7. A special charter provision for the return of jury lists supersedes the general statute. *Hewitt v. Judge*, 71 Mich. 287; *People v. Fuhrman*, 103 Mich. 596. This and the following section clearly contemplate that jurors must be selected from persons whose names appear



on the assessment roll of the township or ward. *People v. Thacker*, 108 Mich. 652, 654. See also *Mt. Clemens v. Judge*, 119 Mich. 296. A juror may be challenged for cause if his name does not appear upon the assessment roll of his township or ward. *Schlacker v. Iron Mining Co.*, 89 Mich. 253. See *People v. Harding*, 53 Mich. 48, 55; *Eberts v. Mt. Clemens Sugar Co.*, 182 Mich. 457.

### (12190). Jurors and Their Qualifications.

SEC. 121. The said officers shall proceed to select from the persons assessed on the assessment roll of the township or ward for the same year, suitable persons, being citizens, having the qualifications of electors, to serve as jurors; and in making such selection, they shall take the names of such only as are not exempt from serving on juries, who are in possession of their natural faculties, and not infirm or decrepit, of good character, of approved integrity, of sound judgment, and well informed and conversant with the English language, and free from all legal exceptions, and who have not made, and in whose behalf there has not been made, to the officers mentioned in the preceding section, any application to be selected and returned as jurors.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 103, being C. L. '57, (4351); as Am. '61, p. 21, Act 25, Imd. Eff. Feb. 2; C. L. '71, (5978); How. 7555; C. L. '97, (319), adding thereto the further qualifications of a juror that he must be a citizen, unchanged except as to the requirements of citizenship which is new.

CONSTRUED: *People v. Harding*, 53 Mich. 52, 54; *People v. Coffman*, 59 Mich. 7; *McGrail v. Kalamazoo*, 94 Mich. 54. This section would seem to indicate that the lists are to be made by officers having some knowledge of the persons listed. *People v. Fuhrman*, 103 Mich. 596.

QUALIFICATIONS: A person lacking the statutory qualifications is not recognized by law as a juror at all. *Hill v. People*, 16 Mich. 351, 355. And the lack of such qualifications can not be waived in a criminal case. *Id.* 356. But in civil cases, by going to trial without challenge, the want of proper qualifications is waived. *Owners of Ship Milwaukee v. Hale*, 1 Doug. 306, 314; *Johr v. People*, 26 Mich. 430. As to the listing of persons exempt from jury duty, see *Smalz v. Boyce*, 109 Mich. 382, 385. As to the selection of jurors, see *Compilers' Sections* (12593-12621).

ASSESSMENT ROLL: It is a good challenge for cause that the name of the juror chosen from the regular panel does not appear upon the assessment roll, of his township or ward. *Schlacker v. Mining Co.*, 89 Mich. 253, 261. But a juror need not necessarily be a taxpayer. *Stewart v. People*, 23 Mich. 63, 79; *Peninsular Ry. Co. v. Howard*, 20 Mich. 26; *Smith v. German Ins. Co.*, 107 Mich. 275; *People v. Thacker*, 108 Mich. 654; *Mt. Clemens v. Macomb Circuit Judge*, 119 Mich. 296.

**ELECTORS:** An elector who removes to another township in the same county less than ten days prior to being summoned as a juror does not cease to be an elector so as to disqualify him from serving. *People v. Collins*, 166 Mich. 4; *People v. Wright*, 89 Mich. 70, 79. *People v. Scott*, 56 Mich. 155.

**ENGLISH LANGUAGE:** *O'Neil v. Lake Sup. Iron Co.*, 67 Mich. 561.

**JURORS MUST BE CITIZENS:** In addition to the requirements heretofore existing, it is required that jurors be citizens.

**TALESMEN:** The mandatory provisions of the present statute, requiring the court, when additional jurors are necessary for the trial of any cause, if requested by either party, to order that jurors be drawn from the regular lists instead of drawing talesmen from the by-standers or others, is changed so that such action is discretionary with the court.

#### (12191). Contents of List.

**SEC. 122.** Such lists shall contain not less than one for every hundred inhabitants of such township or ward, computing according to the last preceding census, and having regard to the population of the county, so that the whole number of jurors selected in the county shall amount at least to one hundred, and not exceeding four hundred, one-half of whom shall be designated as petit jurors, and one-half as grand jurors.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 103, being C. L. '57, (4352); C. L. '71, (5979); How. 7556; C. L. '97, (320), unchanged.

**CONSTRUED:** *People v. Coughlin*, 67 Mich. 470; *Hewitt v. Judge*, 71 Mich. 290; *People v. Fuhrman*, 103 Mich. 593; *People v. MacGregor*, 178 Mich. 461.

#### (12192). Persons Who Served the Preceding Year not to be Selected.

**SEC. 123.** In making such selection, the said officers shall avoid, as far as practicable, selecting any of the same persons who are actually drawn, and who served as jurors, during the preceding year.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 103, being C. L. '57, (4353); C. L. '71, (5980); How. 7557; C. L. '97, (321), unchanged.

**FORMER LAW CITED:** *People v. Harding*, 53 Mich. 50.

#### (12193). Duplicate Lists to be Made.

**SEC. 124.** Duplicate lists of the persons so selected, shall be made out and signed by the officers making such selection, or the major part of them, and within ten days thereafter one

of each of said lists shall be transmitted to the county clerk, and the other shall be filed with the clerk of the township or assessor of the ward, as the case may be.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 103, being C. L. '57, (4354); C. L. '71, (5981); How. 7558; C. L. '97, (322), unchanged.

**JURY LISTS:** See Compilers' Section (12214) for further provisions for making and returning jury lists.

**FORMER LAW CITED:** People v. Harding, 53 Mich. 50.

**(12194). Selection of Jurors in Cities.**

**SEC. 125.** In cities where the commission form of government has been or may hereafter be adopted and the city is made to consist of one ward, the list of jurors from such city shall consist of four names from each voting precinct containing four hundred inhabitants or less according to the last preceding census, and six names from each voting precinct containing more than four hundred inhabitants according to said census. One-half of such names shall be designated as grand jurors and one-half as petit jurors. Such lists when so selected shall be added to the list of jurors selected from other portions of the county, and such aggregate lists when so prepared shall be used in selecting grand and petit jurors of the circuit court for the county in which said city is located until a new list shall be chosen in accordance with law, and in the selection of the jurors for the regular panel, each voting precinct shall be entitled to the same number of jurors as the township or ward of a city had the commission form of government not been adopted.

**HISTORY:** Re-enacts Sec. 1 of Act 167 of '11, p. 283, Imd. Eff. April 25, adding thereto a further provision relating to the selection of grand jurors, changed.

**(12195). The Manner of Selection and Designation of Such Jurors.**

**SEC. 126.** The manner of selection and designation of said jurors shall in all other respects conform to the provisions of law then existing.

**HISTORY:** Re-enacts Sec. 2 of Act 167 of '11, p. 283, Imd. Eff. Apr. 25, adding "then existing," changed so that selection shall be made according to law existing at the time selection is made instead of according to "present provisions of law."

**(12196). Duplicate Lists to be Made.**

SEC. 127. On receiving such lists, the county clerk shall file the same in his office, and shall write down the names contained therein on separate pieces of paper of the same size and appearance as nearly as may be; and shall fold up each of such pieces of paper so as to conceal the names thereon, and he shall make two separate packages for each township or supervisor district or voting precinct in cities having a commission form of government in his county, one package for the names of the grand and one for the names of the petit jurors, upon each of which packages he shall indorse the name of the township or supervisor district, or voting precincts in cities having a commission form of government, in which the persons whose names are contained in such package reside, and also on the package containing the names of persons returned as grand jurors, the words "grand jurors;" and on the package containing the names of the persons returned as petit jurors, the words "petit jurors;" and he shall place in the package marked "grand jurors" all the names appearing upon the lists returned as grand jurors; and in the package marked "petit jurors" all the names appearing upon the list returned as petit jurors from the township or supervisor district, or voting precinct represented by the name indorsed upon such package, and he shall number said packages in numerical order, commencing with number one.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 103, being C. L. '57, (4355); C. L. '71, (5982); as Am. '77, p. 113, Act 125, Eff. Aug. 21; How. 7559; C. L. '97, (323), adding thereto, however, the provisions relating to the selection of jurors from cities having the commission form of government, changed to conform to change in section 125. See the two preceding sections.

**FORMER LAW CITED:** *People v. Harding*, 53 Mich. 50.

**(12197). Persons Selected to Serve One Year as Jurors.**

SEC. 128. The persons whose names shall be so returned shall serve as jurors for one year, and until other lists from the respective townships or wards shall be returned and filed.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 103, being C. L. '57, (4356); C. L. '71, (5983); How. 7560; C. L. '97, (324), unchanged.

**CONSTRUED:** *Stewart v. People*, 23 Mich. 79; *Thomas v. People*, 39 Mich. 311.

**(12198.) The Names Placed in Packages to be Destroyed by County Clerk.**

**SEC. 129.** Upon receiving such new lists, the county clerk shall destroy the names placed in said packages for the preceding year and replace the same by the names contained in such new lists in the same manner as above required.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 103, being C. L. '57, (4357); C. L. '71, (5984); as Am. '77, p. 114, Act 125, Eff. Aug. 21; How. 7561; C. L. '97, (325), unchanged.

**(12199.) Jury to be Drawn.**

**SEC. 130.** At least fourteen days before the holding of any circuit court at which such juries shall be required by law, the clerk of the county where such court is to be held shall draw from the petit jurors the names of twenty-four persons, and any additional number that may have been ordered by the court, to serve as petit jurors; and also from the grand jurors the names of twenty-three persons to serve as grand jurors, if a grand jury shall have been ordered by the court.

**HISTORY:** Re-enacts without material change Sec. 16 R. S. '46, Ch. 103, being C. L. '57, (4358); C. L. '71, (5985); As Am. '77, p. 114, Act 125; Eff. Aug. 21; How. 7562; C. L. '97 (326), substantially unchanged.

**CONSTRUED:** *People v. Jones*, 24 Mich. 217; (decided before the amendment of '77); *People v. Lauder*, 82 Mich. 132; *People v. Reigel*, 120 Mich. 78, 82. There seems to be no doubt that under the general statutes a grand jury may be impaneled and may act, consisting of any number of persons more than 15 and less than 24. *People v. Thompson*, 122 Mich. 411, 416.

**GRAND JURORS:** See *People v. Thompson*, 122 Mich. 417; *People v. Reigel*, 120 Mich. 78; *People v. Lauder*, 82 Mich. 109.

**PETIT JURORS:** See *Bronson v. People*, 32 Mich. 34; *People v. Jones*, 24 Mich. 217.

**(12200.) Clerk Shall Give Notice.**

**SEC. 131.** At least three days before the drawing of such jurors, the clerk shall give notice to the sheriff and two justices of the peace of said county, of the day and hour when such drawing will take place.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 103; as Am. '53, p. 192, Act 96, Imd. Eff. Feb. 14; being C. L. '57, (4359); C. L. '71, (5986); How. 7563; C. L. '97, (327), unchanged.

**(12201.) Duty of Sheriff and Justices.**

**SEC. 132.** At the time so appointed, it shall be the duty of

the sheriff of the county in person, or by his under sheriff, and the justices aforesaid, to attend at the clerk's office of the county, to witness such drawing; and if any two of said officers shall attend at the time and place appointed, the clerk shall proceed in their presence to draw the jurors.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 103; as Am. '53, p. 192, Act 96, Imd. Eff. Feb. 14; being C. L. '57, (4360); C. L. '71, (5987); How. 7564; C. L. '97, (328), unchanged.

**CONSTRUED:** *Evans v. Sutherland*, 41 Mich. 180; *Sturgis v. Mt. Clemens Sugar Co.*, 184 Mich. 457.

**(12202). Adjournment of Drawing.**

Sec. 133. If two of the officers so notified do not appear, the clerk shall adjourn the drawing of such jurors until the next day, and shall, by written notice, require any justice of the peace of the county, to attend such drawing on the adjourned day.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 103, being C. L. '57, (4361); C. L. '71, (5988); How. 7565; C. L. '97, (329), unchanged.

**(12203). Adjourned Day.**

Sec. 134. If at the adjourned day, any two of the officers notified to attend the drawing of such jurors shall appear, but not otherwise, the clerk shall proceed, in the presence of the officers so appearing, to draw the jurors.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 103, being C. L. '57, (4362); C. L. '71, (5989); How. 7566; C. L. '97, (330), unchanged.

**(12204). Drawing of Jurors.**

Sec. 135. The clerk shall conduct such drawing as follows:

1. He shall place in a box prepared for that purpose, first only the names contained in one of said packages, and he shall then shake the box so as to mix the slips of paper upon which such names were written as much as possible;
2. He shall publicly draw out of said box one slip of paper, and hand the same to the officer in attendance whose duty it is to keep a minute of the names drawn; when such officer shall have made a minute of the name so drawn, said clerk shall withdraw from said box all the remaining names and return them to the package from which they were taken; and thereupon he shall place in said box only the names contained in the package represented by the number next in numerical order to the one from which the last name was drawn; and

shall proceed to draw therefrom one name, hand the same to the attending officer, and return the balance thereof to the package from which they were taken in the same manner as hereinbefore provided for drawing the first name, and the said clerk shall continue drawing one name from each package in their numerical order in the manner hereinbefore provided until the number of jurors required shall have been drawn, and the said county clerk shall keep a record of the number of the package from which the last name was drawn at each drawing, and shall at the next succeeding drawing of jurors commence to draw from the package next in numerical order to the one from which the last name was drawn at the last preceding drawing;

3. A minute of the drawing shall be kept by one of the attending officers, in which shall be entered the name contained on every slip of paper so drawn, before any other such slip shall be drawn;

4. If, after drawing the whole number required for grand or petit jurors, the name of any person shall appear to have been drawn who is dead, or insane, or who has permanently removed from the county, to the knowledge of the clerk or any other attending officer, an entry of such fact shall be made in the minute of the drawing, and the slip of paper containing such name shall be destroyed;

5. Another name shall then be drawn in the place of that contained on the slip so destroyed, which shall in like manner be entered in the minutes of the drawing;

6. The same proceedings shall be had as often as may be necessary, until the whole number of jurors required shall have been drawn;

7. The minute of the drawing shall then be signed by the clerk and the attending officers, and filed in the clerk's office;

8. Separate lists of the names of the persons so drawn for petit jurors, and of those drawn for grand jurors, with their places of residence, and specifying for what term of court they were drawn, shall be made and certified by the clerk and the attending officers, and shall be delivered to the sheriff of the county.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 103, being C. L. '57, (4363); C. L. '71, (5990); as Am. '77, p. 114, Act 125, Eff. Aug. 21; How. 7567; C. L. '97, (331), unchanged.

**CONSTRUED:** *People v. Hall*, 48 Mich. 486; *People v. Coffman*, 59 Mich. 7. This section, with section 29 of this act, intends that a jury shall be drawn from the whole body of the county, and that the

names first placed in the boxes shall be exhausted before returning to the boxes names previously drawn. *Wise v. Lumber Co.*, 86 Mich. 40.

THE STATUTE OBVIOUSLY INTENDS: 1. That a jury shall be obtained from the whole body of the county. 2. That the names of those first placed in the boxes shall be exhausted before returning to the boxes the names of those previously drawn. A jury drawn three weeks before trial for a particular case of homicide is illegal if taken from only part of the townships in the county and those not adjoining the county seat not including the locality of the offense.

SUBDIVISION 4: *Matter of Spangler*, 11 Mich. 325; *People v. Coughlin*, 67 Mich. 470.

CLERK: The clerk and no other officer must draw the names from the box. The statute leaves no discretion. *People v. Labadie*, 66 Mich. 702; *Gott v. Brigham*, 45 Mich. 427.

### (12205). Summoning of Jury.

SEC. 136. The sheriff of every county in this state shall serve a personal notice upon each of the persons summoned to serve as petit jurors at any term of the circuit court of said county, by making out a written notice to each person summoned and enclosing the same in a sealed envelope addressed to the person so summoned to serve as such petit juror, at his last known place of residence, which written notice enclosed in said envelope and addressed to the person summoned shall be sent to his last known place of residence by registered mail, at least ten days before the first day of the next term of the court, with a demand in writing on said envelope for the return registry receipt. The sheriff shall make a proper return to the said circuit court at the opening of the term for which said petit jurors have been summoned specifying who have been summoned as such petit jurors for said term of the court and the manner in which such service was made, attaching to his said return the returned registry receipts demanded and received from the persons so summoned.

HISTORY: Re-enacts Sec. 1, Act 396, '13. Sec. 2 of which act repeals Sec. 22 of Ch. 103 of the R. S. '46, being C. L. '97, (332), adding, however, the provision, that the notices should be mailed ten days before the first day of the next term of court, changed.

CONSTRUED: As to the manner of notification under the former laws now superseded by this act, see *People v. Jones*, 24 Mich. 222; *People v. Williams*, 24 Mich. 161.

It has been said that these provisions do not contemplate a jury merely for a particular cause, but for the term, or any remaining portions of a term and, of course for which a jury may be needed. It is manifest that the object of this particular provision was to enable



the court to enforce the attendance and to punish the delinquent jurors for non-attendance. In the event that the jurors actually attended in a body, the manner in which they were served is immaterial, for the mode of notifying them, under these conditions, is no defect. Where a conviction was made by jurors who were properly drawn and impanelled, but not summoned by the proper officer, the conviction will not be disturbed.

**(12206). Clerk to Furnish Copy of Lists of Jurors.**

SEC. 137. It shall be the duty of the county clerk to furnish any person applying therefor, and paying the fees allowed by law for the same, a copy of the lists of jurors drawn to attend any court.

HISTORY: Re-enacts Sec. 23, R. S. '46, Ch. 103, being C. L. '57, (4365); C. L. '71, (5992); How. 7569; C. L. '97, (333), unchanged.

**(12207). Persons Exempt from Jury Service.**

SEC. 138. The following persons shall be exempt from service as jurors, to-wit: All officers and employes of the United States; all officers and employes of the state of Michigan; all county officers and their deputies; all judges of courts of record; all attorneys and counselors; all officers and teachers of colleges and incorporated academies; all settled ministers of the gospel; all superintendents, engineers and conductors of any railroad; all constant ferrymen; all members of any legally organized fire department; all members of the Michigan national guard; all registered pharmacists; all practicing physicians, surgeons and dentists; and all persons more than sixty-five years of age.

HISTORY: This section supersedes Sec. 25, R. S. '46, Ch. 103, being C. L. '57, (4367); C. L. '71, (5994); How. 7571; C. L. '97, (335), changed in phraseology and as to age.

CONSTRUED: By the former act all persons over sixty were exempt from jury service but the presence upon a jury of a talesman over sixty years of age was not a ground for challenge to the array. *People v. Bauman* 52 Mich. 584. And the fact that a jurymen was over that age was not ground for challenge for cause, the exemption being personal to the juror. *People v. Rawn* 90 Mich. 378; (overruling *People v. Bauman*, 52 Mich. 584); *McGrail v. Kalamazoo*, 94 Mich. 54; *Luebe v. Thorpe*, 94 Mich. 271.

CITED: *Smaltz v. Boyce*, 109 Mich. 385.

EXEMPTIONS FROM JURY SERVICE: The exemption from jury service on account of age is changed from sixty to sixty-five years.

**(12208). Grounds Upon Which Court May Excuse Juror.**

SEC. 139. The court to which any person shall be returned

as a juror, shall excuse such juror from serving at such court, whenever it shall appear:

1. That he is exempt from serving on juries by the provisions of the preceding section; or

2. That he is a justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror; or

3. That he is a teacher of any school, actually employed and serving as such; or

4. When for any other reason, the interests of the public, or of the individual juror, will be materially injured by such attendance, or his own health, or that of any member of his family requires his absence from such court.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 103, being C. L. '57, (4368); C. L. '71, (5995); How. 7572; C. L. '97, (336), omitting subdivision 2 of the old section.

**CONSTRUED:** The court is called upon to act only when the exempted person or other person embraced in this section, claims his privilege. *People v. Rawn*, 90 Mich. 379.

**SUBDIVISION 2:** Section 336, C. L. '97, is changed by striking out Subdivision 2 of existing section and incorporating its substance in preceding section.

It is manifest that a juror before he is sworn in the case can be excused by the judge for any reason personal to the juror, provided the judge finds the reason sufficient. *People v. Carrier*, 46 Mich. 444; *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *People v. Lange*, 90 Mich. 454. When a juror was summoned who was exempt from service on account of his age, he is not, by reason of such exemption, subject to challenge for cause. *People v. Rawn*, 90 Mich. 378.

**SUBDIVISION 4:** As to the judge's discretion under this clause, see *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *People v. Carrier*, 46 Mich. 444.

#### (12209). Destruction of Ballot Containing Name.

**SEC. 140.** When any person shall be so excused from serving, on the ground that he is exempt by law from serving on juries, the clerk shall destroy the ballot containing the name of such person; and when any person shall be excused from serving for any other cause, the ballot containing his name shall be returned to the box from which it was drawn.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 103, being C. L. '57, (4369); C. L. '71, (5996); How. 7573; C. L. '97, (337), unchanged.

#### (12210). Disposition of Ballot After Adjournment of Court.

**SEC. 141.** After the adjournment of any court at which

any jurors shall have been returned, as herein provided, the clerk shall enclose the ballots containing the names of those who attended and served as jurors, in an envelope under seal, or deposit the same in a separate box; and the ballots containing names of those who did not appear and serve as jurors, which shall not have been destroyed, shall be returned to the box from which they were taken.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 103, being C. L. '57, (4370); C. L. '71, (5997); How. 7574; C. L. '97, (338), unchanged.

**(12211). Proceedings in Case of Deficiency of Names.**

**SEC. 142.** If at the time of drawing any jury by the clerk, as herein provided, there shall not be a sufficient number of ballots remaining in the boxes in which they were originally deposited, after drawing all that may be therein, the clerk shall return to such boxes the ballots containing the names of those who have previously attended and served as jurors during the same year, and shall then draw from such boxes the number of jurors required, in the same manner and with the like effect, as if jurors had not been previously drawn.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 103, being C. L. '57, (4371); C. L. '71, (5998); How. 7575; C. L. '97, (339), unchanged.

**CONSTRUED:** *People v. Coffman*, 59 Mich. 7; *People v. Coughlin*, 67 Mich. 466; *People v. Coughlin*, 65 Mich. 704; *Wise v. Lumber Co.*, 86 Mich. 41; *Niles v. Schoolcraft Circuit Judge*, 102 Mich. 333.

**(12212). Order for Additional Number of Petit Jurors.**

**SEC. 143.** Whenever in the opinion of the judge of any circuit court, more than twenty-four petit jurors shall be necessary to attend any such circuit court, he may, by an order under his hand, direct such additional number of jurors as he shall deem necessary to be drawn.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 103, being C. L. '57, (4372); C. L. '71, (5999); How. 7576; C. L. '97, (340), omitting, however, the old limitation on the number of additional jurors, changed.

**ADDITIONAL JURORS:** *Bronson v. People*, 32 Mich. 34; *Niles v. Schoolcraft Circuit Judge*, 102 Mich. 333.

**(12213). Additional Number Drawn Where Order Filed With Clerk.**

**SEC. 144.** Such order shall be served on, and filed with the clerk of the county in which such court is to be held, at least twenty days previous to the day appointed for the com-

mencement thereof; and the said clerk shall thereupon draw the number specified in such order, in addition to the number otherwise required by law, and shall proceed therein in all respects in the same manner herein prescribed.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 103, being C. L. '57, (4373); C. L. '71, (6000); How. 7577; C. L. '97, (341), unchanged.

**(12214). Duty of Circuit Judge When Failure is Made to Return List of Jurors or an Insufficient Number are Drawn.**

**SEC. 145.** In case the officers whose duty it is under this chapter to make and return lists of petit jurors, fail to meet, make or return said lists at the time and in the manner prescribed by this chapter; or in case said lists shall become exhausted; or in case said lists shall for any reason be declared illegal before the year for which they were made shall have expired, it shall be lawful for the circuit judge of any circuit court in this state to direct said officers to forthwith meet, make and return to the county clerk new lists of jurors for the remainder of the year, from which lists so made and returned jurors shall be drawn for the balance of the year. And whenever, for any cause, grand or petit jurors shall not have been drawn and summoned to attend any circuit court, or a sufficient number of qualified jurors shall fail to appear, or if at any time an insufficient number shall be in attendance to meet the needs of the court, such court may, in its discretion, order a sufficient number of grand or petit jurors, or both, to be forthwith drawn and summoned, in such manner as the court shall direct, to attend said court: *Provided*, That in drawing jurors under this section the court may, for the purpose of obtaining a jury or talesmen near the county seat, direct from which township or supervisor districts or voting precinct such jurors shall be drawn.

**HISTORY:** This section supersedes Sec. 32, R. S. '46, Ch. 103, being C. L. 57, (4374); C. L. '71, (6001); as Am. '77, p. 115, Act 125, Eff. Aug. 21; How. 7578; as Am. '93, p. 325, Act 201, Imd. Eff. June 1; C. L. '97, (342). It also supersedes in part Sec. 34, R. S. '46, Ch. 103, being C. L. '57, (4376); as Am. '61, p. 21, Act 25, Imd. Eff. Feb. 2; C. L. '71, (6003); How. 7580; C. L. '97, (344); as Am. '11, p. 329, Act 194, Eff. Aug. 1, unchanged, except that the provision that such jurors be summoned in such manner as the court shall direct.

**CONSTRUED:** Prior to the amendment of '77. *People v. Jones*, 24 Mich. 221. The amendment of '93 did not change the language of '77, but added the first half of the above section. As to the provision for drawing jurors from near the county seat, see *People v. Hale*, 48 Mich.

486; *Atkinson v. Morse*, 63 Mich. 279; *People v. Coughlin*, 67 Mich. 469. Under this section as amended in '93, a circuit judge has authority when no jury cases are pending, if he deem the lists already made to be invalid, to declare them so upon his own motion, and order new lists returned. *Smaltz v. Boyce*, 109 Mich. 382.

THE FOLLOWING CASES RELATE TO THE STATUTE: *People v. MacGregor*, 178 Mich. 463; *People v. Fuhrman*, 103 Mich. 593; *Niles v. Schoolcraft Circuit Judge*, 102 Mich. 328; *People v. Lauder*, 82 Mich. 109; *People v. Coughlin*, 67 Mich. 468. Specific Statutes: See *Smaltz v. Boyce*, 109 Mich. 328; *People v. Hall*, 48 Mich. 486; *People v. Jones*, 24 Mich. 220. As to grand jury: See *People v. Salsbury*, 134 Mich. 537; *People v. Reigel*, 120 Mich. 78.

GRAND JURY: *People v. Reigel*, 120 Mich. 78; *People v. Salsbury*, 134 Mich. 537, 540.

DRAWING OF TALESMAN: *People v. Wright*, 89 Mich. 79; *Niles v. Schoolcraft Circuit Judge*, 102 Mich. 333; *People v. Summers*, 115 Mich. 537; *People v. Wheeler*, 142 Mich. 212; *Green v. Traction Co.*, 171 Mich. 18, 21; *People v. Lalonde*, 171 Mich. 286.

FORMER LAW CITED: *People v. Collins*, 166 Mich. 4; *People v. Fuhrman*, 103 Mich. 597.

**(12215.) Persons Summoned if they Neglect to Attend—Subject to Fine.**

SEC. 146. Every person summoned pursuant to the provisions of the last preceding section shall attend forthwith, and serve as a juror, unless excused by the court; and for every neglect or refusal so to attend, shall be subject to the same penalty as jurors regularly drawn and summoned.

HISTORY: Re-enacts without material change, Sec. 35, R. S. '46, Ch. 103, being C. L. '57, (4377); C. L. '71, (6004); How. 7581; C. L. '97, (345), substantially unchanged.

CONSTRUED: *People v. Jones*, 24 Mich. 221.

**(12216.) Fees for Jurors.**

SEC. 147. Each grand and petit juror and each talesman shall be entitled to receive *four* dollars for each day's attendance, and *two* dollars for each half day, upon any term of the circuit court, or before any court of record, and ten cents for each mile traveled in going and returning by the nearest traveled route, to be paid out of the county treasury of the county, on the certificate or order of the clerk or judge of such court.

HISTORY: Re-enacts Sec. 18, R. S. '46, Ch. 150; as Am. '47, p. 172, Act 105, Imd. Eff. Mar. 17; as Am. '57, p. 383, Act 138, Eff. May 19; being C. L. '57, (5654); as Am. '69, p. 66, Act 40, Eff. July 5; C. L. '71, (7450); as Am. '73, p. 462, Act 182, Eff. July 31; as Am. '79, p. 250, Act 247, Eff. Aug. 30; How. 9024; C. L. '97, (11229); as Am. '07, p. 305, Act 236, Eff. Sept. 28. Sec. 18 of Ch. 150 of R. S. '46, Compilers' Sec.

tion (12216), as Am. by Act No. 238, P. A. '17, Eff. Aug. 11.

**CONSTRUED:** A juror is entitled to pay for the time actually in attendance upon the court and not for any period during which he is excused. *Emmer v. Bostock*, 130 Mich. 341.

**FORMER LAW CITED:** *McGraw v. Sturgeon*, 29 Mich. 429; *Cook v. Auditor General*, 129 Mich. 51.

**(12217). County Clerk in Certain Counties When to Draw Fresh Panel.**

**SEC. 148.** The county clerk, in counties having a population of two hundred thousand or more, shall, under the direction of the circuit judge of any of the circuit courts of said counties, in the manner authorized by law, once in each calendar month, draw a fresh panel of citizens qualified for jury duty, to sit and act as jurors in said court, whose respective terms of jury duty, except to finish partly tried cases, shall not exceed sixty days each, except that during the months of July and August the clerk of any of said courts by direction of the judges may omit the calling of any jurors, and any person who shall serve as a juror in a court of record in such county shall be disqualified for further jury duty for the term of one year, in courts of record in the same county.

**HISTORY:** This section supersedes Sec. 3 of Act 240, '09, p. 422, Eff. Sept. 1, unchanged.

**(12218). Provisions Not to Apply to Counties Having Jury Commissioners.**

**SEC. 149.** The provisions of this chapter, relative to the manner of selecting and returning to the county clerk a list of persons to serve as grand and petit jurors, shall not apply to counties having a board of jury commissioners, nor in counties where such list is selected and returned by officers or persons other than provided in this chapter.

**HISTORY:** New section.

**JURY COMMISSIONERS.**

**(12219). Appointment of Jury Commissioners.**

**SEC. 150.** In each county of this state, the governor shall, upon recommendation of the judge, or judges of the circuit in which such county is situated, appoint a board of jury commissioners consisting of three persons, no more than two of whom shall be members of the same political party, and

each of whom shall be a resident elector and freeholder in said county, whose term of office shall be for six years; in the first instance, one of said commissioners shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, and every two years thereafter one member of said board shall be appointed for a term of six years; and the governor shall, on like recommendation, fill all vacancies occurring on said board from any cause. No person holding an office, or employment of profit, in or under any city government, county government, the state of Michigan, or the United States, except that of notary public, shall be eligible to appointment as such commissioner. The official terms of said commissioners shall begin on the first day of February after their appointment. Said commissioners shall, before entering upon their duties, take the constitutional oath of office, and file the same with the county clerk. Said commissioners shall receive as compensation for their services the sum of three dollars for each day actually engaged in the performance of duty, and such actual expenses as shall be incurred in traveling to ascertain the qualifications of jurors, and in attendance upon meetings of the board, to be audited and approved by the circuit judge of the circuit in which such county may be located, and be paid by the county treasurer on the certificate of the county clerk.

**HISTORY:** This and the succeeding sections of this chapter were framed in pursuance of Sec. 6 of Art. VIII, of the Const., which directs the legislature to provide by general law for the appointment of a board of jury commissioners in each county to be operative in such counties which approve the same by a majority of the electors thereof. See note to Compilers' Section (14601) for list of local acts providing for jury commissioners. See Beecher's Annotated Michigan Constitution.

**HISTORY:** C. L. '97, (355).

**JURY COMMISSIONER:** See Compilers' Section (12219) et seq.

**WAYNE COUNTY:** Act 204 of '93, p. 337, provides for a board of jury commissioners for courts of record in Wayne county. That act repealed Act 95 of '87, which latter superseded Act 160 of '81, all on the same subject. The latter act was held constitutional in *People v. Harding*, 53 Mich. 48; *Saginaw v. Campau*, 102 Mich. 597. The acts of '81 and '87 will be found in How. 7623-30, 7629a-z. Sec. 5 of the act of '93 was amended by Act 5 of '95, p. 70. Sec. 1 was amended by Acts 129 of '99, 211 of '01, 51 of '05 and 269 of '07. See *Dickson v. Judge*, 136 Mich. 479; *People v. Gardner*, 136 Mich. 693. As to the effect of Act 31 of '03, C. L. '15, (14624), et seq. amending Act 204 of '93, see *Fornia v. Wayne Circuit Judge*, 140 Mich. 631.

**SAGINAW COUNTY:** Act 273 of '89, p. 413, provides for selecting

and drawing jurors for Saginaw county circuit court by a board of jury commissioners. How. 7630e-o. Sec. 6 was amended by Act 38 of '91, p. 38.

ST. CLAIR COUNTY: Act 213 of '93, repealed by Act No. 2 of P. A. '01. Act No. 36, P. A. '01, now governs.

**(12220). Meeting of the Board—Make Lists of Names of Persons to Serve on Petit Jury.**

SEC. 151. Said board shall meet annually on the second Monday of April in each year, at the hour of ten o'clock in the forenoon, or as soon thereafter as shall be found practicable, at the office of the clerk of said county, and shall then and there select from the tax rolls of the cities, wards and townships of the said county for the preceding year, a list of names of persons to serve as petit jurors in the circuit court of the said county for the succeeding year. The county clerk shall be the clerk of the said board, and shall keep a record of their doings in a book to be provided for that purpose, which record shall, at the close of each meeting of the board, be signed by the members thereof, and attested by the said clerk, and shall then be evidence in all courts and places of the doings of the said board.

See Sec. 150.

**(12221). Qualifications of Persons to be Placed on List.**

SEC. 152. No names shall be placed upon said lists, except those of persons being citizens and having the qualifications of electors, and such only as are not exempt from serving on juries, who are in possession of their natural faculties, and are not infirm or decrepit, of good character, of approved integrity and sound judgment, and well informed and conversant with the English language, free from all legal exceptions, and who have not made, and in whose behalf there has not been made to said commissioners, or either of them, any application to be selected and returned as jurors.

See Sec. 150.

**(12222). The Manner of Making the Lists.**

SEC. 153. Said lists shall consist of four names from each township and ward in such county having four hundred population, or less, according to the last federal census, and of one name additional for each additional one hundred population, and in the case of cities not divided into wards there shall be



one name for each one hundred population in said city. In case there is not sufficient population in any county so that at least one hundred names shall be returned, then it shall be the duty of said commission to add to such list of names, a sufficient number from each city, ward and township, in accordance with the population thereof, to make a list of one hundred names.

See Sec. 150.

**(12223). Grand Jury List.**

SEC. 154. Said commissioners shall also make a list of names of persons of like qualifications to serve as grand jurors, consisting of two names from each township and ward in the county. Such list shall not contain any name already on the list of petit jurors. In the case of cities not divided into wards, they shall place upon said list one name for each five hundred population, according to the last census. In any case, where according to the foregoing provisions, there shall not be at least fifty names on said list, then it shall be the duty of said commissioners to add to such list of names, a sufficient number from each city, ward and township, in accordance with the population thereof, to make a list of fifty names.

See Sec. 150.

**(12224). Proceedings Subsequent to the Completion of Lists of Petit and Grand Jurors.**

SEC. 155. After the completion of said lists of petit and grand jurors, the subsequent proceedings shall be the same in all respects as is or may be provided by law, for the drawing and impaneling of juries.

See Sec. 150.

**(12225). Provisions to be in Force.**

SEC. 156. The provisions of the six last preceding sections shall not be in force or take effect in any county, until a majority of the voters voting thereon at an election as herein after provided, shall have voted in favor of the same. The question of the adoption of the provisions of such sections may be submitted to the voters of each county at any general election, after the passage of this act, by resolution of the board of supervisors, and like notice of the submission of the

same shall be given as is required by law in the case of elections to elect county officers, and shall be submitted in substantially the following form:

Shall the provisions of sections one hundred fifty, one hundred fifty-one, one hundred fifty-two, one hundred fifty-three, one hundred fifty-four and one hundred fifty-five of chapter two of act number (here insert number of this act) of the Public Acts of nineteen hundred fifteen, providing for a board of jury commissioners, be adopted by this county?

Yes [ ].

No [ ].

See Sec. 150.

**(12226). The Effect of a Majority of Electors Voting Upon Such Proposition.**

SEC. 157. If a majority of the electors voting on such proposition in any county, as determined by the canvass of votes cast, shall vote in favor thereof, from and after such determination, the provisions of said sections one hundred fifty, one hundred fifty-one, one hundred fifty-two, one hundred fifty-three, one hundred fifty-four and one hundred fifty-five shall be in force, and all other provisions of law relating to the making up of lists of jurors shall be superseded and repealed in such county: *Provided, however,* That the jury lists then on file and in use in such county, shall continue to be valid and to be used until such time as the board of jury commissioners herein provided for shall have been appointed, and shall have completed and filed the lists herein required to be made by them.

See Sec. 150.

**(12227). Board of Supervisors to Submit Such Proposition.**

SEC. 158. The board of supervisors shall submit such proposition to the electors at the next general election whenever petitions for such submission, signed by ten per cent of the qualified electors of said county as shown by the last preceding general election, shall be filed with the county clerk of said county.

See Sec. 150.

**(12228). Board of Jury Commissioners Still to be in Force.**

SEC. 159. In all counties of this state now having a board

of jury commissioners, or in which jury lists are returned in any manner other than that provided by the general law of the state, the laws providing for such boards of jury commissioners, or such special manner of making said list, shall continue to be in force until superseded by the adoption of the provisions of section one hundred fifty, one hundred fifty-one, one hundred fifty-two, one hundred fifty-three, one hundred fifty-four and one hundred fifty-five, as herein provided for, or until otherwise repealed.

See Sec. 150.

## CHAPTER III

### OF THE PROBATE COURTS

#### (12229). Election of Judges.

**SECTION 1.** Judges of probate shall be elected in the counties in which they reside and shall hold office for four years and until their successors are elected and qualified. They shall be elected on the Tuesday succeeding the first Monday of November, nineteen hundred sixteen, and every four years thereafter.

**HISTORY:** This section supersedes in part Sec. 51, R. S. '46, Ch. 14, being C. L. '57, (391); C. L. '71, (527); How. 533; C. L. '97, (2549); as Am. '09, p. 69, Act 43, Eff. Sept. 1; as Am. '13, p. 125, Act 86, Eff. Aug. 14, and part of C. L. '97, (2549) changed as regards residence and time of election.

**PROBATE COURTS:** See notes to Const. (1850) VI, 13. And for earlier legislation relative to probate courts and their functions, see Woodward Code, 76; Cass Code, 61, 77; Code of '20, 24, 25, 26, 29, 36, 37, 43, 47, 51, 53, 54, 57, 59, 62, 63; R. S. '27, 55, 61, 64, 72, 75, 78, 79, 80, 83, 84, 87, 93, 100; Laws of '28, 4, 68; of '29, 4; of '31, 5; R. S. '33, 291, 297, 299, 301, 315, 318, 322, 323, 324, 326, 327, 328, 434, 573; Laws of '35, 6, 115; of '37, 154, 163; R. S. '38, 267, 279, 283, 286, 292, 294, 299, 302, 311, 319; Laws of '40, 25; of '42, 12; of '43, 172; of '44, 113; R. S. '46, Ch. 91; C. L. '57, pp. 1033-1040; C. L. '71, pp. (1558)-(1559)-(1560)-(1561)-(1562)-(1563)-(1564)-(1565)-(1566)-(1567); Laws of '59, 866; of '63, 306; of '71, 23, 38, 98; of '72, 77; of '73, 220; of '75, 143, 191; of '77, 116, 202; of '79, 34, 187; of '81, 74, 85, 106, 277, 368, 369, 370; and the subsequent amendatory acts and new legislation included in this compilation.

**CONSTITUTIONALITY:** See Const. VII, 13, 14, 17, 20.

**JUDGES OF PROBATE:** For authorities relative to the official character, powers, duties, etc., of judges of probate, see notes on Const. (1850) VI, 13, 14. Election to fill vacancy of. *Secord v. Foutch*, 44 Mich. 89.

#### (12230). Number of Judges.

**SEC. 2.** In counties having two hundred fifty thousand inhabitants there shall be two judges of probate and in counties having five hundred thousand inhabitants there shall be three judges of probate who shall be elected as hereinafter provided. They shall have equal powers, duties and compensa-

tion, except that the power of appointment, nomination and removal of the several employes provided by law for such court and the offices connected therewith, and the general direction and control of the business of such court, including the division of the work between the judges, shall be vested in the judge having served for the longest period continuously. Whenever the United States census shall show that any county has two hundred fifty thousand inhabitants and it has but one judge of probate, the additional office first herein provided for shall be deemed to be created and vacant, and whenever the United States census shall show that any county has five hundred thousand inhabitants the additional office next herein provided for shall be deemed to be created and vacant, which vacancy or vacancies shall be filled by appointment of the governor and the person so appointed shall hold office until his successor is elected and qualified. At the next general election a successor to such officer shall be elected who shall hold office until his successor shall be elected at the next alternate biennial election provided for in section fourteen of article seven of the constitution, and shall have qualified.

**HISTORY:** This section supersedes all of the latter part of Sec. 51, R. S. '46, Ch. 14, being C. L. '57, (391); C. L. '71, (527); How. 533; C. L. '97, (2549); as Am. '09, p. 69, Act 43, Eff. Sept. 1; as Am. '13, p. 125, Act 86, Eff. Aug. 14, substantially changed.

#### SALARIES OF PROBATE JUDGES

##### (12231). Payment of Salary.

SEC. 3. The judges now elected, or to be hereafter elected, shall each receive an annual salary, to be paid monthly out of any money in the county treasury of their respective counties, which shall neither be increased nor diminished during the term for which they shall have been elected, except as changed by the increase or diminution of population of their respective counties. The amount of such salary to be paid to the judge of probate of the several counties shall be based upon and determined by the population of their respective counties as shown by the last preceding federal census, and such salary shall be in full compensation for all services performed by them as such judges, except as is or may otherwise be provided by law.

**HISTORY:** Supersedes part of Sec. 1 of Act 187, '59; as Am. '71, p. 217, Act 138, Imd. Eff. Apr. 15; being C. L. '71, (7435); as Am. '73, p. 496, Act 197, Eff. July 31; as Am. '81, p. 389, Act 277, Eff. Sept. 10;

How. 9012; as Am. '93, p. 253, Act 155, Imd. Eff. May 31; C. L. '97, (2551); as Am. '03, p. 139, Act 119, Eff. Sept. 17, and by striking out reference to state census.

COMPENSATION: Decisions under former laws. Thomas, v. Suprs., 45 Mich. 479; Chapman v. Berrien Co., 50 Mich. 311; Patterson v. Judge, 144 Mich. 416; Hayes v. Aud. Gen., 184 Mich. 83.

(12232). Amount of Salary.

SEC. 4. Said salary shall be, for counties having a population of two hundred fifty thousand and upwards, *eighty-four hundred dollars*; for counties having a population of one hundred fifty thousand and less than two hundred fifty thousand, *forty-five hundred dollars*; for counties having a population of one hundred thousand and less than one hundred fifty thousand, *four thousand dollars*; for counties having a population of seventy thousand and less than one hundred thousand, *thirty-nine hundred dollars* for counties having a population of less than seventy thousand and not less than sixty thousand, *thirty-six hundred dollars*; for counties having less than sixty thousand and not less than fifty-five thousand, *thirty-five hundred dollars*; for counties having less than fifty-five thousand and not less than fifty thousand, *thirty-one hundred dollars*; for counties having less than fifty thousand and not less than forty-five thousand, *twenty-nine hundred dollars*; for counties having not less than forty-five thousand and not less than forty thousand, *twenty-eight hundred dollars*; for counties having less than forty thousand and not less than thirty-five thousand, *twenty-five hundred dollars*; for counties having less than thirty-five thousand and not less than thirty thousand, *twenty-one hundred dollars*; for counties having less than thirty thousand and not less than twenty-five thousand, *two thousand dollars*; for counties having less than twenty-five thousand and not less than twenty thousand, *eighteen hundred dollars*; for counties having less than twenty thousand, and not less than fifteen thousand, *seventeen hundred dollars*; for counties having less than fifteen thousand and not less than ten thousand *thirteen hundred dollars*; for counties having less than ten thousand and not less than seven thousand five hundred, *eleven hundred dollars*; for counties having less than seven thousand five hundred, and not less than five thousand, *eight hundred dollars*; for counties having less than five thousand, *fifteen cents* for each inhabitant of said county: *Provided*, That such salary, in any county of the class last mentioned, shall not be less than *four hundred*

fifty dollars. The board of supervisors of any county may, by a majority vote of all the members-elect, give such additional salary to the judge of probate of that county as shall be deemed just by such board. The board of supervisors of each county may, in its discretion, allow a sufficient amount to pay clerk hire. All local and special acts and provisions relating to the salary and compensation of probate judges are hereby repealed.

**HISTORY:** This section supersedes Sec. 2 of Act 187 of '59; as Am. '63, p. 121, Act 79, Eff. June 22; as Am. '71, p. 217, Act 138, Imd. Eff. Apr. 15; being C. L. '71, (7436); as Am. '73, p. 188, Act 140, Imd. Eff. Apr. 22; as Am. '81, p. 86, Act 102, Imd. Eff. Apr. 22; as Am. '81, p. 390, Act 277, Eff. Sept. 10; How. 9013; as Am. '93, p. 254, Act 155, Imd. Eff. May 31; C. L. '97, (2552); as Am. '03, p. 139, Act 119, Eff. Sept. 17. This section also repeals and supersedes all local acts governing Wayne, Bay, Houghton and Marquette counties. Amended by P. A. '19, Act No. 343, Eff. Aug. 15.

**LOCAL ACTS REPEALED:** The following local acts are undoubtedly repealed by the last sentence in the above section.

**BAY COUNTY:** Local Act 286 of '93, p. 408, fixes the salary of the Bay County Probate Judge at \$2500.

**HOUGHTON COUNTY:** Local Act 342 of '93, p. 984, authorizes the supervisors of Houghton county to fix the salary of the probate judge at not to exceed \$1800 per annum.

**MARQUETTE COUNTY:** Local Act 343 of '93, p. 984, fixes the salary of the Marquette County Probate Judge at \$1600.

**WAYNE COUNTY:** Local Act 218 of '93, p. 5, fixes the salary of the Wayne County Probate Judge at \$5000 per annum.

**(12233). County Clerk to Report the Salary Allowed the Judge of Probate.**

**SEC. 5.** The county clerk of each county shall report the amount of the salary allowed the judge of probate of his county, in pursuance of the preceding section, to the county treasurer, who shall pay the same to said judge as hereinbefore provided.

**HISTORY:** Re-enacts Sec. 3 of Act 187 of '59; as Am. '71, p. 217, Act 138, Imd. Eff. April 15; C. L. '71, (7437); as Am. '81, p. 390, Act 271, Eff. Sept. 10; How. 9014; C. L. '97, (2553), omitting "having less than five thousand inhabitants at the last state or national census," remains substantially unchanged.

**(12234). County to Furnish Books and Stationery.**

**SEC. 6.** Each county shall provide all books, printed blanks and other stationery necessary for keeping the records in the

office of the judge of probate, and all furniture, equipment and supplies necessary for equipping and maintaining said office.

**HISTORY:** Re-enacts Sec. 39, R. S. '46, Ch. 91, being C. L. '57, (3645); as Am. '71, p. 23, Act 19, Eff. July 18; C. L. '71, (5230); as Am. '73, p. 220, Act 165, Eff. July 31; How. 6793; C. L. '97, (683), omitting the clause providing for fuel, and adding a further clause providing for furniture, equipment and supplies.

**(12235). Probate Court a Court of Record.**

**SEC. 7.** Every probate court shall be a court of record and have a seal. The seals of the several probate courts now used by them respectively, shall continue to be the seals of such courts until others shall be provided according to law.

**HISTORY:** Re-enacts the first clause of Sec. 2, R. S. '46, Ch. 91, being C. L. '57, (3608); C. L. '71, (5193); How. 6756; C. L. '97, (647), and all of Sec. 42, R. S. '46, Ch. 91, being C. L. '57, (3648); C. L. '71, (5233); How. 6796; C. L. '97, (686), remains substantially unchanged.

**COURT OF RECORD:** The constitution and the statutes make probate courts, courts of record. *Holbrook v. Cook*, 5 Mich. 227; *Drake v. Kinsell*, 38 Mich. 234; *Wilkinson v. Conaty*, 65 Mich. 621. Its proceedings must not rest in parole. *Pierson v. Fisk*, 99 Mich. 46. But secondary evidence may be given of the contents of records lost or destroyed. *Drake v. Kinsell*, 38 Mich. 234. See also *Cole v. Cole's Estate*, 125 Mich. 660.

**(12236). Seal of Court.**

**SEC. 8.** In case the probate court of any county shall have no proper seal, the judge shall, at the expense of his county, cause a seal to be made for his office, with such device as he shall think proper, and with the words "probate seal," and the name of the county inscribed thereon, and shall deliver a description thereof to the secretary of state, to be deposited and recorded in his office.

**HISTORY:** Re-enacts Sec. 43, R. S. '46, Ch. 91, being C. L. '57, (3649); C. L. '71, (5234); How. 6797; C. L. '97, (687), unchanged.

**(12237). Time of Holding Court.**

**SEC. 9.** There shall be a probate court held in each county at the seat of justice, on the first Monday of each month, and on such other days as the judge of probate shall appoint, and in case any matter shall not be heard at the time appointed for hearing same, said matter shall stand continued until the next stated term of said court, unless the court shall otherwise order; and the court may adjourn such hearing in ab-



sence of the petitioner, or otherwise, in his discretion: *Provided, however*, Said court shall be deemed open at all times for the transaction of any ordinary business which may be necessary therein, when previous notice is not required to be given to the person interested: *Provided further*, In case an executor, administrator, guardian or trustee shall be appointed at any such hearing, such appointee shall have twenty days thereafter, or such other and further time as the court may order, in which to qualify; and unless otherwise ordered, said matter shall stand continued until the next stated term of said court, after the lapse of such period, and in case of failure to qualify, such other appointment shall thereupon be made as the court may order.

**HISTORY.** New section. This section merges and supersedes Sec. 1, R. S. '46, Ch. 91, being C. L. '57 (3607); C. L. '71, (5192); How. 6755; C. L. '97, (646); and Sec. 4 of R. S. '46, Ch. 91, being C. L. '57, (3610); C. L. '71, (5195); How. 6758; C. L. '97, (649); and Sec. 40 R. S. '46, Ch. 91, being C. L. '57, (3646); C. L. '71, (5231); How. 6794; C. L. '97, (684); as Am. '99, p. 105, Act 69, Imd. Eff. May 10; and Sec 52, R. S. '46, Ch. 14, being C. L. '57, (392); C. L. '71, (528); How. 534; C. L. '97, (2550), remains substantially unchanged.

**NATURE OF COURT:** Probate courts are "courts of record," but they are not "courts of law," according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. They render no judgments—their determinations being called orders, sentences or decrees—and upon summary inquiry, with or without notice, as the case may be. *Holbrook v. Cook*, 5 Mich. 228. The orders and decrees of these courts are subject to review only in virtue of statutory provisions, and not of their inferior character (for primarily, they are not courts of inferior jurisdiction, as justices and circuit courts are). *Id.* 229. But see *Palmer v. Oakley*, 2 Doug. 479. Their proceedings are of a summary character. *Allison v. Smith*, 16 Mich. 430; *Holbrook v. Cook*, 5 Mich. 229. They have always been regarded as courts for peculiar and limited purposes, which are outside of ordinary litigation and incapable of dealing completely with ordinary rights. *Detroit L. & N. R. R. Co. v. Probate Judge*, 63 Mich. 681. The probate court is a tribunal of limited jurisdiction and the judge of probate has no power to set aside his own adjudications and grant rehearings. *Hitchcock v. Probate Judge*, 99 Mich. 130. It is, for most purposes at least, a prerogative and not a judicial court and has no jurisdiction over persons or property, except in such proceedings as relate to the estates of deceased persons, or those under disability and liable to wardship. *Grand Rapids L. & D. R. R. Co. v. Chesebro*, 74 Mich. 472.

**EQUITY JURISDICTION:** Under our probate system, a very large portion of the old equity jurisdiction has been vested in the probate courts; and it seems that the court of chancery has jurisdiction in those cases only, in which an adequate remedy does not exist in the probate

court. *People v. Judge*, 11 Mich. 404; *Andrew's Est.*, 92 Mich. 452. And this jurisdiction must be considered as having been transferred with such of its incidents as can be properly exercised in the new tribunal. *Taff v. Hosmer*, 14 Mich. 256. But see the proviso to Subsection 6 of Compilers' Section (13764). The probate court has no jurisdiction to order an accounting by a trustee in a will, the chancery court being the proper tribunal for that purpose. *McBride v. McIntyre*, 91 Mich. 408. But see Compilers' Sections (14052-94), relative to the jurisdiction of the probate court over trustees. When a resort to chancery is unnecessary for an order to sell lands to pay debts. *Moore's Appeal*, 84 Mich. 474. Probate courts, with us, occupy the same relations to persons under guardianship as did courts of chancery under the English system. They stand in loco parentis, in the place formerly occupied by the king, then by the chancellor, then by the court of chancery. *Andrew's Estate*, 92 Mich. 452.

**DETERMINATION OF SANITY:** As to the proceedings in probate courts, see Compilers' Section (1324 et seq.). As to whether the probate court has exclusive jurisdiction in the settlement of estates of mentally incompetent persons, see *Nolan v. Garrison*, 156 Mich. 399.

**UNSWORN PETITION:** A probate judge is not required to act upon a petition which he has not some reason to believe is presented in good faith and in a real interest; and he may properly require an absolute verification of anything whereon his action is required upon the merits; but where the party complained of is cited to appear and has an opportunity of controverting the facts, there is no rule which renders it imperative on the probate judge to decline receiving an unsworn petition. *Robinson's Estate*, 6 Mich. 143.

**REGULAR TERMS:** The probate court is always open for ordinary routine business, but for contested matters the statute contemplates that there shall be regular terms; and proceedings in which a party has the right to be heard can not be brought up at other times, except on notice. *M. C. R. R. v. Probate Judge*, 48 Mich. 639.

**JURISDICTION TO ADJOURN HEARING:** It was held, that the court in a juvenile proceeding had authority to adjourn hearing in his discretion. *In re Broughton*, 192 Mich. 418; 23 D. L. N., 521; 158 N. W., 884.

### (12238). Judge to Have Possession of Seal, Books and Papers of Court.

**SEC. 10.** The judge of probate shall have possession of the seal, records, books, files and papers belonging to said court, and shall keep a true and correct record of each order, sentence and decree of the court, and of all other official acts made or done by him, and of all wills proved therein with the probate thereof, of all letters testamentary, and of administration, and of all other things proper to be recorded in said court. Such records may be inspected without charge by all persons interested.

**HISTORY:** This section merges and supersedes parts of Sec. 2,

R. S. '46, Ch. 91, being C. L. '57, (3608); C. L. '71, (5193); How. 6756; C. L. '97, (647); and Sec. 51, R. S. '46, Ch. 14, being C. L. '57, (391); C. L. '71, (527); How. 533; C. L. '97, (2549); as Am. '09, p. 69, Act 43, Eff. Sept. 1; as Am. '13, p. 125, Act 86, Eff. Aug. 14, changed.

**TRUE RECORD:** Of orders and decrees. *Pierson v. Fisk*, 99 Mich. 47. Of wills proved in the court. *Ives v. Kimball*, 1 Mich. 315. And a will recorded 10 years after probate is regularly recorded. *Id.* 316. Of letters of administration. *Farrand v. Caton*, 69 Mich. 242. Petitions and applications to sell lands can properly be regarded as "things proper to be recorded." *Ellsworth v. Hall*, 48 Mich. 410. Courts have uniformly recognized the fact that the records in probate courts are often carelessly and imperfectly kept, and have uniformly refused to set aside titles of long standing on account of defects in the record. *Egan v. Grece*, 79 Mich. 637. See also *Cole v. Cole's Estate*, 125 Mich. 660; *In re Quinn's Estate*, 179 Mich. 63.

#### HOLDING COURT BY OTHER JUDGES

##### (12239). When Judge May Call in Another Judge.

**SEC. 11.** If a judge of probate shall remove out of his county, or shall be temporarily absent therefrom, or shall die, resign, or shall be necessarily occupied in the performance of other duties required of him by law, or otherwise become incapacitated for executing the duties of his office, the judge of the circuit court for such county shall hold the probate court unless he also be incapacitated for executing such duties, or the judge of any circuit court or the probate judge of any county of this state, who is not legally incapacitated for so executing the duties of such probate judge, may upon the written request of such probate judge or in case of his absence or legal disability to make such request, then upon the request of the circuit judge of such county, hold the probate court, and the judge so acting shall have all the powers and perform all the duties of the judge of probate therein, until the return of the judge of probate so temporarily absent or such incapacity is removed, or until another judge of probate shall be elected or appointed and qualified, and if any such judge so acting as judge of probate shall have begun any hearing which is not concluded at that time he shall have authority to hear such matter to its conclusion and give judgment thereon. In all cases where a circuit judge or a probate judge of any other county shall perform the duties of the judge of probate, an entry of the reason for such circuit judge or probate judge so performing such duties shall be made in the records of such probate court.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 91, being C. L. '57,

(3622); as Am. '63, p. 306, Act 167, Imd. Eff. Mar. 19; C. L. '71, (5207); as Am. '81, p. 226, Act 186, Eff. Sept. 10; How. 6770; as Am. '95, p. 286, Act 148, Imd. Eff. May 17; C. L. '97, (660); as Am. '03, p. 128, Act 105, Eff. Sept. 17, unchanged.

**VACANCY:** Election to fill vacancy. *Secord v. Foutch*, 44 Mich. 89.

**FORMER LAW CITED:** *Landon v. Comet*, 62 Mich. 85.

DISQUALIFICATION OF JUDGES

(12240). When Deemed Incapacitated.

**SEC. 12.** Whenever a judge of probate is disqualified within the meaning of section seven of chapter four of this act, or when such judge shall be an executor or administrator of a deceased person, or a creditor, or otherwise interested in any question to be decided by the court, or when he or his law partner, or any employe or assistant in his office, shall have been attorney or counsel for any party interested therein in relation thereto, such judge of probate shall be deemed incapacitated for acting in the decision of that question, and another probate judge or a circuit judge shall hold the court in his place as provided in the preceding section.

**HISTORY:** This section merges and supersedes Sec. 17, R. S. '46, Ch. 91, being C. L. '57, (3623); as Am. '63, p. 306, Act 167, Imd. Eff. Mar. 19; C. L. '71, (5208); as Am. '81, p. 227, Act 186, Eff. Sept. 10; How. 6771; C. L. '97, (661); and Sec. 18, R. S. '46, Ch. 91, being C. L. '57, (3624); as Am. '63, p. 306, Act 167, Imd. Eff. Mar. 19; C. L. '71, (5209); as Am. '81, p. 227, Act 186, Eff. Sept. 10; How. 6772; as Am. '85, p. 283, Act 204, Eff. Sept. 19; C. L. '97, (662), unchanged.

**CONSTRUED:** The fact that the judge is interested is no objection to his making formal orders that put the case on the road to determination. *McFarlane v. Clark*, 39 Mich. 44. See also *In re Leonard*, 95 Mich. 295. Judge Chatterton, in his work on probate law and practice, doubted the constitutionality of the proviso of C. L. '97, Sec. (662), which provided for the holding of court by the probate judge of an adjoining county, as conflicting with Sec. 25 of Art. IV, Const. '50.

**FORMER LAW CITED:** *Landon v. Comet*, 62 Mich. 85.

OF PROBATE REGISTERS.

(12241). Appointment of Registers.

**SEC. 13.** In every county in this state the judge of probate may appoint a probate register, who shall hold such office during the term for which the judge of probate making the appointment shall have been elected, unless sooner removed by the judge of probate; such register so appointed shall take

and subscribe the oath of office prescribed by the constitution, and give a bond in the penal sum of one thousand dollars to be approved by the probate judge, and shall exercise the power of, and be competent to do all acts required of the judge of probate except judicial acts; such register so appointed and qualifying shall receive in compensation for his or her services an annual salary to be paid monthly out of the county treasury of his county, as follows: In counties of twenty thousand and not exceeding thirty thousand, five hundred dollars, in counties of thirty thousand and not exceeding fifty thousand, seven hundred dollars; in counties of fifty thousand and not exceeding one hundred thousand, one thousand dollars; in counties of one hundred thousand and not exceeding two hundred thousand, two thousand dollars and in counties of two hundred thousand and upwards, three thousand dollars; in counties having less than twenty thousand population, a probate register may be appointed by the probate judge, if authorized by a majority vote of the board of supervisors, the compensation of such probate register to be fixed by the board of supervisors. The board of supervisors of the several counties of this state, may by a majority vote of all the members elect, give such additional salary to the probate register of their respective counties as they may deem just. All local and special acts relating to the appointment of probate registers, or probate clerks, and their salaries and compensation are hereby repealed.

**HISTORY:** This section merges and supersedes Sec. 11 of Act 79 of '69, being C. L. '71, (5246); as Am. '79, p. 173, Act 186, Eff. Aug. 30; How. 535; as Am. '85, p. 334, Act 229, Eff. Sept. 19; As Am. '93, p. 289, Act 183, Imd. Eff. Mar. 31; C. L. '97, (2554); and Sec. 2 of Act 79, of '69, being C. L. '71, (5247); as Am. '79, p. 174, Act 186, Eff. Aug. 30; How. 536; as Am. '95, p. 535, Act 241, Eff. Aug. 30; C. L. '97, (2555), changed.

**REGISTER:** Probate register under territorial laws. *Willets v. Mandalbaum*, 28 Mich. 521.

**LOCAL ACTS REPEALED:** The following local and special acts which relate to probate registers are undoubtedly repealed by the last sentence in the above section. For those relating to stenographers see, Sec. 15, *Post*.

**BERRIEN COUNTY:** See Act 13 of '99, as amended by Act 6 of '05.  
**CALHOUN COUNTY:** Act 150 of '67, p. 206, (How. 539-43).

**GENESEE COUNTY:** Local Act 438 of '97, authorizes the appointment of a stenographer for the Genesee county probate court, and prescribes his duties.

**HOUGHTON COUNTY:** Act 13 of '05.

**INGHAM COUNTY:** Act 201 of '07.

JACKSON COUNTY: Act 150 of '77, p. 145, (How. 550).

KEWEENAW COUNTY: Act 121 of '07.

LAPEER COUNTY: Local Act 428 of '97 authorizes the appointment of a stenographer for the probate court of Lapeer county, and prescribes his duties.

LIVINGSTON COUNTY: Act 13 of '01.

MACOMB COUNTY: Local Act 412 of '93, p. 1318.

MENOMINEE COUNTY: Local Act 448 of '95, p. 643.

OAKLAND COUNTY: Oakland county is included with Calhoun and Cass counties in Act 150 of '67, for the appointment of a register. Act 377 of '95, p. 158, provided for the appointment of a stenographer for the Oakland county probate court and prescribed his duties.

SHIAWASSEE COUNTY: Act 3 of '07.

ST. CLAIR COUNTY: Local Act 408 of '95, p. 327.

ST. JOSEPH COUNTY: Act 172 of '75, p. 198, (How. 545-9).

WASHTENAW COUNTY: Act 118 of '75, p. 151, (How. 544).

WAYNE COUNTY: Act 135 of '61, p. 180, (amended '67, Vol. 2, p. 829, C. L. '71, (7439); Am. '73, p. 187, How. 537; Am. '89, p. 143), provides for a register and a deputy for the Wayne county probate court. They are authorized by another section, (amended '67, Vol. 2, p. 380; C. L. '71, (7440); How. 538; amended '89, p. 144), "to receive all petitions and fix the time of hearings, and to do all other acts required of the judge of probate, except judicial acts." Act 133 of '89, p. 152, (How. 538a-e), authorizes the appointment of a stenographer for said court and prescribes his duties and compensation. This act was repealed and superseded by Act 96 of '03.

### (12242). Appointment of Deputy Registers.

SEC. 14. The probate judge or judges of any county having a probate register may appoint one or more deputy probate registers, *who shall have such compensation as shall be fixed by the board of supervisors of said county. The term of office of such deputy probate registers and their powers shall be the same as those prescribed by law for probate registers. They shall take and subscribe the constitutional oath of office, which shall be filed with the county clerk of the county, and in counties having more than one hundred fifty thousand population may appoint such probate clerks as may be necessary when authorized by the board of supervisors, who shall also fix the salaries of such clerks. The duties of such probate clerks shall be such as may be prescribed by the probate judge or judges of the county in which such clerks are appointed.*

HISTORY: This section supersedes Sec. 46/ R. S. '46, Ch. 91. As Added '50, p. 422, Act 334, Imd. Eff. Apr. 2; C. L. '57, (3652); C. L. '71, (5237); as Am. '81, p. 277, Act 234, Eff. Sept. 10; How. 6800; as Am. '89, p. 207, Act 178, Eff. Oct. 2; C. L. '97, (690). Sec. 14 of Ch. 3 of Act 314, P. A. '15, Compilers' Section (12242), Am. by Act No.

26, P. A. '17, Eff. Aug. 11, modified to provide for compensation and term of office.

**(12243). Appointment of Stenographers.**

SEC. 15. The board of supervisors of any county may authorize the appointment by the probate judge, of one or more official stenographers of said probate court; such stenographers shall receive such salary as shall be fixed by the board of supervisors.

HISTORY: New section.

STENOGRAPHER: See note relating to "Local Acts Repealed" to Compilers' Section (12241).

GENERAL PROVISIONS

**(12244). Probate Judge and Probate Officials Barred From Practice.**

SEC. 16. No judge of probate, probate register or employe in his office shall be retained or employed as attorney or counsel, in any suit or matter which may depend on, or in any way relate to, any sentence or decree made or passed by him; nor shall he, or the probate register, or any employe in his office, be attorney or counsel for or against any executor, administrator or guardian appointed within his jurisdiction, in any suit brought by or against the executor, administrator or guardian, as such, nor in any suit relating to the official conduct of such party. Nor shall any clerk or other person employed in the office of any probate court, be commissioner, appraiser, or divider of any estate, in any case that is within the jurisdiction of such court.

HISTORY: This section merges and supersedes, Secs. 19 and 20, R. S. '46, Ch. 91, being C. L. '57, (3625)-(3626), C. L. '71, (5210)-(5211); How. 6773-4; C. L. '97, (663)-(664), remains unchanged.

**(12245). No Judge or Official of the Probate Court to Receive any Fees for Services.**

SEC. 17. No probate judge, probate register, probate clerk, or official stenographer, shall receive any fees or compensation for drawing any petition, application, or other paper whatever, or for any service performed by him in any matter or proceeding in said probate court, except the probate judge or the probate register shall make attested copies and exemplifications of any record, paper or proceeding in such probate

court, furnish the same on request to any person, and may collect therefor the sum of twenty-five cents for certified copies of orders for publication; for certified copies of all other probate orders, seventy-five cents; for certified copies of letters of authority, one dollar; for all certifications issued under the seal of the probate court, fifty cents, and at the rate of eight cents per folio for all such copies or exemplifications and twenty-five cents additional for the certification of the same: *Provided*, That such fees shall be paid over to the county treasurer in all counties having existing local acts requiring the same.

**HISTORY:** This section merges and supersedes parts of Sec. 2, R. S. '46, Ch. 91, being C. L. '57, (3608); C. L. '71, (5193); How. 6756; C. L. '97, (647); and Sec. 1 of Act 187 of '59, as Am. '71, p. 217, Act 138, *Imd. Eff.* Apr. 15; C. L. '71, (7435); as Am. '73, p. 496, Act 197, *Eff.* July 31; as Am. '81, p. 389, Act 277, *Eff.* Sept. 10; How. 9012; as Am. '93, p. 253, Act 155, *Imd. Eff.* May 31; C. L. '97, (2551); as Am. '03, p. 139, Act 119, *Eff.* Sept. 17; and Sec. 2 of Act 79 of '69, being C. L. '71, (5247); as Am. '79, p. 174, Act 186, *Eff.* Aug. 30; How. 536; as Am. '95, p. 535, Act 241, *Eff.* Aug. 30; C. L. '97, (2555), changed.

**FEES:** In drain proceedings. *Patterson v. Judge*, 144 Mich. 418.

**(12246). Probate Judge and Official to Receive no Compensation.**

**SEC. 18.** No judge of probate, probate register, clerk, or employe of the probate office, shall receive or accept any compensation whatever for collecting from any executor, administrator or estate, any fees for the publishing of any notice or matter required in any proceeding in said court, and the receiving of such compensation therefor from any person, corporation, partnership or association, owning or controlling a newspaper publication, shall be a sufficient cause for removal from office of such judge of probate, probate register, clerk or employe.

**HISTORY:** New section.

**(12247). Alphabetical Index to be Made by Judge.**

**SEC. 19.** Each judge of probate shall make an alphabetical index to the records of proceedings in the probate court, and keep the same in his office.

**HISTORY:** This section re-enacts Sec. 45, R. S. '46, Ch. 91, being C. L. '57, (3651); C. L. '71, (5236); How. 6799; C. L. '97, (689), remains unchanged.



## CHAPTER IV.

### GENERAL PROVISIONS CONCERNING COURTS OF RECORD

#### (12248). Courts of Record.

SECTION 1. The several courts of this state having a seal, are courts of record, and they shall respectively have power:

1. To issue process of subpoena, requiring the attendance of any witness residing or being in any part of this state, to testify in any matter or cause pending or triable in such courts;

2. To administer oaths to witnesses in any such matter or cause, and in all other cases where it may be necessary in the exercise of the powers and duties of such courts;

3. To devise and make such new writs and forms of proceedings as may be necessary to carry into effect the powers and jurisdiction possessed by them.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 96, being C. L. '57, (4047); C. L. '71, (5660); How. 7228; C. L. '97, (1092), unchanged.

FORMER LAW CITED: Chapter cited In re Osborne, 131 Mich. 119; Hunt v. Wayne Judge, 142 Mich. 107; Attorney Gen. ex. rel., Danhof v. Renihan, 184 Mich. 272.

#### (12249). Vacancy Not to Discontinue Suit.

SEC. 2. No process, proceeding or suit, civil or criminal, before any of the said courts, shall be discontinued by the occurrence of any vacancy in the office of any judge, or of all the judges of such court, nor by the issuing of any new commission to any judge or judges of any such court, but the persons appointed in any such new commission shall have power to continue, hear and determine such process, proceeding or suit, as their predecessors might have done if no new commission had been issued.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 96, being C. L. '57, (4048); C. L. '71, (5661); How. 7229; C. L. '97, (1093), remains unchanged.

#### (12250). New Seal to be Made.

SEC. 3. Whenever the seal of any court shall be so injured

that it cannot conveniently be used, the courts shall cause the same to be destroyed; and whenever the seal of any court shall be lost or destroyed, such court shall cause a new seal to be made, similar in all respects to the former seal, which shall become the seal of the court.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 96, being C. L. '57, (4051); C. L. '71, (5664); How. 7232; C. L. '97, (1096), remains unchanged.

**(12251). New Seal to be Paid for by County.**

**SEC. 4.** The expense of a new seal for any circuit court, or court of probate, shall be paid by the county in which such courts are held; and the expense of new seals for other courts shall be paid from the state treasury.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 96, being C. L. '57, (4052); C. L. '71, (5665); How. 7233; C. L. '97, (1097), remains unchanged.

**(12252). Public Sitzings of Court.**

**SEC. 5.** The sittings of every court within this state shall be public, and every citizen may freely attend the same.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 96, being C. L. '57, (4063); C. L. '71, (5676); How. 7244; C. L. '97, (1108), remains unchanged.

**PUBLIC TRIAL:** This statute voices the sentiment of the people at the time the Constitution of '50 was adopted. It gives expression to what is there meant by a public trial (Const. 50, VI, 28). Courts have no dispensing power when the legislature has spoken. An order by the court in a criminal case, directing an officer to stand at the door "and see that the room is not over-crowded, but that all respectable citizens be admitted and have the opportunity to get in when they shall apply," violates the constitutional and statutory right to a public trial. *People v. Murray*, 89 Mich. 276. See also, *People v. Yeager*, 113 Mich. 228; *McGraw v. Fire Ins. Co.*, 54 Mich. 159.

**PUBLIC TRIAL:** When a trial judge made an order in compliance with Local Acts '93, No. 408, Sec. 18, authorizing the judge of the recorder's court of Detroit to exclude from the court room, upon the trial of any cause wherein evidence of licentious, lascivious, degrading, or peculiarly immoral acts will probably be given, all persons, except those necessarily in attendance, it was decided that the act was unconstitutional inasmuch as it violated the right of the accused to a public trial. In *People v. Murray*, 89 Mich. 286, the Court said: "This statute has been in force since '46. It voices the sentiment of the people at the time the Constitution of '50 was adopted. Courts have no dispensing power when the legislature has spoken. The judge who presided at the trial of this case was as much bound by this provision of law as the humblest citizen. The trial may have

been an impartial one; the respondent may have been justly convicted; but it still remains that it was accomplished in violation of his constitutional and statutory right to a public trial."

**(12253). Power to Exclude Minors.**

SEC. 6. Every court shall have the right whenever any trial is being had in such court, which involves scandal or immorality, to exclude from the court room all minors, as a matter of public policy, unless such minor or minors are parties or witnesses in said cause: *Provided*, That the court shall also have the power to exclude from within the bar of the court, all persons except officers of the court, parties and witnesses in said cause.

HISTORY: New section.

PUBLIC TRIAL: As to the right of the court to exclude certain people from the court room during the trial of a criminal case which involves immorality, see *People v. Murray*, 89 Mich. 276, 290; *People v. Yeager*, 113 Mich. 228.

**(12254). Judge Not to Sit Under Certain Circumstances.**

SEC. 7. No judge of any court shall sit as such in any cause or proceeding in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties; nor shall any judge decide, or take part in the decision of any question which shall have been argued in the court, when he was not present and sitting therein as a judge. Nor shall any judge sit as a court in any cause in which he is related within the third degree of consanguinity to either of the attorneys or counselors of either party to said cause: *Provided*, That such last mentioned disqualification be made to appear and that it may be waived by stipulation filed in the cause; and it shall be deemed to have been waived unless the objection on account of such qualification [disqualification] shall have been filed in writing at or before the commencement of the trial or hearing.

HISTORY: This section re-enacts in part and supersedes Sec. 18, R. S. '46, Ch. 96, being C. L. '57, (4064); C. L. '71, (5677); How. 7245; C. L. '97, (1109); as Am. '03, p. 404, Act 245, Eff. Sept. 17, changed.

CONSTRUED: *Peninsular Ry. Co. v. Howard*, 20 Mich. 18; *Hasceig v. Tripp*, 20 Mich. 218; *Stockwell v. Twp. Board*, 22 Mich. 345; *Whipple v. Judge*, 26 Mich. 346; *Clement v. Everest*, 29 Mich. 19; *People v. Judge*, 41 Mich. 550; *Horton v. Howard*, 79 Mich. 642; *Detroit v. Detroit Ry.*, 134 Mich. 11, 14; *Knickerbocker v. Worthing*, 138

Mich. 224, 227; Bliss v. Caille Bros., 149 Mich. 601, 607; Colliery Co. v. Sugar Co., 155 Mich. 228, 231.

**JUDGMENT VOID:** Judgment and orders made by a disqualified judge are not voidable merely, but are void. They may be collaterally attacked and the objection if not taken before decision is rendered, is available in the appellate court. Bliss v. Caille Brothers Co., 149 Mich. 606; Horton v. Howard, 79 Mich. 642; Shannon v. Smith, 31 Mich. 451; Peninsular R. Co. v. Howard, 20 Mich. 18; Teller v. Wetherell, 6 Mich. 46. Where the circuit judge was a brother-in-law of the plaintiff's counsel who was conducting the case on a contingent basis, he was not disqualified to sit in the Knickerbocker v. Worthing, 138 Mich. 227. Morton v. The Detroit, Bay City and Alpena Railroad Co., 89 Mich. 437; Whipple v. Judge, 41 Mich. 550; Barnard v. Judge of Superior Court of Grand Rapids, 191 Mich. 573; 153 N. W. 202; Gunn v. Gunn, 205 Mich. 198; 171 N. W. 371.

**(12255). Judge Not to Sit in Certain Cases.**

**SEC. 8.** No judge of an appellate court, or of any court to which a writ of certiorari or of error shall be returnable, shall decide or take part in the decision of any cause or matter which shall have been determined by him while sitting as a judge of any other court.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 96, being C. L. '57, (4065); C. L. '71, (5678); How. 7246; C. L. '97, (1110), remains unchanged.

**(12256). Circuit Judge Barred from Practice.**

**SEC. 9.** No circuit judge can practice or act as counselor or attorney in any court of this state during his term of office.

**HISTORY:** This section supersedes Sec. 20, R. S. '46, Ch 96, being C. L. '57, (4066); C. L. '71, (5679); How. 7247; as Am. '89, p. 210, Act 180, Imd. Eff. June 21; C. L. '97, (1111), remains unchanged.

**CONSTRUED:** Prior to the amendment of '89 it was held: That a circuit judge could not practice in his own court, after having called another judge to sit in his place. Bashford v. People, 24 Mich. 244; Meister v. People, 31 Mich. 104; People v. Evans, 72 Mich. 384. That this statute applies to arbitration proceedings as well as others. Gallagher v. Kern, 31 Mich. 138. That a judge can not appoint himself referee in a cause pending in his court, even on stipulation of the parties. Woodin v. Phoenix, 41 Mich. 655. As to practicing in adjoining circuits, see People v. Evans, 72 Mich. 383. The amendment of '89 was intended and had the effect to remove whatever question may have formerly existed of the right of a circuit judge to practice at the bar of other circuits than his own. It violates no provision of the constitution. Morton v. R. R. Co., 81 Mich. 437.

**CIRCUIT JUDGE NOT TO PRACTICE AS ATTORNEY:** The prohibition against circuit judges practicing law is broadened so that they may not practice in any court in the state.

**(12257). Partners of Judge Not to Practice Before Him.**

SEC. 10. No judge shall have any partner practicing in the circuit court of which he is judge; nor shall any judge be directly or indirectly interested in the costs of any suit that shall be brought in said circuit except in those suits in which he shall be a party, or be interested in the subject matter thereof.

HISTORY: Re-enacts Sec. 21, R. S. '46, Ch. 96, being C. L. '57, (4067); C. L. '71, (5680); How. 7248; as Am. '89, p. 210, Act 180, Imd. Eff. June 21; C. L. '97, (1112), remains unchanged.

CONSTRUED: Gallagher v. Kern, 31 Mich. 138.

**(12258). Judge and Other Court Officials Not to Receive any Fees in Certain Cases.**

SEC. 11. No judge, commissioner, or other judicial officer, shall demand or receive any fees or other compensation for giving his advice in any matter or suit pending before such judge or officer, or which he has reason to believe will be brought before him for decision; or for drafting or preparing any papers or other proceedings relating to any such matter or suit; except in those cases where fees are expressly given by law to such judge or officer, for services performed by him.

HISTORY: Re-enacts Sec. 22, R. S. '46, Ch. 96, being C. L. '57, (4068); C. L. '71, (5681); How. 7249; C. L. '97, (1113), remains unchanged.

**(12259). Court to be Closed on First Day of Week.**

SEC. 12. No court shall be opened or transact any business on the first day of the week, unless it be for the purpose of instructing or discharging a jury, or of receiving a verdict; but this section shall not prevent the exercise of the jurisdiction of any single magistrate, when it shall be necessary, in criminal cases to preserve the peace, or to arrest offenders.

HISTORY: Re-enacts Sec. 23, R. S. '46, Ch. 96, being C. L. '57, (4069); C. L. '71, (5682); How. 7250; C. L. '97, (1114), remains unchanged.

CONSTRUED: The issuing of a justice's summons is merely ministerial, and is valid though done on a legal holiday. *Smith v. Ihling*, 47 Mich. 614; *Malcolmson v. Scott*, 56 Mich. 465; See, also, *Shriver v. Bean*, 112 Mich. 513; *Linnen v. Banfield*, 114 Mich. 93, 97.

**(12260). Writs, Process and Proceedings to be in English.**

SEC. 13. All writs, process, proceedings and records in any

court within this state, shall be in the English language (except that the proper and known names of process and technical words, may be expressed in the language heretofore and now commonly used), and shall be made out on paper or parchment, in a fair, legible character, in words at length, and not abbreviated; but such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 96, being C. L. '57, (4070); C. L. '71, (5683); How. 7251; C. L. '97, (1115), remains unchanged.

**CONSTRUED:** *Schaale v. Wasey*, 70 Mich. 419; *Visscher v. Ottawa Circuit Judge*, 116 Mich. 666.

**(12261). Every Person of Full Age and Sound Mind May be His Own Attorney.**

**SEC. 14.** Every person of full age and sound mind, may appear by attorney, as the case may require, in every action or plea by or against him, in any court, or may, at his election, prosecute or defend such action or plea in person; but this provision shall not extend to criminal cases, nor shall any person be permitted to appear on the record in any civil cause in person, when he has an attorney in such case.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 96, being C. L. '57, (4071); C. L. '71, (5684); How. 7252; C. L. '97, (1116), omitting "or solicitor" and changing "whilst" to "when," remains unchanged.

**(12262). Subsequent Order After Refusal of Order.**

**SEC. 15.** If an application for an order that an injunction or a writ ne exeat or supersedeas be made to the circuit judge or any person authorized to grant the same, and such order be refused, in whole or in part, or be granted conditionally or on terms, no subsequent application for the same purpose and in relation to the same matter shall be made to any other circuit judge or any other person authorized to grant the same.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 90, being C. L. '57, (3473); as Am. '58, p. 4, Act 4, Eff. May 6; C. L. '71, (5055); How. 6609; C. L. '97, (431), except to make the section applicable also to writs of supersedeas, remains unchanged.

**NE EXEAT:** History of the practice as to the writ of ne exeat. *Bailey v. Cadwell*, 51 Mich. 217.

**INJUNCTION:** As to the issuance of an injunction after appeal, see *Patek v. Patek*, 166 Mich. 433, 444.

See Compilers Section (12173).

**(12263). Subsequent Order Void.**

SEC. 16. If upon any subsequent application any order be made, it shall be absolutely void, and shall be revoked by the person making it, upon due proof of the facts; and any person making such subsequent application contrary to the foregoing provisions, shall be liable to be fined or imprisoned by the court, or both, in its discretion.

HISTORY: Re-enacts Sec. 20, R. S. '46, Ch. 90, being C. L. '57, (3474); C. L. '71, (5056); How. 6610; C. L. '97, (432), remains unchanged.

See Compilers' Sections (12173)-(12174).

**The Restoration of Lost Records, Papers, or other Proceedings  
In Courts of Record.****(12264). Order for Lost Paper.**

SEC. 17. Whenever any record, paper or proceeding in or relating to any cause or special proceeding pending or determined in any court of record in this state, shall be lost, any person having an interest in the recovery of the lost record, paper or proceeding, may apply to the court having jurisdiction of said cause, or of the record thereof, for an order that a duplicate of the lost record, paper or proceeding, be prepared and filed in said court.

HISTORY: Re-enacts Sec. 1 of Act 8 of '61, being C. L. '71, (6055); How. 7639; C. L. '97, (10276), remains unchanged.

CONSTRUED: This statute does not exclude secondary evidence. It takes away no common law right and alters no common law rule of evidence. It only provides a method by which lost record evidence may again be restored and perpetuated. *Drake v. Kinsell*, 38 Mich. 235.

CITED: *Carver v. Smith*, 113 Mich. 208; *Newton v. Newton*, 166 Mich. 426; *Hyman v. Kadrovach*, 180 Mich. 372.

See, *Dalton's Appeal*, 59 Mich. 352; *Norvell v. McHenry*, 1 Mich. 227.

**(12265). Application Must Show Certain Facts.**

SEC. 18. The person making such application shall show to the satisfaction of the court, that the record, paper or proceeding proposed to be restored, once existed, and has been lost, without the fault or connivance, directly or indirectly, of such applicant; and thereupon the court shall direct the manner of proceeding to supply the loss, and the notices which shall be given to parties interested in the application.

**HISTORY:** Re-enacts Sec. 2 of Act 8 of '61, being C. L. '71, (6056); How. 7640; C. L. '97, (10277), remains unchanged.

**CITED:** Carver v. Smith, 113 Mich. 208; Newton v. Newton, 166 Mich. 426.

**(12266). Subpoena Witnesses.**

**SEC. 19.** The court before whom any such application is pending, may issue subpoenas for, and compel the attendance of witnesses, or may direct the examination of witnesses on interrogatories, and compel such witness to submit to such examination for the purpose of establishing any point in any such proceeding.

**HISTORY:** Re-enacts Sec. 3 of Act 8 of '61, being C. L. '71, (6057); How. 7641; C. L. '97, (10278), changing "any proceedings under this act" to "any such proceedings," remains unchanged.

**(12267). Order for Substitution.**

**SEC. 20.** If the court shall be satisfied that the record, paper or proceeding proposed to be substituted for the lost, exhibits all the material facts of the original, an order shall be entered that said substituted record, paper or proceeding, be filed or recorded with the officer to whom belongs the custody of the original; and during the continuance of such loss, the substituted record, paper or proceeding shall have the same effect in all respects and in all places as the original.

**HISTORY:** Re-enacts Sec. 4 of Act 8 of '61, being C. L. '71, (6058); How. 7642; C. L. '97, (10279), remains unchanged.



## CHAPTER V.

### OF PROCEEDINGS FOR CONTEMPTS.

#### (12268). Powers of Courts to Punish Contempt.

SECTION 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings.

3. All attorneys, counselors, clerks, registers, sheriffs, coroners, and all other persons in any manner duly elected or appointed to perform any judicial or ministerial services, for any misbehavior in such office or trust, or for any wilful neglect or violation of duty therein; for disobedience of any process of such court, or any lawful order thereof, or of any lawful order of a judge of such court, or of any officer authorized to perform the duties of such judge;

4. Parties to suits for putting in fictitious bail or sureties, or for any deceit, or abuse of the process or proceedings of the court;

5. Parties to suits, attorneys, counselors, and all other persons, for the non-payment of any sum of money ordered by such court to be paid, in cases where by law execution cannot be awarded for the collection of such sum; the disobedience of or refusal to comply with any order of such court for the payment of alimony, either permanent or temporary, or costs made in any suit for divorce or separate maintenance; and any other disobedience to any lawful order, decree or process of such court;

6. All persons for assuming to be officers, attorneys or counselors of any court, and acting as such without authority; for rescuing any property or persons, which shall be in the custody of an officer by virtue of process issued from such

court; for unlawfully detaining any witness or party to a suit, while going to, remaining at, or returning from the court where such suit shall be pending for trial; and for any other unlawful interference with or resistance to the process or proceedings in any action;

7. All persons summoned as witnesses for refusal or neglect to obey such summons, or to attend or to be sworn, or when so sworn to answer any legal and proper interrogatory;

8. Persons summoned as jurors in any court, for improperly conversing with any party to a suit to be tried at such court, or with any other person in relation to the merits of such suit; for receiving communications from any such party, or from any other person in relation to the merits of such suit, without immediately disclosing the same to the court;

9. All inferior magistrates, officers and tribunals, for disobedience of any lawful order or process of a superior court, or for proceeding in any cause or matter contrary to law, after such cause or matter shall have been removed from their jurisdiction;

10. The publication of a false or grossly inaccurate report of its proceedings; but no court can punish as a contempt the publication of true, full and fair reports of any trial, argument, proceedings or decision had in such court;

11. All other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record to enforce the civil remedies of any party, or to protect the right of any such party.

**HISTORY:** This section merges and supersedes Sec. 7, R. S. '46, Ch. 96, being C. L. '57, (4053); C. L. '71, (5666); How. 7234; C. L. '97, (1098); and Sec. 1, R. S. '46, Ch. 121, being C. L. '57, (4074); C. L. '71, (5689); How. 7257; C. L. '97, (10891); as Am. '99, p. 360, Act 230, Eff. Sept. 23, changed as regards extent of power.

See also C. L. '15, (12288).

**CHANGES BY THE JUDICATURE ACT:** A uniform method of procedure in all contempt cases in courts of record has been provided. The distinction between civil and criminal contempts no longer obtains. No addition has been made to the acts which may be punished as contemptuous, except that non-payment of costs in divorce cases as well as non-payment of temporary and permanent alimony may be made the basis of contempt proceedings. Heretofore the fact that execution could be issued for taxable costs precluded the remedy by proceedings as for contempt.

The principal change in contempt proceedings is the elimination of interrogatories. The defendant merely answers the allegations of the affidavit on which the proceeding is based and proofs are taken upon the matters in dispute. Heretofore it has been required in case the

misconduct had resulted in actual loss or injury to any party, that the court order a sufficient sum to be paid to such party to indemnify him *instead* of imposing a fine. This left the court powerless to punish the wrong done to the court, no matter how great it was, if there was an actual injury to a party, no matter how small it was. This result followed because a proceeding under the civil statute barred any proceeding under the criminal statute, even though the act might be one which could originally have been prosecuted against under either statute. It is now provided that the court may both order the payment of indemnity and impose such other penalty as may be proper. A minor change is that in case a defendant, who has given bail after being served with an attachment, does not appear on the return day thereof, the court may either order an assignment of the bond to any aggrieved party, who may prosecute the same in his own name, or the court may order the bond prosecuted by the public prosecutor. In the first instance, the recovery would be limited to the loss or injury sustained by the aggrieved party with his costs and expenses. In the second instance, the recovery would be the whole penalty of the bond, from which recovery the court would order such sum to be paid to the party prosecuting the attachment, as the court thought proper to satisfy any costs and expenses incurred by him and to compensate him for his injury, and the balance of the money recovered would be paid into the treasury of the county to the credit of the general fund.

**CONTEMPTS:** The classification of contempts in this section embraces mostly those contempts which are offenses against the court as a tribunal of justice, tending to lessen its dignity, condemn its mandates, impair the respect due to its authority, or interrupt its proceedings. *Langdon v. Judges*, 76 Mich. 369. Contempts under subdivision 1 of this section are confined to those committed during the sitting of the court and in its immediate view and presence. In *re Wood*, 82 Mich. 82. Courts of record in this state have inherent power to hear and determine all contempts of court, which the Superior Courts of England had at the common law; and the statute has not undertaken to limit or prohibit their jurisdiction in the matter of contempts. The statutes are in affirmation of the common law power of courts to punish for contempts, and, while not attempting to curtail the power, they have regulated the mode of proceeding and prescribed what punishment may be inflicted. *Langdon v. Judges*, 76 Mich. 367; In *re Wood*, 82 Mich. 81. The circuit courts of this state have power to punish, as for a contempt of court, any person guilty of an attempt to bring about a disagreement of a jury, in a suit pending by means of bribery. *Langdon v. Judges*, 76 Mich. 358. The power to punish for contempt is inherent in, and is as ancient as the courts themselves. In *re Chadwick*, 109 Mich. 588, 598. As to the effect of an acquittal of a charge of contempt in a court of general jurisdiction upon a proceeding in an appellate court, see *Eaton Rapids v. Horner*, 126 Mich. 52, 55. This section was intended to apply to the courts which the legislature was empowered to establish, and does not apply to circuit courts which possess inherent and exclusive power over contempts. *Nichols v. Judge*, 130 Mich. 187. In proceedings for criminal contempt under this section the respondent is not entitled to have written interrogatories furnished, and time to answer. In *re Archer*, 134 Mich.

408. As to the determining of the question of an incriminating tendency of the testimony, see *In re Moser*, 138 Mich. 302. This section does not confer upon the circuit court the power to punish for contempt an interference with the people's witnesses or a preliminary examination pending before a justice of the peace. *In re Emery*, 149 Mich. 383. A wilful disobedience of an injunction restraining from interfering with complainant's employees is punishable as criminal contempt under this section. *Fdry. Co. v. Iron Molders' Union*, 149 Mich. 31. See also, *In re Langwell*, 178 Mich. 305. But a party marrying again in a foreign jurisdiction within a month after a decree of divorce was entered forbidding the defendant husband from remarrying within two years, is not punishable for contempt. *In re Crane*, 170 Mich. 651. Since the abolition of imprisonment for debt, a decree in chancery cannot be enforced by attachment where an execution is permitted. *Eaton Rapids v. Horner*, 126 Mich. 275; *Mast v. Judge*, 154 Mich. 485. Compiler' Section (12445), which prohibits the imprisonment of a female on civil process does not prevent the imprisonment of a woman for violation of a decree in equity. *Carnahan v. Carnahan*, 143 Mich. 397.

**NATURE OF PROCEEDINGS:** These proceedings are "summary criminal proceedings, although allowed to be conducted by a private prosecutor, with a view to ultimate private benefit." *Montgomery v. Booming Co.*, 104 Mich. 413; *Schwab v. Coots*, 44 Mich. 463. See *Langdon v. Judges*, 76 Mich. 373. The process of contempt to enforce civil remedies is one of extreme resort, which cannot be justified if there is any other adequate remedy. *Haines v. Haines*, 35 Mich. 138. It is allowed only where an execution cannot be awarded. *North v. North*, 39 Mich. 67; *Swarthout v. Lucas*, 102 Mich. 494. These proceedings cannot be instituted on the petition of a party, upon whom process has not been served, and who has not appeared and submitted himself to the jurisdiction of the court. *Latimer v. Barmore*, 81 Mich. 592. They may be prosecuted although no party is aggrieved by the misconduct, and like proceedings as for criminal contempts, may be instituted by the court upon its own motion. *Id.* Citing *Langdon v. Judge*, 76 Mich. 358. Two purposes are apparent in this chapter: (1). To enforce the civil rights and remedies of parties to an action pending in the court; (2). To protect the rights of parties in civil actions. *Langdon v. Judges*, 76 Mich. 358. In contempt proceedings under this chapter the respondent cannot be ordered to reimburse the moving party for loss and injury claimed to have been sustained; except upon a finding that respondent is guilty of the contempt charged, that his misconduct caused loss or injury, and of the amount thereof. *Montgomery v. Booming Co.*, 104 Mich. 411; citing *Smith's Appeal*, 86 Mich. 149; *Holland v. Weed*, 87 Mich. 584.

**ATTACHMENT OF THE PERSON:** Will not issue in a divorce suit for alimony where the decree erroneously entered in a prior suit had been dismissed, in which alimony was granted. *Dwyer v. Wayne Circuit Judge*, 197 Mich. 387.

**REVIEW OF PROCEEDINGS:** A person charged with contempt in refusing to give evidence may go behind the commitment and show that the court committing him had no jurisdiction of the proceeding in which he was called as a witness. *Matter of Morton*, 10 Mich. 208;

Matter of Hall, 10 Mich. 210. Under the Constitution, Art. VII, 4, the supreme court has authority to inquire into the justice or propriety of proceedings in contempt, whether before or after commitment only so far as to ascertain whether the court or officer has jurisdiction and is proceeding according to law. Commitments for contempt cannot be impeached for mere irregularity. The attack upon a judgment for contempt can go no further than to the power of the court to act in the given case. But the question of jurisdiction necessarily involves an inquiry whether the conduct alleged was in fact a contempt of the court and committed under circumstances which authorize the court to proceed to punishment therefor; it also involves the question whether the court is proceeding in the manner prescribed by law. In re Wood, 82 Mich. 81. A defendant in contempt proceedings must be allowed a reasonable time in which to prepare his defense. In re Dingley, 182 Mich. 45.

SUBDIVISION 3: (Sub. 1 C. L. '97, (10891). An order refusing a petition for the punishment of a sheriff in omitting the performance of his duty is not reviewable on certiorari. Schwab v. Coots, 44 Mich. 463; Attorneys.—In re McHugh, 152 Mich. 507. Coroners.—In re Toepel, 139 Mich. 88. Disobedience of an order in chancery.—Ladies of Maccabees v. Daley, 173 Mich. 577. Disobedience of injunction.—In re Osborn, 131 Mich. 118; In re Briggs, 178 Mich. 28. Failure to comply with peremptory writ of mandamus.—Railroad Com'n v. Detroit, Etc., Ry. Co., 184 Mich. 242; 185 Mich. 649.

SUBDIVISION 4: (Sub. 2, C. L. '97, (10891), Smith v. Judge, 84 Mich. 564.

SUBDIVISION 5: (This subdivision is taken from Sub. 3, C. L. '97, (10891), adding thereto the provision in case of refusal to pay alimony). Refusal to pay alimony, see, Compilers' Sections (11443 et seq.); Ross v. Griffin, 53 Mich. 5; Potts v. Potts, 68 Mich. 492; Judd v. Judd, 125 Mich. 228; Brown v. Brown, 135 Mich. 141. See, also, Lohrstorfer v. Lohrstorfer, 140 Mich. 551. This statute does not authorize contempt proceedings in a suit brought in this state to enforce a decree for alimony made by a court in another state. Mayer v. Mayer, 154 Mich. 386. Mandamus to review order committing for contempt for failure to pay alimony. Lake v. Judge, 172 Mich. 660. Only where execution cannot be awarded. Swarthout v. Lucas, 102 Mich. 494; North v. North, 39 Mich. 67; Haines v. Haines, 35 Mich. 138. For refusal to execute a deed. Berry v. Innes, 35 Mich. 189. See Brewer v. Kidd, 23 Mich. 442; People v. Simonson, 9 Mich. 492. For placing on probation a party guilty of contempt for failure to pay alimony, see Compilers' Section (11449 et seq.).

SUBDIVISION 6: (Sub. 4, C. L. '97, 10891). Concealing oneself to avoid service of a subpoena does not constitute contempt. Broderick v. Judge, 125 Mich. 275. Attempting to prevent the attendance of a witness not yet subpoenaed is a contempt. Montgomery v. Judge, 100 Mich. 436. Also an attempt to bring about a disagreement of a jury in a pending suit by bribery. Langdon v. Judges, 76 Mich. 358.

SUBDIVISION 7: (Sub. 5, C. L. '97, 10891). A board of supervisors has power to subpoena witnesses, but cannot arrest or commit them for contempt in refusing to appear. Matter of Blue, 46 Mich. 268.

SUBDIVISION 11: (Sub. 8, C. L. '97, 10891). *Broderick v. Judge*, 125 Mich. 276.

FORMER LAW CITED: *Russell v. Judge*, 136 Mich. 624; *Metheany v. Judge*, 142 Mich. 630; *Fournier v. Clutton*, 146 Mich. 301; *In re Emery*, 149 Mich. 384.

See also, *Bromley v. People*, 7 Mich. 477-8; *Scott v. Layng*, 59 Mich. 43; *Wilcox Silver Plate Co. v. Schimmel*, 59 Mich. 524; *Chapel v. Hull*, 60 Mich. 175; *Scott v. Judge*, 62 Mich. 532; *Bagley & Co. v. Scudder*, 66 Mich. 97.

### (12269). Punishment for Contempt When Summarily.

SEC. 2. When any misconduct, punishable by fine and imprisonment as declared in the last section, shall be committed in the immediate view and presence of the court, it may be punished summarily, by fine or imprisonment, or both, as hereinafter prescribed.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 121, being C. L. '57, (4075); C. L. '71, (5690); How. 7258; C. L. '97, (10892), remains unchanged.

IMMEDIATE VIEW AND PRESENCE: These are words of limitation and exclude the idea of constructive presence. The immediate view and presence does not extend beyond the range of vision of the judge and the term applies only to such contempts as are committed in the face of the court. Of such contempts he may take cognizance of his own knowledge, and may proceed to punish summarily such contempts, basing his action entirely upon his own knowledge. All other alleged contempts depend solely upon evidence and are inferences from fact, and the foundation for the proceedings to punish therefor must be laid by affidavit. *In re Wood*, 82 Mich. 82; *Langdon v. Judges*, 76 Mich. 368. The affidavit is jurisdictional. *In re Wood*, 82 Mich. 83. In cases of contempts not committed in the immediate view and presence of the court, the party accused must be notified of the accusation and have a reasonable time to make his defense. If committed, the warrant must set forth the particular circumstances of the offense. *Langdon v. Judges*, 76 Mich. 368.

A direct contempt, committed in the immediate view and presence of the court, will be noticed and punished summarily, on its own motion. *In re Wood*, 82 Mich. 82.

TIME OF HOLDING TERMS OF CIRCUIT COURTS: Heretofore the court was required to make an order every two years fixing the time for holding the terms of court for the next two years. This was required to be published at the expense of the state and the order was unchangeable for two years. This has been changed so that the orders existing at the time the act takes effect shall stand until revoked, but the court may at any time, by a court journal order change the time, such change not to be effective until the expiration of three months from the date of the order.

**(12270). Proceedings for Punishment for Contempt When Not Committed in Presence of Court.**

**SEC. 3.** When such misconduct is not so committed, the court shall be satisfied by due proof; by affidavit of the facts charged, and shall cause a copy of such affidavit to be served on the party accused, a reasonable time to enable him to make his defense, except in cases of disobedience to any rule or order requiring the payment of money, and of disobedience to any subpoena.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 121, being C. L. '57, (4076); C. L. '71, (5691); How. 7259; C. L. '97, (10893), remains unchanged.

**CONSTRUED:** When the contempt is not committed in the immediate view and presence of the court, it must be brought before the court by affidavit and a rule is made, either that an attachment issue, or that the accused show cause why he should not be punished. In *re Wood*, 82 Mich. 82-3. The facts by which the charge may be established must be shown with reasonable certainty. *Verplank v. Hall*, 21 Mich. 469. And a defendant cannot be held guilty of contempt, in refusing to execute, acknowledge and deliver to complainant a deed, until a deed has been presented to him. *Berry v. Innes*, 35 Mich. 189.

Mandamus will be entertained where it appears that when the writ was applied for the relator was imprisoned, but the writ of mandamus will not be issued to set aside the action of the lower court on account of irregularities in the proceedings which were waived in that court, or the defects which are not jurisdictional, or which do not otherwise affect the very right of relator. *Lake v. Houghton Circuit Judge*, 172 Mich. 665; *Dillon v. Shiawassee Circuit Judge*, 131 Mich. 574. Where it is questionable whether respondent's testimony is not evasive if affirmative acts were shown by other testimony, yet when the case rests entirely upon statements of respondent, such statements, taken as a whole, should make out the act of contempt which was not done. *Richter v. Rabat*, 114 Mich. 575. When the contempt is not committed in the immediate view and presence of the court, it must be brought before the court by affidavit and a rule is made, either that an attachment issue, or that accused show cause why he should not be punished. In *re Wood*, 82 Mich. 82. A defendant cannot be held guilty of contempt, in refusing to execute, acknowledge and deliver to complainant a deed, until a deed has been presented to him. *Berry v. Innes*, 35 Mich. 189. The facts by which the charge may be established must be shown with reasonable certainty. *Verplank v. Hall*, 31 Mich. 469.

**FORMER LAW CITED:** *Richter v. Rabat*, 114 Mich. 580; *Lake v. Houghton Circuit Judge*, 172 Mich. 666.

**(12271). Issue of Precept.**

**SEC. 4.** When any rule or order of the court shall have been made for the payment of costs, or any other sum of

money, and proof by affidavit shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison until such sum, and the costs and expenses of the proceeding shall be paid.

**HISTORY:** Re-enacts Sec. 4, R. S. '46, Ch. 121, being C. L. '57, (4077); C. L. '71, (5692); How. 7260; C. L. '97, (10894), remains unchanged.

**CONSTRUED:** The purpose of this section is to enable courts to enforce interlocutory orders, no other means of enforcement being provided by statute. *Swarthout v. Lucas*, 102 Mich. 494. Personal demand is prerequisite to a commitment for contempt in not paying alimony. *Edison v. Edison*, 56 Mich. 185; *Brown v. Brown*, 22 Mich. 299. But where a husband informs his wife that he will not pay temporary alimony, a formal demand is unnecessary. *Potts v. Potts*, 68 Mich. 492. Before a party can be imprisoned for refusing to obey an order "for the payment of costs, or any other sum of money," he should have an opportunity to be heard. *Stellar v. Stellar*, 25 Mich. 159. See *Ervay v. Ervay*, 120 Mich. 525; *Dwyer v. Wayne Circuit Judge*, 197 Mich. 387.

#### (12272). Order to Show Cause.

**SEC. 5.** In all cases, other than that specified in the last section, the court shall either grant an order on the accused party, to show cause at some reasonable time, to be therein specified, why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest such party, and to bring him before such court, to answer for such misconduct.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 121, being C. L. '57, (4078); C. L. '71, (5693); How. 7261; C. L. '97, (10895), remains unchanged.

**CONSTRUED:** An attachment issued by the register on affidavit, but without any order from the court, is invalid. *Thompson v. Ellsworth*, 39 Mich. 719.

#### (12273). Attachment to Issue.

**SEC. 6.** When a rule shall have been entered in any court, according to the practice thereof, requiring any officer or other person, to whom any process of such court may have been directed and delivered, to return the same, an attachment for disobedience of such rule may issue according to the practice of the court, to arrest such officer or person, to answer for such disobedience, without special application to the court.



**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 121, being C. L. '57, (4079); C. L. '71, (5694); How. 7262; C. L. '97, (10896), remains unchanged.

**(12274). Habeas Corpus May be Awarded.**

**SEC. 7.** If the party charged with misconduct be in the custody of any officer, by virtue of an execution against his body, or by virtue of any process for any other contempt or misconduct, the court may award a writ of habeas corpus, to bring up the body of such person, to answer for such misconduct.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 121, being C. L. '57, (4080); C. L. '71, (5695); How. 7263; C. L. '97, (10897), remains unchanged.

**(12275). Habeas Corpus When Allowed.**

**SEC. 8.** In cases where a party is entitled to an attachment against any person, without the special order of the court, and such person shall be in custody, as specified in the last section, a writ of habeas corpus, to bring up such person, may be allowed by any judge of the court, or by any officer authorized to perform the duties of such judge in vacation.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 121, being C. L. '57, (4081); C. L. '71, (5696); How. 7264; C. L. '97, (10898), unchanged.

**(12276). Duty of Sheriff in Such Cases.**

**SEC. 9.** Such writ shall authorize the sheriff in whose custody such person shall be, to remove and bring him before the court to which the same shall be returnable, and to detain him at the place where such court shall be sitting, until some order be made by the court for his disposition.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 121, being C. L. '57, (4082); C. L. '71, (5697); How. 7265; C. L. '97, (10899), remains unchanged.

**(12277). Order to Direct Penalty.**

**SEC. 10.** When an attachment shall be issued according to the provisions of this chapter, by the special order of any court, such court shall direct the penalty in which the defendant shall give bond for his appearance to answer.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 121, being C. L. '57, (4083); C. L. '71, (5698); How. 7266; C. L. '97, (10900), unchanged.

**(12278). Penalty to be Directed by Single Judge.**

**SEC. 11.** In all other cases, when a party shall be entitled to an attachment without the special order of the court, he shall make application to a judge of the court, or to some officer authorized to perform the duties of such judge, who, upon due proof of the facts and circumstances, shall direct the penalty in which the defendant shall give bond for his appearance to answer the matters alleged against him, and shall indorse such order on the attachment.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 121, being C. L. '57, (4084); C. L. '71, (5699); How. 7267; C. L. '97, (10901), unchanged.

**PUNISH FOR CONTEMPT:** The right to punish an offender for criminal contempt is no more an open question in this state, for the power is conferred by statute (1 Comp. Laws, '97, (1098), and the courts possess the power independently of the statute. In re Dingley, 182 Mich. 44; 21 D. L. N., 743; 148 N. W., 218.

**(12279). Persons to be Kept in Actual Custody.**

**SEC. 12.** Upon arresting any defendant, upon an attachment, to answer for any alleged misconduct, the sheriff shall keep such person in his actual custody, and shall bring him personally before the court issuing the attachment, and shall keep and detain him in his custody, until such court shall have made some order in the premises, unless such defendant shall entitle himself to be discharged, as prescribed in the next section.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 121, being C. L. '57, (4085); C. L. '71, (5700); How. 7268; C. L. '97, (10902), remains unchanged.

**(12280). Discharged on Giving Bond.**

**SEC. 13.** In cases where a sum shall have been endorsed on any attachment issued by the special order of the court, and where any sum shall have been so endorsed by any judge or other officer as hereinbefore prescribed, the defendant shall be discharged from arrest on such attachment upon executing and delivering to the officer making the same, in his name of office, and to his assigns, at any time before the return day of such writ, a bond with two sufficient sureties, in the penalty endorsed on such attachment, with a condition that the defendant will appear on the return of such attachment, and abide the order and judgment of the court thereupon.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 121, being C. L. '57, (4086); C. L. '71, (5701); How. 7269; C. L. '97, (10903), remains unchanged.

**(12281). Discharge to be Made Only on Order of Court.**

**SEC. 14.** When an attachment shall be issued by the special order of the court, a certificate to that effect shall be endorsed thereon by the clerk of such court, and if no sum be specified in which the defendant shall be held to bail on such writ, he shall not be entitled to be discharged from the arrest thereon, upon executing any bond or in any other manner unless upon the special order of the court issuing the attachment.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 121, being C. L. '57, (4087); C. L. '71, (5702); How. 7270; C. L. '97, (10904), unchanged.

**(12282). Penalty of Bond.**

**SEC. 15.** When an attachment shall be issued without the special order of the court, and an order specifying the sum in which the defendant is to be held to bail is not endorsed thereon, the defendant shall be discharged from the arrest thereon, on executing a bond in the penalty of one hundred dollars, with sureties, in the same manner, and with the like condition, as hereinbefore specified.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 121, being C. L. '57, (4088); C. L. '71, (5703); How. 7271; C. L. '97, (10905), unchanged.

**(12283). Bond to be Returned.**

**SEC. 16.** Upon returning any attachment, the officer executing the same shall return the bond, if any, taken by him of the defendant, which shall be filed with such attachment.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 121, being C. L. '57, (4089); C. L. '71, (5704); How. 7272; C. L. '97, (10906), unchanged.

**(12284). Attachment Neglected to be Returned.**

**SEC. 17.** The sheriff or other officer to whom any attachment shall be delivered, shall return the same by the return day specified therein, without any previous rule or order for that purpose, and in case of default, an attachment may be issued against him, upon being allowed by a judge of the court, or by an officer authorized to perform the duties of such judge, upon proof of such default; and in such allowance, the cause of issuing the same shall be stated, and that

the defendant is not to be discharged upon bail, or in any other manner but by order of the court.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 121, being C. L. '57, (4090); C. L. '71, (5705); How. 7273; C. L. '97, (10907), except the omission of the words "of course" relating to the manner of the issuance of attachment in case of default, unchanged.

**(12285). Arresting and Keeping of Defendant.**

**SEC. 18.** The officer to whom such last mentioned attachment shall be delivered, shall execute the same by arresting and keeping the defendant in his custody, bringing him personally before the court, and detaining him in such custody, until the order of the court.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 121, being C. L. '57, (4091); C. L. '71, (5706); How. 7274; C. L. '97, (10908), remains unchanged.

**(12286). Affidavits and Proof.**

**SEC. 19.** When any defendant arrested upon an attachment, shall have been brought into court, or shall have appeared therein in response to any order to show cause, he shall be permitted to file affidavits controverting or explaining the matters stated in the affidavits upon which such attachment was issued, or order to show cause made, within such reasonable time as the court shall allow, and the court may receive any affidavits, or oral proofs contradictory or conformity of the answers of the defendant, and upon all such affidavits and proof, the court shall determine whether the defendant has been guilty of the misconduct alleged.

**HISTORY:** Re-enacts in part and supersedes Sec. 19, R. S. '46, Ch. 121, being C. L. '57, (4092); C. L. '71, (5707); How. 7275; C. L. '97, (10909), modifying the section, however, by eliminating the clause in relation to interrogatories and making other slight changes in relation to the proof. Changed as above only.

**CONSTRUED:** As to procedure under former practice, see, *In re Archer*, 134 Mich. 410; *Metheany v. Judge*, 142 Mich. 630. Right to controvert answers. *People v. Kidd*, 23 Mich. 442. See also, *Scott v. Judge*, 62 Mich. 538; *Latimer v. Barmore*, 81 Mich. 601.

**(12287). Methods of Punishment for Contempt.**

**SEC. 20.** Punishment for contempts may be by fine or imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of the court; but the fine

shall in no case exceed the sum of two hundred and fifty dollars, nor the imprisonment thirty days; except in those cases where the commitment shall have been for the refusal to perform an act or duty which is still within the power of the party to perform.

**HISTORY:** This section modifies and supersedes both Sec. 8, R. S. '46, Ch. 96, being C. L. '57, (4054); C. L. '71, (5667); How. 7235; C. L. '97, (1099); and Sec. 20, R. S. '46, Ch. 121, being C. L. '57, (4093); C. L. '71, (5708); How. 7276; C. L. '97, (10910), modified as regards limitation of punishment.

**PUNISHMENT:** However aggravated the contempt, the fine or imprisonment cannot exceed the limit prescribed by the statute. *Ware v. Judge*, 75 Mich. 495. A sentence for contempt, under this section giving the alternative of paying a fine within a specified time or being imprisoned for a stated time, without the right to be released upon payment of the fine is void. *Sloman v. Judge*, 95 Mich. 264. See also *In re McHugh*, 152 Mich. 505.

**FINE:** Whether the fine is imposed as for a criminal contempt or for a contempt under this chapter, when paid, it goes into the library fund, under the constitution and laws of this state. *Langdon v. Judges*, 76 Mich. 373. But see *Compilers' Sections* (12296)-(13432).

**IMPRISONMENT:** Imprisonment as a means of coercion for civil purposes is not allowed by law until other means fail. *Railway Co. v. Jennison*, 60 Mich. 235. Where the respondent was required to pay into court a certain sum of money within forty days, or give bonds to produce it, or stand committed indefinitely, it was held that the statute does not permit such a vague sentence of imprisonment. *Scott v. Judge*, 62 Mich. 532.

**SENTENCE:** A sentence in the alternative is void. *Sweet v. Thorildsen*, 115 Mich. 314. See *Compilers' Section* (12289).

**REVIEW OF ORDER:** *People v. Simonson*, 9 Mich. 492; 10 Mich. 335; *Matter of Morton*, 10 Mich. 208; *Romeyn v. Caplis*, 17 Mich. 449; *People v. Jones*, 33 Mich. 303; *Haines v. Haines*, 35 Mich. 138; *Matter of Bissell*, 40 Mich. 63; *Ross v. Ross*, 47 Mich. 185; *Ross v. Griffin*, 53 Mich. 5; *Edison v. Edison*, 56 Mich. 185; *Langdon v. Judges*, 76 Mich. 358; *Latimer v. Barmore*, 81 Mich. 592; *Smith's Appeal*, 86 Mich. 149; *Swarthout v. Lucas*, 102 Mich. 492; *Montgomery v. Booming Co.*, 104 Mich. 411.

**FORMER LAW CITED:** *In re Osborn*, 131 Mich. 119; *Eaton Rapids v. Horner*, 126 Mich. 55; *Smith's Appeal*, 86 Mich. 161.

### (12288). Punishment of Accused.

**SEC. 21.** If an actual loss or injury has been suffered by any party, by the misconduct alleged, the court, in addition to such other penalty as may be imposed, shall order a sufficient sum to be paid by the defendant to such party to indemnify him, and to satisfy his costs and expenses; and in such case the payment and acceptance of such sum shall be

an absolute bar to any action by such aggrieved party, to recover damages for such injury or loss.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 121, being C. L. '57, (4094); C. L. '71, (5709); How. 7277; C. L. '97, (10911), except that it provides that the additional sum as an indemnity may be ordered "in addition to" in the place of "instead of" a fine. Modified as above only.

**CONSTRUED:** An order for the payment of money to the injured party stands "instead of a fine." *Haines v. Haines*, 35 Mich. 146; *Holland v. Weed*, 87 Mich. 587. Indemnity to the injured party. *Langdon v. Judges*, 76 Mich. 373. The purpose of this indemnity is to protect the civil rights and remedies of parties and to compensate them for the injury or loss occasioned by the misconduct alleged. *Holland v. Weed*, 87 Mich. 587-8. Review of order refusing to direct payment of damages. *Montgomery v. Booming Co.*, 104 Mich. 411. See *Sweet v. Thorkildsen*, 115 Mich. 317; *Eaton Rapids v. Horner*, 126 Mich. 55.

#### (12289). Time of Imprisonment.

**SEC. 22.** When the misconduct complained of consists in the omission to perform some act or duty, which is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings.

**HISTORY:** Re-enacts Sec. 23, R. S. '46, Ch. 121, being C. L. '57, (4096); C. L. '71, (5711); How. 7279; C. L. '97, (10913), unchanged.

**CONSTRUED:** Under this and the next section, imprisonment can be ordered only until the fine is paid or the act or duty imposed is performed. *Latimer v. Barmore*, 81 Mich. 605. An order for imprisonment until the further order of the court is not indefinite. *Carnahan v. Carnahan*, 143 Mich. 397.

Proceedings by contempt do not apply where execution may issue to collect a decree for the payment of money. *Carnahan v. Carnahan*, 143 Mich. 399. When the sentence of imprisonment was not imposed as a means of insuring the payment of the fine under the latter part of the clause of this section, as it does not provide that the sentence of imprisonment shall terminate upon the payment of the fine; but the defendant was given fifteen days to pay the fine, and, if not paid within that time, he should be imprisoned for the period of thirty days, the sentence was void as an alternative one, *Swett v. Thorkildsen*, 115 Mich. 317.

#### (12290). Order of Commitment Must Specify Act.

**SEC. 23.** In such case the order and process of commitment shall specify the act or duty to be performed, and the amount of the fine and expenses to be paid.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 121, being C. L. '57, (4097); C. L. '71, (5712); How. 7280; C. L. '97, (10914), unchanged.

**FORMER LAW CITED:** Where the sentence of imprisonment was not imposed as a means of insuring payment of the fine under the latter part of the clause of C. L. '97, (10913), as it does not provide that the sentence of imprisonment shall terminate upon the payment of the fine; but the defendant was given fifteen days to pay the fine, and if not paid within that time, he should be imprisoned for the period of thirty days, the sentence was void as an alternative sentence. *Swett v. Thorkildsen*, 115 Mich. 317.

**(12291). Persons Subject to Indictment.**

**SEC. 24.** Persons proceeded against according to the provisions of this chapter, shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction shall be had on such indictment shall take into consideration the punishment before inflicted, in imposing sentence.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 121, being C. L. '57, (4099); C. L. '71, (5714); How. 7282; C. L. '97, (10916), changing "in forming its sentence" to "imposing sentence," unchanged

**(12292). Default of Defendant.**

**SEC. 25.** If the defendant against whom an attachment shall have been issued and returned served, do not appear on the return day thereof, the court may either award another attachment, or may order the bond taken on the arrest to be prosecuted, or both.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 121, being C. L. '57, (4100); C. L. '71, (5715); How. 7283; C. L. '97, (10917), unchanged.

**(12293). Order of Assignment of Bond.**

**SEC. 26.** The court may order an assignment of the bond to any aggrieved party who shall be authorized by the court to prosecute the same, and such party may maintain an action thereon in his own name, as assignee of the sheriff or officer to whom the same was given, in the same manner as in other actions on bonds with condition to perform covenants other than the payment of money.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 121, being C. L. '57, (4101); C. L. '71, (5716); How. 7284; C. L. '97, (10918), except that the former law provided that "such order shall operate as an assignment." Modified by, "Court may order an assignment."

**CONSTRUED:** The measure of damages in any action on the bond is the extent of the loss or injury sustained by reason of the misconduct for which the attachment issued, and his costs and expenses. *Langdon v. Wayne Circuit Judges*, 76 Mich. 373.

**(12294). Measure of Damages.**

**SEC. 27.** The measure of the damages to be assessed in such action, shall be the extent of the loss or injury sustained by such aggrieved party, by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 121, being C. L. '57, (4102); C. L. '71, (5717); How. 7285; C. L. '97, (10919), unchanged.

**CONSTRUED:** *Langdon v. Wayne Circuit Judges*, 76 Mich. 373.

**(12295.) Action on Bond.**

**SEC. 28.** If the court shall not order an assignment of such bond as provided in section twenty-six, the court, in case the defendant shall fail to appear according to the condition of the bond taken on the arrest, shall order the same to be prosecuted by the attorney general, or by the prosecuting attorney for the county in which the bond was taken, in the name of the officer who took such bond.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 121, being C. L. '57, (4103); C. L. '71, (5718); How. 7286; C. L. '97, (10920), changing "if there be no party aggrieved by the misconduct for which the attachment was issued, etc." to "if the court shall not order an assignment, etc.," substantially unchanged.

**(12296). Recovery.**

**SEC. 29.** In such case the whole penalty of the bond shall be forfeited and recovered, and from the moneys collected thereon the court shall order such sum to be paid to the party prosecuting the attachment, as the court ordering the prosecution shall think proper, to satisfy the costs and expenses incurred by him, and to compensate him for any injury he may have sustained by the misconduct for which such attachment was issued; and the residue of such moneys shall be paid into the treasury of the county in which the bond was taken, to the credit of the general fund.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 121, being C. L. '57, (4104); C. L. '71, (5719); How. 7287; C. L. '97 (10921), except that this section provided that the residue should be paid to the credit



of the general fund, whereas the former section provided that it should be paid to the library fund. See also, Compilers' Section (13432).

This section, C. L. '97, (10921), modified so as to conform to C. L. '97, (4762), as amended by P. A. '09, Act No. 32.

FORMER LAW CITED: Langdon v. Judges, 76 Mich. 373.

**(12297). Securities Insufficient.**

SEC. 30. If on the return of an execution, duly issued upon any judgment obtained on such bond, it shall appear that the sureties taken therein were, at the time of taking them, insufficient, and that the officer receiving them had reasonable ground to doubt their sufficiency, he shall be liable in an action on the case to the party aggrieved, who may have prosecuted such suit, for the amount of the judgment recovered by him, and for his costs and expenses in such suit; or if such suit was brought by the attorney general or a prosecuting attorney, an action on the case may in like manner be brought by them, in the name of the people of this state, for the amount of the judgment so recovered; and the same disposition of the moneys collected in such action on the case against such officer shall be made as directed in the last preceding section.

HISTORY: Re-enacts Sec. 32, R. S. '46, Ch. 121, being C. L. '57, (4105); C. L. '71, (5720); How. 7288; C. L. '97, (10922), unchanged.

**(12298). Inability of Defendant.**

SEC. 31. Whenever by the provisions of this chapter an officer is required to keep any person arrested upon an attachment in actual custody, and to bring him personally before any court, the inability, from sickness or otherwise, of such person to attend such court personally, shall be a sufficient excuse for not bringing him before such court; nor shall any officer be required, in any case, to confine any person arrested upon an attachment to answer for misconduct in any prison, or otherwise to restrain him of his personal liberty, except so far as shall be necessary to secure his personal attendance.

HISTORY: Re-enacts Sec. 33, R. S. '46, Ch. 121, being C. L. '57, (4106); C. L. '71, (5721); How. 7289; C. L. '97, (10923), unchanged.

**CHAPTER VI.**  
**OF THE JURISDICTION AND POWERS OF THE**  
**CIRCUIT COURTS AT LAW AND**  
**IN CHANCERY.**

**(12299). Original and Exclusive Jurisdiction.**

**SECTION 1.** The said circuit courts within and for their respective counties, shall have and exercise original and exclusive jurisdiction, except as otherwise provided:

1. Of all civil actions and remedies of whatever name or description, not excepted in the constitution and not prohibited by law, except in cases where exclusive or concurrent jurisdiction shall be given by law to some other court or tribunal;

2. To issue writs of habeas corpus, mandamus, injunction, quo warranta, certiorari and ne exeat, and to hear and determine the same, provided that no circuit court shall have jurisdiction to issue the writs of mandamus or quo warranto against state officers;

3. To issue such other writs as may be necessary to carry into effect their orders, judgments and decrees, and give them control over all inferior courts and tribunals within their respective jurisdictions;

4. Said courts shall have jurisdiction in all such other cases and matters as the supreme court shall by rule prescribe;

5. Said courts shall have such appellate jurisdiction and powers as may be provided by law;

6. Said courts shall also have and exercise all the powers usually possessed and exercised by courts of record at the common law, except as now or hereafter modified by the laws of this state, or by rule of the supreme court, for the full exercise of the jurisdiction hereby conferred, and shall have the power to make all orders in any cause pending therein, which may be necessary or proper for carrying into effect the jurisdiction vested in such courts by law, and to give full effect to any judgment of such courts and may enforce

any lawful order so made by attachment and proceedings for contempt;

7. Parties to any civil action pending in any circuit court, and parties to any question of difference which might be the subject of any civil action, without bringing suit, may agree upon a case containing the facts of the matter in controversy, and submit the same to the court, and the court shall thereupon hear and determine the cause and render judgment thereon, as in other cases. But if such case be agreed upon without action, it must appear by affidavit that the controversy is real and the proceedings in good faith, to determine the rights of the parties;

8. Said circuit courts may from time to time make rules for regulating the practice of the said courts in matters not covered by rule of the supreme court or by statute.

**HISTORY:** This section modifies and supersedes parts of Secs. 8, 9, 11, 13 and 14 of Act 157 of '51, being C. L. '57, (3418)-(3419)-(3421)-(3423)-(3424); C. L. '71, (4944)-(4945)-(4947)-(4949)-(4950); How. 6466, 67, 69, 70, 71; C. L. '97, (307)-(308)-(310)-(311)-(312), modified.

**CONSTITUTIONALITY:** See Const. VII, 10, and notes to Const. '50, VI, 8, 16.

**SUBDIVISION 3:** As to the powers of judges at chambers, see note to Const. '50, VI, 16. The writ of prohibition is an extraordinary judicial writ. *Land Co. v. Aud. Gen.*, 172 Mich. 289, 291.

**SUBDIVISION 6:** (C. L. '97, (307), (312). Contempt. See *Lake v. Judge*, 172 Mich. 666. See also preceding chapter of this act.

**SUBDIVISION 7:** (C. L. '97, (310)).

**CASE MADE:** See notes to Compilers Section (13752). Must be signed by the parties or their attorneys and filed with the clerk, that it may be certified by him. *Farrand v. Bentley*, 6 Mich. 283.

It is not a mere stipulation as to evidence, but is equivalent to a finding of facts by the court, or the special verdict of a jury, and must contain everything necessary to the recovery. *Goodrich v. Detroit*, 12 Mich. 288; *Cofrode v. Judge*, 79 Mich. 348.

**SUBDIVISION 8:** (C. L. '97, (308). **Constitutionality:** Any power inherent in the circuit courts to make rules regulating their own practice is restricted by the Const. VII, 5, vesting such power in the supreme court. *Detroit, G. R. & W. R. v. Judge*, 128 Mich. 497.

**RULES:** There can be no doubt of the power of every court of record, when not forbidden, to ordain suitable rules to apply to matters of practice under or regulated by the legislature or the supreme court. *Wyandotte Roll. Mill Co. v. Robinson*, 34 Mich. 432; See also *Cofrode v. Judge*, 79 Mich. 349; *Ludwick v. Judge*, 138 Mich. 110. A circuit court cannot adopt rules conflicting with those prescribed by the supreme court, or covering matters of other than mere local concern. *Detroit, G. R. & W. R. v. Eaton Circuit Judge*, 128 Mich. 497.

See *Cummins & Beechers' Michigan Rule Book*, page 483, "The Law Relating to the Michigan Court Rules."

**(12300). Circuit Courts to be Courts of Chancery.**

**SEC. 2.** The several circuit courts of this state shall be courts of chancery within and for their respective counties, the powers of which shall be exercised by the circuit judges thereof; and the name and style of such courts sitting in chancery shall be "The circuit court for the county of....., in chancery."

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 90, being C. L. '57, (3456); C. L. '71, (5038); How. 6592; C. L. '97, (415), unchanged.

**JURISDICTION, LAW SIDE:** See *Sherman v. Supervisors*, 84 Mich. 111; *People v. McCaffrey*, 75 Mich. 125.

**JURISDICTION, EQUITY SIDE:** See *Hunt v. Stevens*, 174 Mich. 508; *Bridge St., etc., Road Co. v. Hogadone*, 150 Mich. 638; *Mack v. Village of Frankfort*, 123 Mich. 425.

**(12301). Certain Suits to be Dismissed.**

**SEC. 3.** Such courts shall dismiss every suit concerning property, excepting suits between co-partners, and suits for the enforcement of mechanics' liens, suits for the foreclosure of mechanics' liens, and suits for the foreclosure of mortgages, and suits for the foreclosure of land contracts or other liens upon real estate, where the matter in dispute shall not exceed one hundred dollars, with costs to the defendant.

**HISTORY:** Re-enacts Sec. 23, R. S. '46, Ch. 90, being C. L. '57, (3477); C. L. '71, (5059); as Am. '81, p. 119, Act 129, Eff. Sept. 10; as Am. '83, p. 152, Act 145, Eff. Sept. 18; How. 6613; C. L. '97, (435); as Am. '13, p. 25, Act 14, Eff. Aug. 14; except that it limits the proviso relating to mining options, etc., changed.

**ONE HUNDRED DOLLARS:** Jurisdiction depends upon the amount claimed and not upon the sum found to be due. *Gamber v. Holden*, 5 Mich. 331, 335. As to averment of amount and value, see *Gamber v. Holben*, 5 Mich. 335; *Palmer v. Rich*, 12 Mich. 420; *Bay City Bridge Co. v. Van Etten*, 36 Mich. 212; *Abbott v. Gregory*, 39 Mich. 68; *Glidden v. Norvell*, 44 Mich. 202, 206. Where the aid of a court of chancery is sought to protect the enjoyment of property, it will not be governed by the mere value of the property but will interfere if the injury will materially lessen the enjoyment by the owner. *White v. Forbes*, Walk. 112. Where the title or enjoyment of real estate is in question, jurisdiction depends upon the value of the land and not upon the claim asserted against it. *Fuller v. Grand Rapids*, 40 Mich. 395. Although the land itself may not be worth \$100, equity will take jurisdiction, if riparian rights are involved, making the land worth more. *Blodgett v. Dwight*, 38 Mich. 596. Where the bill of complaint shows on its face that the amount in controversy is less than \$100, the court must dismiss the suit, except as provided in this section. *Gamber v. Holben*, 5 Mich. 331; *Steinbach v. Hall*, 25 Mich. 78; *Wells v. Elsam*, 40 Mich. 218. As to jurisdiction in suits

to reform and correct conveyances of land, see *Backus v. Jeffrey*, 47 Mich. 127. Where the amount in controversy is more than \$100, but has to be disposed of under separate issues, each less than that, a bill in chancery will not lie. *Wallace v. Sortor*, 52 Mich. 159, 163. A bill by a receiver of an insolvent mutual fire insurance company to declare a lien on insured property, where the amount, inclusive of costs, was less than one hundred dollars, was properly dismissed. *Peake v. Bradley*, 121 Mich. 182, 183. Where a creditor files a bill in aid of execution, the amount of the execution; and not the value of the land, determines the jurisdiction of the court. *Matteson v. Matteson*, 132 Mich. 516. A suit in chancery to foreclose a land contract on which less than one hundred dollars remains unpaid, was properly dismissed. (This decision was before the amendment of '13). *Lumber Co. v. Gay*, 138 Mich. 82. Where there is nothing in the pleadings to show the inadequacy of the amount in controversy, the court should not dismiss upon that ground until the proofs show inadequacy. *Brassington v. Waldron*, 143 Mich. 364; *George v. Rollins*, 176 Mich. 144, 149. See also, as to the amount involved. *Bartlett v. Austin & Western Co.*, 147 Mich. 58; *Kimmerle v. Cassopolis*, 160 Mich. 90, 92; *McManus v. Petoskey*, 164 Mich. 390, 393; *Soule v. Grand Haven*, 174 Mich. 276. See also *School District v. Musback*, 176 Mich. 243, 246; *Brandt v. Luce*, 177 Mich. 187.

**EXCEPTIONS:** Prior to the amendment of '81 the chancery courts had no jurisdiction to enforce mechanics' liens for less than \$100. *Dewey v. Dyer*, 39 Mich. 509. See *Collar v. Harrison*, 25 Mich. 518; *Milroy v. Iron Mining Co.*, 43 Mich. 237.

**MECHANICS' LIENS:** See Compilers' Section (14796 et seq.); *Wykes' Michigan Mechanics' Liens*, page 157.

### (12302). Jurisdiction in Chancery.

**SEC. 4.** The powers and jurisdiction of the circuit courts and circuit judges in chancery, in and for their respective counties, shall be co-extensive with the powers and jurisdiction of the courts and judges in chancery in England as existing on March first, eighteen hundred forty-seven, with the exceptions, additions and limitations created and imposed by the constitution and laws of this state. Said circuit court in chancery shall also have jurisdiction and authority:

1. To hear and determine all cases of encroachments upon the public highways, streets, and public alleys, in organized townships, incorporated villages and cities in this state;

2. In all matters concerning nuisances and waste, where there is not a plain, adequate and complete remedy at law, and may grant injunctions to stay and prevent such nuisances and waste;

3. To appoint receivers in all cases pending in chancery, when such appointment is allowed by law, as well in vacation and at chambers as during the sessions of the court;

4. To hear and determine suits instituted by any person claiming the legal or equitable title to lands, whether in possession or not, against any other person not in possession, setting up a claim thereto in opposition to the title claimed by the plaintiff: and, if the plaintiff shall establish his title to such lands, the defendant shall be decreed to release to the plaintiff all claims thereto;

5. A bill of discovery may be filed and the defendant shall be compelled to answer same where the defendant is charged with having given to another person a power of attorney to enter up a judgment, or with having confessed or suffered any judgment purporting to be for a sum or debt due, when in fact nothing, or only a part of the sum mentioned in such power of attorney or judgment is due, with intention to defraud the just creditors of such defendant, or to place the property of the defendant out of the reach of his creditors, or to hold the same in some secret trust or confidence, or for the benefit of such defendant;

6. Whenever an execution against the property of defendant shall have been issued in a judgment at law and shall have been returned unsatisfied in whole or in part, the party suing out this execution, may file a bill in chancery against such defendant, and any other person, to compel a discovery of any property or things in action belonging to the defendant, and of any property, money or things in action, due to him, or held in trust for him, and to prevent the transfer of any such property, money or things in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund is held in trust as proceeding from some person other than the defendant. The court shall have power to compel such discovery and to prevent such transfer, payment or delivery and decree satisfaction of the money remaining due on such judgment, out of any property, money or other things in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by proceedings in chancery, whether the same were originally liable to be taken by execution in law or not: *Provided*, This section shall not apply to property exempt from execution.

**HISTORY:** Sub. Div. 1. This subdivision and the portion of the section preceding it supersedes Sec. 21, R. S. '46, Ch. 90, being C. L. '57, (3475); C. L. '71, (5057); as Am. '77, p. 61, Act 78, Eff. Aug. 21; as

Am. '81, p. 255, Act. 212, Eff. Sept. 10; How. 6611; C. L. '97, (433), changed.

**SUBDIVISION 2:** This subdivision supersedes and merges Sec. 17, R. S. '46, Ch. 110, being C. L. '57, (4714); C. L. '71, (6369); How. 7956; C. L. '97, (11132), and Sec. 5, R. S. '46, Ch. 112, being C. L. '57, (4722); C. L. '71, (6377); How. 7965; C. L. '97, (11213), unchanged.

**SUBDIVISION 3:** This subdivision merges and supersedes Secs. 34 and 35, R. S. '46, Ch. 90, being C. L. '57, (3488)-(3489); C. L. '71, (5070)-(5071); How. 6624-5; C. L. '97, (446)-(447), unchanged.

**SUBDIVISION 4:** This subdivision supersedes Sec. 36, R. S. '46, Ch. 90, being C. L. '57, (3490); C. L. '71, (5072); How. 6626; as Am. '87, p. 337, Act 260, Eff. Sept. 28; C. L. '97, (446); as Am. '09, p. 441, Act 256, Eff. Sept. 1, changed.

**SUBDIVISION 5:** This subdivision supersedes Sec. 27, R. S. '46, Ch. 90, being C. L. '57, (3481); C. L. '71, (5063); How. 6617; C. L. '97, (439), unchanged.

**SUBDIVISION 6:** This subdivision merges and supersedes Secs. 24, 25, Ch. 90, R. S. '46, as Rep. in '51 by Act No. 184, Eff. Sept. 27; as re-enacted '55 by Act No. 120, Eff. May 15; C. L. '57, (3478)-(3479); C. L. '71, (5060)-(5061); How. 6614-15; C. L. '97, (436)-(437), changed.

#### Constructions.

**SUBDIVISION 1:** Although jurisdiction is conferred upon chancery courts "to hold and determine all cases of encroachment upon the public highways" in townships, cities and villages, yet such courts will not, except under special circumstances, assume jurisdiction of encroachments upon township highways, as Compilers' Section (4401 et seq.) provided a remedy at law. *Township of Greenfield v. Norton*, 111 Mich. 54. See also *Township of Bangor v. Traction, Etc., Co.*, 147 Mich. 166; *Township of Lebanon v. Burch*, 78 Mich. 641.

**JURISDICTION:** A court of equity has no jurisdiction to enforce forfeitures. *Fitzhugh v. Maxwell*, 34 Mich. 138. Jurisdiction in re exeat. *Bailey v. Cadwell*, 51 Mich. 219. In divorce cases. *People v. McCaffrey*, 75 Mich. 125. As to the inherent powers of the court of equity, see *National Bank v. Blodgett*, 115 Mich. 160, 172. As to the appointment of a receiver, see *Union St. Ry. Co. v. Saginaw*, 115 Mich. 300, 304. As to the extent of the jurisdiction of the court of chancery, see also *Mack v. Village of Frankfort*, 123 Mich. 421, 424; *People v. Det., Etc., Ry. Co.*, 169 Mich. 77; *Heffernan v. Burns*, 175 Mich. 457. As to the power of the court of equity to set aside a judgment, see *Barr v. Packard Motor Car Co.*, 172 Mich. 299, 303.

**EQUITY JURISPRUDENCE:** See note to Const. '50, VI, 1.

**ENJOINING LABOR COMBINATIONS:** As to jurisdiction enjoining combinations of working men, see *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497.

**PAYMENT OF MUNICIPAL BONDS:** A court of equity will not compel payment of municipal bonds on an allegation of fraud where the remedy at law is not shown to be inadequate. *Mack v. Frankfort*, 123 Mich. 421.

**FORMER LAW CITED:** *Davis v. Township of Frankenlust*, 118 Mich. 496.

**SUBDIVISION 2:** Independently of this section, it was a branch of equity jurisdiction to prevent the commission of waste by injunction;

and the language of this statute is not intended to curtail that jurisdiction, but is merely in affirmance of the concurrent jurisdiction of courts of equity and of law. *Chapel v. Hull*, 60 Mich. 174.

See, also, *Norris v. Hill*, 1 Mich. 202; *Gilbert v. Showerman*, 23 Mich. 448; *Robinson v. Baugh*, 31 Mich. 290; *Wallace v. Harris*, 32 Mich. 392; *Coleman v. Stearns Mfg. Co.*, 38 Mich. 40; *Edwards v. Mining Co.*, 38 Mich. 46; *Ronayne v. Loranger*, 66 Mich. 373.

**SUBDIVISION 3; POWER TO APPOINT:** Courts of equity have no power to appoint receivers except "when such appointment is allowed by law." *Hazeltine v. Granger*, 44 Mich. 504. And only when a suit is pending. *Bank v. Judge*, 43 Mich. 296; *Cook v. D. & M. R. R. Co.*, 45 Mich. 453. The appointment of receivers is, like many other judicial functions, governed in part by discretion and in part by rules of right. *Barry v. Briggs*, 22 Mich. 207. Under the general supervisory powers of a court of chancery over assignment proceedings, it may proceed upon petition to the removal of the assignee and may, in the same proceeding, appoint a receiver. *Smith's Appeal*, 86 Mich. 159.

**IN WHAT CASES:** Where complainant in his bill shows a legal title to lands in possession of the defendant and from the answer of the defendant a strong presumption arises of title in complainant the court will grant a receiver. *Payne v. Atterbury*, Har. 417. See *Griswold v. Fuller*, 33 Mich. 268; *Tregaskis v. Judge*, 47 Mich. 509. In partnership cases. *Kirby v. Ingersoll*, 1 Doug. 477; *Barry v. Briggs*, 22 Mich. 208; *Simon v. Schloss*, 48 Mich. 233; *Morey v. Grant*, 48 Mich. 326. Of property owned by tenants in common. *Duncan v. Campau*, 15 Mich. 415. Upon decreeing alimony the court may direct the husband to furnish security therefor. Upon his neglect or refusal to give security, or upon his failure to pay what he has been directed to pay, but only upon such default, the court may sequester his personal estate and the rents and profits of his real estate and appoint a receiver. *Perkins v. Perkins*, 16 Mich. 167-8. Of the property of corporations. See *Compilers' Section* (13583). In foreclosures of chattel mortgages. *Bank v. Judge*, 43 Mich. 292. The mortgagor being entitled to the possession and to the rents and profits of the premises, his right in that regard cannot be cut short by the appointment of a receiver in the foreclosure suit. *Wagar v. Stone*, 36 Mich. 366-7. Courts of equity cannot appoint receivers except when such appointment is allowed by law. *Hazeltine v. Granger*, 44 Mich. 503. Not even when the parties to a mortgage agree that one may be appointed after default. *Id.* See *Beecher v. Marquette, Etc., Co.*, 40 Mich. 307. An order appointing a receiver when no suit is pending concerning the property of which he is put in charge is void. *Bank v. Judge*, 43 Mich. 292. Under the method of enforcing the collection of unpaid taxes upon real estate and the system of foreclosing liens, the appointment of a receiver of the rents and profits of land, on default of a life tenant to pay taxes thereon, is not the proper remedy. *Jenks v. Horton*, 96 Mich. 13.

**APPLICATION:** When notice of application is necessary. *Hazeltine v. Granger*, 44 Mich. 503; *Cook v. D. & M. Ry. Co.*, 45 Mich. 453; *P. H. & G. Ry. Co. v. Judge*, 31 Mich. 456; *Salling v. Johnson*, 25 Mich. 489.

**WHO MAY BE APPOINTED:** The partner of complainant's solicitor cannot be. *Bank v. Judge*, 43 Mich. 292. A director, trustee or



other officer of an insolvent corporation may be appointed. *Covert v. Rogers*, 38 Mich. 368. The insolvency of a trustee or receiver may be sufficient reason for superseding him. *Brown v. Vandermeulen*, 41 Mich. 418.

**APPEAL FROM APPOINTMENT:** An appeal may be taken from an order appointing a receiver when it divests a party of his property to which he is entitled. *Lewis v. Campau*, 14 Mich. 460; *Barry v. Briggs*, 22 Mich. 205; *P. H. & G. Ry v. Jones*, 33 Mich. 303; *McCombs v. Merryhew*, 40 Mich. 721; *Taylor v. Sweet*, 40 Mich. 739; *Simon v. Schloss*, 48 Mich. 233; *Morey v. Grant*, 48 Mich. 326. See *Arnold v. Bright*, 41 Mich. 210; *T. & B. C. R. Co. v. Judge*, 44 Mich. 482. But not when the appointment is merely incidental and ancillary to the relief sought. *Duncan v. Compau*, 15 Mich. 415; *Beecher v. M. & P. R. M. Co.*, 40 Mich. 307; *Brown v. Vandermeulen*, 41 Mich. 418. An order discharging a receiver is not appealable. *Colgate v. M. L. S. R. Co.*, 28 Mich. 288.

**SUBDIVISION 4; BILLS TO QUIET TITLE:** The jurisdiction to institute suits in chancery for the removal of clouds from title was given to holders of the legal title by the code of '33. It was enlarged by the act of '40 (Act 76, p. 107, re-enacted in R. S. '46, Ch. 90, Sec. 36) so as to give the right to owners of equitable titles. *Canal & Railway Co. v. Aud. Gen.*, 79 Mich. 353-4. This section was not repealed by the tax law of '89, either expressly or by implication. *Id.* 353. As to the code of '33, see *Rowland v. Doty*, Har. 3. As to the extension of the right to owners of the equitable title by the act of '40, see *Stockton v. Williams*, Walk. 120; 1 Doug. 546; *Blackwood v. Van Vleet*, 11 Mich. 252; *Hunton v. Platt*, 11 Mich. 264; *Fitzhugh v. Barnard*, 12 Mich. 104; *Blanchard v. Tyler*, 12 Mich. 339; *Moran v. Palmer*, 13 Mich. 367; *Tabor v. Cook*, 15 Mich. 322; *Hall v. Kellogg*, 16 Mich. 135; *Woods v. Monroe*, 17 Mich. 238; *Raynor v. Lee*, 20 Mich. 384. This section must be regarded as extending the jurisdiction of courts of equity, rather than limiting it or taking it away. *Cleland v. Casgrain*, 92 Mich. 149; *Ormsby v. Barr*, 22 Mich. 80; *King v. Carpenter*, 37 Mich. 366. The object of the statute is to enable a person in possession (possession unnecessary under the amendment of '87) of real estate and having a title thereto, to remove all doubts in regard to his title arising from the claims of third persons, who are taking no steps to test the validity of their claims, either at law or in equity, and who, by their refusal or neglect to institute proceedings for that purpose, keep the party in possession in a state of suspense. *Stockton v. Williams*, Walk. 126; *King v. Carpenter*, 37 Mich. 366. And to enable equity to quiet title without the necessity of repeated trials at law. *Id.* Before the amendment the statute was confined by its terms to cases where the complainant was in possession and could not, therefore, bring ejectment to test the validity of defendant's claim. *Holbrook v. Winsor*, 23 Mich. 397-8; *Eaton v. Trowbridge*, 38 Mich. 457; *Hatch v. St Joseph*, 68 Mich. 227. And the bill had to be based upon an actual possession of the land and could be sustained only because the complainant had no other means of bringing his title into adjudication. *M. E. Church v. Clark*, 41 Mich. 738; *Stockton v. Williams*, Walk. 120; 1 Doug. 546; *Moran v. Palmer*, 13 Mich. 367; *Tabor v. Cook*, 15 Mich. 322. See *Woods v. Monroe*, 17 Mich. 238. Under the following circumstances, it was held—prior to the amendment—that

a bill to quiet title could not be maintained under this section: If the premises were unoccupied wild lands. *Jenkins v. Bacon*, 30 Mich. 154. Or in the possession of defendant. *King v. Carpenter*, 37 Mich. 366. Or if complainant had an adequate remedy at law. *Devaux v. Detroit*, Har. 98; *Blackwood v. Van Vleet*, 11 Mich. 252; *Moran v. Palmer*, 13 Mich. 367; *Tabor v. Cook*, 15 Mich. 324; *Geney v. Maynard*, 44 Mich. 580. When a bill was deemed filed to late. *Supervisors v. Grand Rapids*, 61 Mich. 143.

See *Campbell v. Judge*, 111 Mich. 575. This section includes a person claiming title by adverse possession. *Vier v. Detroit*, 111 Mich. 646. See also *Triece v. South Haven*, 154 Mich. 129. Where a party has been in possession of a tract of land, claiming the title to a line which has been recognized and acquiesced in for the statutory period, equity has jurisdiction to enjoin the owner of the adjoining premises from moving the boundary fence. *Wolf Brick Co. v. Lonyo*, 132 Mich. 162. An equitable title is sufficient upon which to base a bill to quiet title. *Horton v. Helmholtz*, 149 Mich. 227. A bill in equity for the cancellation of a deed obtained fraudulently, is not a bill to quiet title. *Gragg v. Maynard*, 164 Mich. 539. See also *Blackford v. Ohmstead*, 140 Mich. 583. After the amendment of '09 a bill to quiet title could be maintained to set aside an execution levied upon land of husband and wife, owned by the entireties, where the execution was issued upon a judgment against the husband. *Monroe v. Carter*, 167 Mich. 325. See also as to bills to quiet title. *Olsen v. Williams*, 172 Mich. 316. As to bills of peace, see *Detroit Trust Co. v. Hunrath*, 168 Mich. 180, 192.

**REQUISITES OF RELIEF:** Where legal titles are sought to be brought into litigation under this section, every statutory requisite must exist. *Ormsby v. Barr*, 22 Mich. 85. Complainant, before he can entitle himself to relief, must show: (1). Possession—but see amendment; (2). Legal or equitable title; (3). A claim set up by some other person. (4). His title must be substantiated, *Stockton v. Williams*, 1 Doug. 565; *Hatch v. St. Joseph*, 68 Mich. 227. First—Possession—prior to the amendment, *Stockton v. Williams*, 1 Doug. 565; *Blackwood v. Van Vleet*, 11 Mich. 252; *Fitzhugh v. Barnard*, 12 Mich. 112; *Blanchard v. Tyler*, 12 Mich. 339; *Moran v. Palmer*, 13 Mich. 371; *Tabor v. Cook*, 15 Mich. 324; *Ormsby v. Barr*, 22 Mich. 85; *Barron v. Robbins*, 22 Mich. 42; *Torrent v. Booming Co.*, 22 Mich. 23; *Jones v. Smith*, 22 Mich. 365; *Jenkins v. Bacon*, 30 Mich. 154; *Grover v. Fox*, 36 Mich. 458; *Geney v. Maynard*, 44 Mich. 578; *Kilgannon v. Jenkinson*, 51 Mich. 240. Possession of part of premises, held sufficient, *Fitzhugh v. Barnard*, 12 Mich. 112; *Blanchard v. Tyler*, 12 Mich. 339. When not sufficient. *Geney v. Maynard*, 44 Mich. 578. Possession will not avail, if unfairly or surreptitiously gained. *Stetson v. Cook*, 39 Mich. 755; *Watson v. Brewing Co.*, 61 Mich. 595. Second—Legal or equitable title. *Stockton v. Williams*, 1 Doug. 565; *Whipple v. Farrar*, 3 Mich. 448; *Moran v. Palmer*, 13 Mich. 367; *Torrent v. Booming Co.*, 22 Mich. 21; *Grover v. Fox*, 36 Mich. 458. As to the allegations of title, see *LeBaron v. Shepherd*, 21 Mich. 263; *Hanscom v. Hinman*, 30 Mich. 419; *Jenks v. Hatheway*, 48 Mich. 536. When an equitable title is claimed, the equitable circumstances relied upon must be specifically set forth. *Moran v. Palmer*, 13 Mich. 372. Third—An adverse claim. *Stockton v. Williams*, 1 Doug. 565; *Moran v. Palmer*, 13 Mich. 371; *Salisbury v.*

Miller, 14 Mich. 162; Haddon v. Hemingway, 39 Mich. 618; Hardy v. Powell, 40 Mich. 413. An indefinite claim may be sufficient. Woodworth v. Gorton, 46 Mich. 324. Complainant is not bound to show by his bill that the claim set up by the defendant is one that would be prima facie good at law; what complainant is not presumed to know he cannot be required to set forth or to negative in his bill. Holbrook v. Winsor, 23 Mich. 398. But the bill must show in some way that defendant is setting up a cloud on the title and either describe how, or explain why the method cannot be described. Jenks v. Hatheway, 48 Mich. 536. A void conveyance of property to satisfy a special sewer assessment establishes a cloud on title. Chaffee v. Detroit, 53 Mich. 573. Nothing which is not calculated to cloud the title is any foundation for relief. Jenks v. Hatheway, 48 Mich. 538; Detroit v. Martin, 34 Mich. 170. Fourth.—Must substantiate his title; complainant cannot depend upon the weakness of adversary's title. Stockton v. Williams, 1 Doug. 575; Griswold v. Fuller, 33 Mich. 268; Haddon v. Hemingway, 39 Mich. 615; Hardy v. Powell, 40 Mich. 413. But proof of a presumptive title as against defendant is sufficient until overthrown by defendant's evidence. Hall v. Kellogg, 16 Mich. 135; Rayner v. Lee, 20 Mich. 389.

One claiming to be the owner of an absolute title of lands derived through tax proceedings, may not lay the foundation for a suit to quiet title under this section by alleging a demand upon, and refusal of the former owner out of possession, to disclaim all interest in the land. Land Co. v. Nessen, 155 Mich. 463. The owner of land which has been sold to the state at tax sales has after the expiration of the period for redemption, no title which will sustain a bill to remove a cloud. Embury v. Goodenough, 157 Mich. 140. As to a sufficient averment of a cloud on complainant's title, see Steyskal v. Radford, 166 Mich. 365.

Premises: As to the description of the premises, see Howell v. Merrill, 30 Mich. 282; Geney v. Maynard, 44 Mich. 583; Verplank v. Hall, 27 Mich. 79. Bill to quiet title when the premises consist of several parcels and ejectment suits are pending as to some of them. Woods v. Monroe, 17 Mich. 238. Parcels contracted to be sold to others and in their possession may be included. Eaton v. Trowbridge, 38 Mich. 454.

**JOINDER OF DEFENDANTS:** Defendants having separate and distinct claims to the premises or portions of them, arising from different sources, cannot be joined. Hunton v. Platt, 11 Mich. 264; Hall v. Kellogg, 16 Mich. 138; Hammontree v. Lott, 40 Mich. 190. See Damouth v. Klock, 29 Mich. 289, 295. But where there are several persons claiming different portions of the same land by title from the same source, the questions being the same as to all, they may be joined. Woods v. Monroe, 17 Mich. 238.

**JOINDER OF CLAIMS:** Several distinct claims made by the same defendant to the same land, although arising from different sources, may all be joined and disposed of in one suit. Hammontree v. Lott, 40 Mich. 190.

**OTHER REMEDY:** The jurisdiction of the court of chancery (exclusive of any statutory provision upon the subject) to set aside deeds and other legal instruments which are a cloud upon the title to real estate, and to order them to be delivered up to be cancelled, is fully

established. *Rowland v. Doty*, Har. 7; *Cleland v. Casgrain*, 92 Mich. 149. In the statute regarding the quieting of titles in equity there is no indication of an intention to take away any previously existing equitable remedies, nor have the courts so construed it. Those remedies are still left in force. *Ormsby v. Barr*, 22 Mich. 85; *Jones v. Smith*, 22 Mich. 366. No statute was needed to enable any one to sue in equity upon an equitable cause of action, and in such case possession is not important and has never been required. *King v. Carpenter*, 37 Mich. 366; *Salisbury v. Miller*, 14 Mich. 160; *Ormsby v. Barr*, 22 Mich. 80; 21 Mich. 474; *Jones v. Smith*, 22 Mich. 360; *Geney v. Maynard*, 44 Mich. 580. As in case of titles affected by fraud. *King v. Harrington*, 14 Mich. 539. Or a mistake in a conveyance. *Salisbury v. Miller*, 14 Mich. 160. Or in case of a bill to remove a cloud. *Woods v. Monroe*, 17 Mich. 238. Or to cancel a satisfied security. *Jones v. Smith*, 22 Mich. 365. Or to remove an incumbrance. *M. E. Church v. Clark*, 41 Mich. 739. A bill will not lie to remove a cloud from a title caused by an irregular levy of an execution, the remedy being by an application to the court wherein the judgment was rendered. *Rhode v. Hassler*, 113 Mich. 56.

**PERSON NOT IN POSSESSION:** It is not competent for the legislature to provide for the trial of the legal title to lands in equity, when the defendant was in possession, so that ejectment might be brought against him. *Ormsby v. Barr*, 22 Mich. 85; *Tabor v. Cook*, 15 Mich. 326. The right to bring a suit under this section against any other person not in possession, etc., is not barred by a possession on the part of the adverse claimant obtained by a forcible ouster of complainant. *Bigelow v. Sanford*, 98 Mich. 661.

As to the effect of the procuring of the defendant's tenant to surrender possession, see *Lille v. Snow*, 118 Mich. 611. A bill to quiet title will not lie against a party in possession claiming ownership—the proper remedy being ejectment. *Seymour v. Rood*, 121 Mich. 173. See also *Tinker v. Piper*, 149 Mich. 335; *Dolph v. Norton*, 158 Mich. 417; *Nisbett v. Milner*, 159 Mich. 337, 344; *Miscotten v. Hellenthal*, 162 Mich. 402; *Beldier v. City Bank*, 172 Mich. 381; *School District v. Musbach*, 176 Mich. 243, 249. But a bill by a city to restrain the obstruction of a public street will not be dismissed merely because the premises are in the possession of the defendant. *Mt. Clemens v. Mt. Clemens Sanitarium Co.*, 127 Mich. 115, 118. So long as the defendant in a suit to quiet title is not in possession, it is immaterial that complainant is not, or that a third person is. *Messenger v. Peter*, 129 Mich. 93, 100. But a bill failing to show that the defendant is not in possession is demurrable. *Moody v. Macomber*, 158 Mich. 209. A bill to quiet title is not demurrable on the ground that an action of ejectment is still pending, where the defendant in the original action had died and the action had not been revived against his heirs for fifteen years. *Conley v. Sinclair*, 163 Mich. 306. Equity has jurisdiction to set aside a conveyance of lands in trust which is void under the statute against perpetuities, upon the complaint of an heir, although he is not in possession. *Casgrain v. Hammond*, 134 Mich. 419, 433. A bill in equity to quiet title, which does not aver that the complainants are in possession or the defendants are not in possession, is demurrable, for if the defendants are in possession they are entitled to a jury trial. *Berger v. Roe*, 179 Mich. 184.

CITED: *Van Zanten v. City of Grand Haven*, 174 Mich. 283.

AGAINST UNKNOWN CLAIMANTS: See Compilers Section (12372 et seq.).

FORMER LAW CITED: *Booth v. Thompson*, 49 Mich. 74.

SUBDIVISION 5; BILL OF DISCOVERY: Technically a bill of discovery is one brought in aid of a suit at law. *McCreery v. Judge*, 93 Mich. 467. The complainant in such a bill must charge therein that the facts are known to defendant and that he is unable to prove them by other testimony. *Carroll v. Bank*, Har. 197. It has been held that, since the enactment of Compilers' Sections (12551)-(12552)-(12553), making parties competent as witnesses, a bill of discovery cannot be filed in this state. *Riopelle v. Doellner*, 26 Mich. 102; *Shelden v. Walbridge*, 44 Mich. 251; *McCreery v. Judge*, 93 Mich. 466; *Mulhern v. Judge*, 111 Mich. 528. But the supreme court recognized the right to seek a discovery in a judgment creditor's bill in *Hubbard v. McNaughton*, 43 Mich. 223, and again, such right was recognized as still existing in *Turnbull v. Lumber Co.*, 55 Mich. 392. It is, therefore, clear from these two decisions that the supreme court understood the decision in *Riopelle v. Doellner*, to apply only to the bill of discovery in aid of a suit at law. *McCreery v. Judge*, 93 Mich. 467.

SUBDIVISION 6; JUDGMENT CREDITOR'S BILL: When a judgment creditor may resort to equity for relief. *Williams v. Hubbard*, Walk. 28. A judgment creditor's bill cannot be maintained until the creditor has exhausted his remedy at law. *Eldred v. Camp*, Har. 163; *Stewart v. Stevens*, Har. 169; *Thayer v. Swift*, Har. 430; *Smith v. Thompson*, Walk. 2; *Williams v. Hubbard*, Walk. 28; *Freeman v. Bank*, Walk. 62; *Maynard v. Hoskins*, 9 Mich. 489; *Tyler v. Peatt*, 30 Mich. 65; *Griswold v. Fuller*, 30 Mich. 268; *McCullough v. Day*, 45 Mich. 556; *Tarbell v. Millard*, 63 Mich. 262; *National Bank v. Dwight*, 83 Mich. 190. But a judgment creditor is not bound to point out property to be levied upon. He has done all the law requires of him, when he places his execution in the officer's hands. *Albany City Bank v. Dorr*, Walk. 323. The fact that the judgment creditor has exhausted his remedy at law is usually shown by an execution, directed to the debtor's county and returned unsatisfied. *Freeman v. Bank*, Walk. 63. When not multifarious. *Hulbert v. Detroit Cycle Co.*, 107 Mich. 81. "Strict observance" of the statute in the framing of a bill has uniformly been required. *Campau v. Detroit Driving Club* and cases cited, 144 Mich. 99. As to the effect of taking a bill as confessed, see *Hoop & Stave Co. v. Danforth*, 160 Mich. 226. As to the levy on specific property as a prerequisite to the jurisdiction of a court of equity, see *Schelowski v. Pawlowski*, 168 Mich. 664, 666. See *Coffey v. McGahey*, 181 Mich. 235. As to proceedings at law in the nature of a judgment creditor's bill, see Compilers' Section (13378 et seq.).

RETURN OF EXECUTION: A return made before the return day will not sustain a bill. *Steward v. Stevens*, Har. 169; *Thayer v. Swift*, Har. 430; *Stafford v. Hulbert*, Har. 435; *Smith v. Thompson*, Walk. 1; *Beach v. White*, Walk. 495; *National Bank v. Dwight*, 83 Mich. 190. A return on the return day sufficient. *Williams v. Hubbard*, 1 Mich. 446. See also *Freeman v. Bank*, Walk. 62. The following have been held insufficient. A return unsatisfied by direction of complainant and not on the personal responsibility of the officer.

**Williams v. Hubbard**, Walk. 28, 30. A return that the officer has "property on his hands for want of bidders." **Eldred v. Camp**, Har. 162. A return which does not show that the defendant had no property which could be levied upon. **Smith v. Thompson**, Walk. 3. But a return that defendants had no property, without in terms negating the fact that either of them had is sufficient. **Williams v. Hubbard**, 1 Mich. 446. The return should be such as would subject the officer to an action for a false return, if untrue. **Williams v. Hubbard**, Walk. 28, 30. When a return is conclusive on the parties. **Albany City Bank v. Dorr**, Walk. 324. As to the necessity of issuing executions to counties other than where defendant resides, see **Freeman v. Bank**, Walk. 63; **Bank v. Dorr**, Walk. 317. A return of nulla bona is not open to attack on a judgment creditor's bill based on such return. **Wright v. Judge**, 109 Mich. 139. See also **Newlove v. Pennock**, 123 Mich. 263. A bill will not lie where the officer has, by his return placed the writ beyond his control. **Studley v. Ann Arbor Savings Bank**, 112 Mich. 181-5.

**FILING OF BILL:** A judgment creditor's bill must be filed within a reasonable time after the return of the execution, nine years after is not a reasonable time. **Gould v. Tryon**, Walk. 353. The right to file a creditor's bill having once attached by the return of an execution unsatisfied, a party does not lose his right to file the same by the issuing of a new execution. **Clark v. Davis**, Har. 227. The remedy by creditor's bill is a harsh remedy, which will not be afforded unless the creditor shows a strict and rigid compliance with the rules and forms of law. **Thayer v. Swift**, Har. 432.

**PARTIES:** The assignee of a judgment is the proper complainant and the assignor need not be made a party, unless there is a controversy between them touching the assignment, when the court will direct the assignor to be made a party for the protection of all parties. **Morey v. Forsyth**, Walk. 465; **Beach v. White**, Walk. 495. Also where the demand upon which the judgment was rendered has been assigned as security for an amount equal thereto. **Andrews v. Kibbe**, 12 Mich. 94. Where one of several judgment creditors is wholly irresponsible and destitute of property he need not be made a party. **Williams v. Hubbard**, 1 Mich. 446. Where stockholders are jointly and severally liable, it is not necessary that all should be joined as parties, as it is a well settled rule that when it is apparent that the parties are very numerous, who may be affected by the decree, and that to require the joinder of all would be virtually to deny any remedy, their joinder will not be insisted upon. **Pettibone v. McGraw**, 6 Mich. 445.

**AVERMENTS; VERIFICATIONS:** A creditor's bill must contain the averments required by rule. **Clark v. Davis**, Har. 227. The bill must affirmatively show, (1) a judgment; (2) an execution sued out on such judgment; (3) a return of the execution unsatisfied in whole or in part. **Smith v. Thompson**, Walk. 1; **Williams v. Hubbard**, 1 Mich. 448. As to the sufficiency of averments when land has been purchased with the debtor's money and conveyed directly to his wife, see **Hopson v. Payne**, 7 Mich. 334. The bill must be sworn to. **Clark v. Davis**, Har. 227. As to verification by an agent, see **Bergin v. Poupard**, Walk. 5.

**FRAUDULENT CONVEYANCES:** A person who takes title from

an insolvent debtor merely for the purpose of defrauding creditors is liable to them for its value. *Robinson v. Boyd*, 17 Mich. 128. A voluntary conveyance from husband to wife without valuable consideration is void in law as against creditors. *Fellows v. Smith*, 40 Mich. 689. See also *Heller, Aller Co. v. Ries*, 164 Mich. 502; *Keegan v. Loranger*, 118 Mich. 481; *Rohrabacher v. Walsh*, 170 Mich. 59. As to the affect of a secret agreement between the mortgagor and mortgagee, see *Bigelow v. Sheehan*, 150 Mich. 507. As to following funds fraudulently obtained which are invested in exempt property, see *Allen v. Crane*, 152 Mich. 380.

**PRIORITY; LIEN:** The creditor who first files his bill, by his diligence, acquires a right to have his debt paid out of the choses in action belonging to the debtor, before other creditors are paid who are less vigilant. But the statute does not make the filing of the bill a lien on the property of the debtor. *Jones v. Smith*, Walk. 116.

**INJUNCTION:** The only ground on which injunctions are granted against persons in possession of personal property and ostensibly the rightful owners upon an ex parte application, is the danger that such property may be lost to complainant if he succeeds in establishing his title. *Thayer v. Swift*, Har. 430. The filing of a creditor's bill and the obtaining of an injunction against the transfer of the debtor's property, gives the creditor a lien on the assets of the defendant, which takes precedence over the rights of the personal representative after the death of a debtor. *Savings Bank v. Duffield*, 157 Mich. 522.

**RECEIVER:** A receiver will not be appointed over a party charged with being a trustee for the benefit of creditors, when there is no allegation that he is insolvent, transient or irresponsible, or that the fund is in a hazardous condition. *Thayer v. Swift*, Har. 430. The pendency of a demurrer is no objection to granting an order for the appointment of a receiver. *Howard v. Palmer*, Walk. 391. The debtor cannot be compelled to make a general assignment of all his property including that which is exempt, to a receiver. *Remick v. Bradley*, 119 Mich. 399, 401.

**DEFENSE:** On a judgment creditor's bill the regularity of the judgment and execution cannot be inquired into. *Williams v. Hubbard*, 1 Mich. 446. A personal judgment or decree against one who has never been served with process is a mere nullity and cannot be made the basis of any equitable remedy. The debtor may make this defense, or any other person affected by the proceedings. *Tyler v. Peatt*, 30 Mich. 63. See *Trask v. Green*, 9 Mich. 358. The negligence of the sheriff in searching for the debtor's property is no defense. The debtor must look to the sheriff for his redress. *Bank v. Dorr*, Walk. 324. But it is a good defense if the sheriff, by the creditor's direction, omits or refuses to levy on property which the defendant offers to turn out. *Wharton v. Fitch*, Walk. 143.

**DEFENDANT'S EXAMINATION:** The examination of the defendant, under the rule, is not confined to the defendant's property or effects, but extends to any matter which he would be required to disclose by answer. Irregularity in the appointment of a receiver is no ground for defendant's objecting to submit to an examination concerning his property and effects. *Howard v. Palmer*, Walk. 391. Termina-

tion of proceedings upon the death of defendant. *Jones v. Smith*, Walk 115.

As to compelling more specific answers to interrogatories in relation to the property of the defendant, see *Crawford v. Wayne Circuit Judge*, 173 Mich. 109, 111.

**BILL IN AID OF EXECUTION:** Where a lien has been acquired by levy of execution, or where there is an outstanding execution in the hands of an officer and a fraudulent obstruction is interposed to prevent its being levied, a bill may be sustained for a discovery and to remove such obstruction. *Thayer v. Swift*, Har. 430; *Tarbell v. Millard*, 63 Mich. 250. But a bill in aid of execution can be filed only to reach those interests which are subject to sale at law. It cannot be filed to reach mere equitable interests. *Trask v. Green*, 9 Mich. 358; *Maynard v. Hoskins*, 9 Mich. 485. Compare *Cleland v. Taylor*, 3 Mich. 201. And the creditor must have first obtained a lien upon the property by the levy of his execution. *McKibben v. Barton*, 1 Mich. 213; *Cleland v. Taylor*, 3 Mich. 206; *Tyler v. Peatt*, 30 Mich. 65; *Griswold v. Fuller*, 33 Mich. 268. See *Eslow v. Mitchell*, 26 Mich. 500; *Millar v. Babcock*, 29 Mich. 526, and compare *Thayer v. Swift*, Har. 430; *Williams v. Hubbard*, Walk. 28; *Beach v. White*, Walk. 495. See, also, notes to Compilers' Section (12897). But a bill in aid of execution cannot be maintained in the following cases: If the judgment is invalid, *Trask v. Green*, 9 Mich. 358; *Tyler v. Peatt*, 30 Mich. 63. If the property levied upon is not subject to execution. *Trask v. Green*, 9 Mich. 358; *Maynard v. Hoskins*, 9 Mich. 458; *Harwood v. Underwood*, 28 Mich. 428. Nor when a man, while solvent, in good faith and not in anticipation of reverses, makes reasonable provision for his wife, for a debt incurred afterward. *Brown v. Vandermeulen*, 44 Mich. 522. See, also, *Keeler v. Ullrich*, 32 Mich. 87; *Hopson v. Payne*, 7 Mich. 334. Nor as against the conveyance of a homestead, which is not subject to execution. *Rhead v. Hounson*, 46 Mich. 243. A bill in aid of execution must be filed before sale thereon. *Cranston v. Smith*, 47 Mich. 189, 647; *Messmore v. Huggard*, 46 Mich. 558.

**BILL WITH DOUBLE ASPECT:** A bill may be filed both to reach mere equitable interests and in aid of an execution at law, such bill not being multifarious. *Clark v. Davis*, Har. 227; *Williams v. Hubbard*, Walk. 28. But such a bill cannot be maintained for both purposes, if filed before an execution has been returned unsatisfied. *McCullough v. Day*, 45 Mich. 45 Mich. 554; *Tarbell v. Millard*, 63 Mich. 250.

**EXCEPT WHERE SUCH TRUST, ETC.:** Where a wife, having separate estate when married, by will made her husband, an insolvent, the executor of her will, providing after other bequests, that he should have the use of the remainder during his lifetime, it was held that such will created a trust for the husband's benefit and charged him with the execution of it, and that the fund was beyond the reach of a creditor's bill, as the trust was not created by the defendant. *Cummings v. Corey*, 58 Mich. 494, 500. One may not declare a trust in his own property, reserving a beneficial interest in himself, which interest shall not be subject to proceedings by a judgment creditor. *Hackley v. Littell*, 150 Mich. 116.

**SEC. 437: C. L. '97, CONSTRUED:** *Turnbull v. Lumber Co.*, 55 Mich. 392; *Remick v. Bradley*, 119 Mich. 399, 400, 401. The court of chancery has no power to enforce a judgment by directing a sale of



property used as a cemetery, although the owner be a private corporation organized for financial profit. *Avery v. Cemetery Co.*, 127 Mich. 125. Strict observance of the statute in framing the bill required. *Campau v. Detroit Driving Club*, 144 Mich. 99. See, also, *Crawford v. Wayne Circuit Judge*, 173 Mich. 110.

FORMER LAW CITED: *Savings Bank v. Duffield*, 157 Mich. 528.

Where complainant filed bill by virtue of 4 Howell's Annotated Statute (2nd Ed.), (11965), for the purpose of establishing a boundary line and quieting title to land, and the litigation grew out of conflicting surveys, the evidence adduced in the trial was sufficient to establish the fact of the existence of the boundary fence for more than twenty years. *Parent v. Hodges*, 188 Mich. 69; 22 D. L. N., 779; 153 N. W., 1072; *Newcomb v. Montague*, 194 Mich. 74; 160 N. W. 405; *Grand Rapids Trust Co. v. Nichols*, 199 Mich. 133.

## CHAPTER VII.

### TIME AND PLACE OF HOLDING CIRCUIT COURTS.

#### (12303). Four Terms of Court in Each Year.

**SECTION 1.** In every county organized for judicial purposes, there shall be held at least four terms of court in each year.

**HISTORY:** Reenacts Sec. 2 of Act 157 of '51, being C. L. '57, (3412); as Am. '69, p. 8, Act 7, Imd. Eff. Jan. 30; C. L. '71, (4938); How. 6459; C. L. '97, (301), omitting all provisions relating to the regulation of the number of terms according to the number of inhabitants. This section supersedes C. L. '97, (301), and follows Sec. 8, Article VII. See Beecher's Annotated Michigan Constitution, '08, Section 8, Article VII.

#### (12304). Change of Time to Hold Court How Made.

**SEC. 2.** The times now fixed for holding the terms of court in the several counties, shall continue to be the times for holding such terms until changed in the following manner: The circuit court of any county may, by order entered upon the journal of said court, change the times of holding such terms in said county from time to time, but such change shall not be effective until the expiration of three months from the date of entry of such order.

**HISTORY:** This section supersedes Sec. 3 of Act 157 of '51, being C. L. '57, (3413); C. L. '71, (4939); as Am. '87, p. 178, Act 168, Imd. Eff. June 10; How. 6460; C. L. '97, (302), changed.

**TIME OF HOLDING TERMS OF CIRCUIT COURTS:** Heretofore the court was required to make an order every two years fixing the time for holding the terms of court for the next two years. This was required to be published at the expense of the state and the order was unchangeable for two years. This has been changed so that the orders existing at the time the act takes effect shall stand until revoked, but the court may at any time by a journal order change the time, such change not to be effective until the expiration of three months from the date of the order.

**CONSTRUED:** In conferring upon the circuit judge the power to fix the time for holding terms, the legislature has not divested itself of the power to change the times fixed by the judge. Whallon v. Judge, 51 Mich. 503, 508; McCall v. Judge, 146 Mich. 319, 325. In the

absence of any evidence as to the appointment of terms of court for the county, the recital in a judgment record that the decision was rendered at a regular term of court is conclusive. *Curtis v. Suprs.*, 154 Mich. 646.

(12305). **Appointment of Temporary Place by Judge Under Certain Circumstances.**

SEC. 3. Whenever it shall be deemed unsafe or inexpedient by reason of war, pestilence or other public calamity to hold any court at the time and place appointed therefor, or whenever there shall be no court house in any county, or when the court house shall for any cause be unsafe or unfit for the holding of any court, the judge or judges of the court may appoint any other place and time within the same county as a temporary place for holding such court. The place so appointed shall be deemed the court house of the county for the time being, for all purposes connected with said court.

**HISTORY:** This section merges and supersedes Secs. 13, 15, 16, R. S. '46, Ch. 96, being C. L. '57, (4059)-(4061)-(4062); C. L. '71, (5672)-(5674)-(5675); How. 7240, 42, 43; C. L. '97, (1104)-(1106)-(1107); and also supersedes Sec. 6 of Act 157 of '51, being C. L. '57, (3416); C. L. '71, (4942); How. 6464; C. L. '97, (305), changed in matter of notice.

**SEAT OF JUSTICE:** See note to Const. '50, VI, 11. *Whallon v. Judge*, 51 Mich. 512, 515.

**COURT HOUSE:** Court can not be lawfully held anywhere else than at the court house, except when the county has no court house at all. *Atty. Gen. v. Supervisors*, 33 Mich. 294.

**TERMS IN LANSING:** Sec. 18 of Act 125 of '95, provides: "Not less than two regular terms of the circuit court for the county of Ingham in said thirtieth judicial circuit shall be appointed and held in the city of Lansing and at the county seat of said county, respectively, in each calendar year, and special or adjourned terms of said court may be appointed or ordered and held at either the county seat of said county of Ingham or the city of Lansing in said county, each adjourned term to be holden where its respective term is held: Provided, That the common council of said city of Lansing, or the citizens thereof, shall furnish and provide, free of expense to said county, a suitable place for holding said court, within said city, and transacting the business thereof, and also a suitable and sufficient jail for the incarceration of prisoners during the sittings of said court, both to be inspected and approved by the judge of said court or the prosecuting attorney of said county which approval shall be in writing and shall be filed with the clerk of said county." And Sec. 22 of the same Act, as amended by Act 122 of '97, p. 139, provides, "A deputy clerk shall be appointed by the county clerk of Ingham county as provided by law, who shall attend upon each session of the court held in said city of Lansing, and shall maintain an office at said city of Lansing in the place appointed for holding said court"; and further provides

for the furnishing of such deputy, by the secretary of state, with local and public acts.

**CALHOUN COUNTY:** See Act 272 of '05, Compilers' Section (14549 et seq.). As to the effect of this act upon above section, see *McCall v. Calhoun Circuit Judge*, 146 Mich. 319.

**(12306). Appointment of Such Order Made by an Order in Writing.**

**SEC. 4.** Every such appointment shall be made by an order in writing, signed by the judge or judges making the same, and shall be published by advertisement, or in such other manner as shall be required in the order.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 96, being C. L. '57, (4060); C. L. '71, (5673); How. 7241; C. L. '97, (1105), with a slight change in phraseology, unchanged.

**(12307). Failure of Judges to Attend.**

**SEC. 5.** If from any cause the judge of any circuit or superior court shall fail to attend on the first day or any succeeding day of any term, said court shall stand adjourned until the next day in which court may be lawfully held, and shall stand adjourned from day to day until a judge lawfully authorized to hold said court, shall be in attendance. Said courts at law and in chancery, shall on all lawful days and times be deemed to be in actual session from the first day of any term until the first day of the next succeeding term, notwithstanding any formal adjournment thereof: And, if any judge authorized to hold such court, shall at any time be in attendance thereon, he shall have full power to hear, try and determine all causes, matters and proceedings within the jurisdiction of said court which may in a lawful manner be brought before him. Judges of circuit courts may hold court for each other.

**HISTORY:** This section merges and supersedes Sec. 4 of Act 157 of '51, being C. L. '57, (3414); as Am. '59, p. 148, Act 70, Imd. Eff. Feb. 7; C. L. '71, (4940); How. 6461; C. L. '97, (303); as Am. '03, p. 73, Act 57, Imd. Eff. Apr. 27; and Sec. 4, R. S. '46, Ch. 96, being C. L. '57, (4050); C. L. '71, (5663); How. 7231; C. L. '97, (1095); and also Acts 73 and 315 of '09, changed.

**ADJOURNMENTS:** Adjournments of the court from day to day during the same term are not continuances that must be stated in the record. *Owners of Ship Milwaukee v. Hale*, 1 Doug. 314.

**ABSENCE OF JUDGE:** Where it does not appear that the judge has failed to attend a term of court for five successive days, there is

no presumption of such nonattendance and this section is not controlling. *People v. McGarry*, 136 Mich. 316, 321.

**NEW TRIAL:** The Circuit Court shall on all lawful days and times be deemed to be in actual session from the first day of one term until the next succeeding term notwithstanding the formal adjournment of a regular or special session. *People v. Ayres*, 195 Mich. 274.

**FORMER LAW CITED:** *Curtis v. Suprs.*, 154 Mich. 655.

**JUDGE DESIGNATING ANOTHER:** In *Campbell v. Judge*, 155 Mich. 326, the court held that under the constitution of '50, Art. VI, 11, a judge disqualified to act in a cause could designate another judge to sit in such case. The provision of the Constitution of '50 referred to reads: "Judges of the circuit court may hold court for each other." The Constitution of '08, Art. VII, 8, provides that each judge shall hold court in his own circuit, "and in other circuits as may be provided by law."

**GOVERNOR DESIGNATING JUDGE:** See *Compilers'* (12144). (12144).

**PRESIDING JUDGE:** See *Compilers'* (14546).

**CHANGE OF VENUE:** See *Compilers'* (12341).

**TRANSFER OF CAUSES:** Judge disqualified. See *Compilers'* (12342).

#### (12308). Continuance Until Next Term.

**SEC. 6.** All causes and matters, of whatsoever name or kind, pending at any term of any circuit court, which shall not have been held because of the absence of the circuit judge, shall stand continued till the next term; and all persons bound by recognizance or otherwise to appear at any such court, either as witnesses or parties to any proceedings cognizable therein, shall be bound to appear at the next term of the circuit court appointed to be held in the county; and all such recognizances shall continue in force and be as binding and obligatory on the parties thereto as if no failure of a term had occurred, unless a new recognizance, approved according to law, shall be entered into for such appearance.

**HISTORY:** Re-enacts Sec. 5 of Act 157 of '51, being C. L. '57, (3415); C. L. '71, (4941); How. 6463; C. L. '97, (304), making a slight change to correct grammatical error, unchanged.

## CHAPTER VIII.

### JOINDER AND SEVERANCE OF CAUSES OF ACTION AND THE CONSOLIDATION OF ACTIONS.

#### (12309). Joinder of Causes of Action.

SECTION 1. The plaintiff may join in one action, at law or in equity, as many causes of action as he may have against the defendant, but legal and equitable causes of action shall not be joined; but when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant, the liability must be one asserted against all the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice, or when several suits shall be commenced against joint and several debtors, in the same court, the plaintiff may, in any stage of the proceedings, consolidate them into one action. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials, or whenever several suits shall be pending in the same court, by the same plaintiff against the same defendant for causes of action which may be joined, the court in which the same shall be prosecuted may, in its discretion, order the several suits to be consolidated into one action.

**HISTORY:** This section supersedes Sec. 1, R. S. '46, Ch. 100, being C. L. '57, (4186); C. L. '71, (5806); How. 7375; C. L. '97, (10087); and Sec. 2, R. S. '46, Ch. 100, being C. L. '57, (4187); C. L. '71, (5807); How. 7376; C. L. '97, (10088), making quite radical changes, however, and following the Federal Equity Rule No. 26, changed.

**JOINDER AND SEVERANCE OF CAUSES OF ACTION:** A radical change in respect to the joinder of causes of action in one suit has been made, in that a plaintiff may join as many causes of action as he may have against the defendant, excepting, however, that legal and equitable causes of action cannot be joined. This is subject to the right of the court to order separate trials in case it is made to appear that any such causes cannot be conveniently disposed of together. If there be more than one plaintiff, all the causes of action joined must be joint, and if more than one defendant, the liability must be asserted against all material defendants. In case the plaintiff brings

several suits where a single suit covering all the causes of action might have been brought, the court may in its discretion order them consolidated.

**CONSOLIDATION OF ACTIONS; UNDER FORMER STATUTE:** The consolidation of cross-actions is not authorized at common law or by statute, nor are parties allowed to stipulate that the same jury shall hear in one case and decide by one verdict a series of incompatible issues, which cannot be tried together without violating the fundamental principles of procedure. *Harris v. Sweetland*, 48 Mich. 110. Discretion given the court by the statute. *Id.* 112. See *Wisner v. Mabley Estate*, 70 Mich. 276.

**JOINDER OF CAUSES OF ACTION:** Plaintiff may join in one action, at law or in equity, as many causes of action as he may have against the defendant. *Stanton v. Stanton*, 197 Mich. 161.

**ABOLITION OF DISTINCTION; LAW AND EQUITY:** The distinction between actions at law and suits in chancery have not been abolished in Michigan. *Otto v. Village of Highland Park*, 204 Mich. 74.

### (12310). Joint Several Actions.

**SEC. 2.** When any person shall die, leaving heirs, either in the same or in different degrees; and where several persons shall be, in any other way, entitled to real estate as tenants in common, or as joint tenants, they may bring a joint action for the recovery thereof, or may bring several actions for their respective shares or interests.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 113, being C. L. '57, (4731); C. L. '71, (6386); How. 7974; C. L. '97, (11193). This section is also re-enacted by Compilers' (13364).

## CHAPTER IX.

### LIMITATION OF ACTONS.

#### (12311). The Period Within Which to Bring Action for the Recovery of Land.

SECTION 1. Hereafter no person shall bring or maintain any action for the recovery of any lands, or the possession thereof, or make any entry thereupon, unless such action is commenced or entry made within the time herein limited therefore, after the right to make such entry or to bring such action shall have first accrued to the plaintiff, or to some person through whom he claims, to-wit:

1. Within five years, where the defendant claims title to the land in question, by or through some deed made upon a sale thereof by an executor, administrator, guardian or testamentary trustee, or by a sheriff, or other proper ministerial officer, under the order, judgement, decree or process of a court, or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale; or through a devise in any will which shall have been probated in this state for fifteen years, during which period no suit in chancery has been brought to test the validity of such devise: *Provided*, That in cases where such fifteen year period has already elapsed such rights of entry or actions shall be barred after two years from the passage hereof, or in case such right has not accrued, then after two years from the accruing thereof;

2. Within ten years, where the defendant claims title under a deed made by some officer of this state, or of the United States, authorized to make deeds upon the sale of lands for taxes assessed and levied within this state;

3. Within fifteen years in all other cases: *Provided*, That the provisions of this section shall not apply to actions brought by any municipal corporation, for the recovery of the possession of any public highway, street or alley, or any other public grounds.

HISTORY: This section merges and supersedes Sec. 22, R. S. '46,



Ch. 78, being C. L. '57, (3115); C. L. '71, (4621); How. 6101; C. L. '97, (9162); and Sec. 1, R. S. '46, Ch. 139, being C. L. '57, (5350); as Am. '63, p. 388, Act 227, Eff. January 1, 1864; C. L. '71, (7137); How. 8698; as Am. '89, p. 10, Act 8, Eff. Oct. 2; C. L. '97, (9714); as Am. '11, p. 416, Act 243, Eff. Aug. 1; and Sec. 50, R. S. '46, Ch. 79, being C. L. '57, (3088); C. L. '71, (4594); How. 6074; C. L. '97, (9127); and also Act 46 of '07, p. 48, Imd. Eff. Apr. 17.

**CONSTITUTIONALITY:** The legislature has general power to pass such laws provided they do not destroy perfected rights. *Price v. Hopkins*, 13 Mich. 318; *Groesbeck v. Seeley*, 13 Mich. 343; *Harrison v. Metz*, 17 Mich. 477; *St. Mary's Power Co. v. Water Power Co.*, 133 Mich. 474. The general power of the legislature to pass statutes of limitation and give them a retroactive effect cannot be doubted; but a definite time must be fixed, within which all suits where the right of action has accrued, must be brought. *Ludwig v. Stewart*, 32 Mich. 28; *Parsons v. Judge*, 37 Mich. 287; *Krone v. Krone*, 37 Mich. 307. The legislature may extend or repeal a statute of limitations or abolish the rule of adverse possession, so as to affect cases where the period has not already run, or title been previously acquired. *Klatt v. Detroit*, 162 Mich. 190. But cannot impose a liability or a lien upon land *ex post facto*. *Id.* The legislature can limit the time for bringing suit against an adverse holder, even if his possession began under void proceedings. *Toil v. Wright*, 37 Mich. 102.

**CONFLICTING STATUTES:** As to whether the amendment of this section by Act 243 of '11 and its re-enactment by the Judicature Act of '15 repeals Section 73 of Act 262 of '99, Compilers' Section (4070), and Section 73a of Act 58 of '07, Compilers' Section (4071), relative to the time within which action must be brought to enforce a tax deed, see *St. Mary's Power Co. v. Water Power Co.*, 133 Mich. 475, where the same situation arose relative to prior amendments. See also *Pense v. Miller*, 140 Mich. 205.

**EARLIER LIMITATION LAWS:** The first statute of limitations in this state was passed May 15 '20. *Lastly v. Cramer*, 2 Doug. 310. This case considers several of the earlier provisions as to limitation of actions. This statute of '20 continued in force until repealed in '38, *Hulburt v. Merriam*, 3 Mich. 160. It is found in R. L. '27, p. 255; R. L. '33, p. 570; Terr. Laws, 1, 628. Other Acts; Act of Feb. 26, '21; R. L. '27, p. 218; Terr. Laws, 1, 796; repealed by R. S. '38, Act of Nov. 5, '29, p. 95; R. L. '33, p. 408; *May v. Rumney*, 1 Mich. 1; *Proctor v. Bigelow*, 38 Mich. 284; *Campau v. Dubois*, 39 Mich. 274. Both the Acts of '20 and '29 were repealed by R. S. '38, p. 693; R. S. '38, p. 573 provided a new statute of limitations. See *Campau v. Chene*, 1 Mich. 410; *Lastly v. Cramer*, 2 Doug. 307; *Joy v. Thompson*, 1 Doug. 373; *Riopelle v. Gilman*, 23 Mich. 33; *Albright v. Cobb*, 34 Mich. 316; *Van Vleet v. Blackwood*, 39 Mich. 728; *Miller v. Davis*, 106 Mich. 304. Act 86 of '42; *Perry v. Hepburn*, 4 Mich. 165; *Gilman v. Riopelle*, 18 Mich. 145; *Porter v. Van Dyke*, 31 Mich. 176. Act 40 of '43; *Lastly v. Cramer*, 2 Doug. 315. The limitation laws in R. S. '46 are substantially the same as those contained in this chapter, the change being indicated by the annotation.

**STATUTES OF LIMITATION:** Reasons for the enactment of the earlier ones. *Lastly v. Cramer*, 2 Doug. 314. Statutes of limitation are statutes of repose. *Id.* 308; *Jewitt v. Pettit*, 4 Mich. 510; *Jenny v.*

Perkins, 17 Mich. 33; Toll v. Wright, 37 Mich. 102; McKisson v. Davenport, 83 Mich. 215; See Hardy v. Powell, 40 Mich. 413; Green v. Angelmire, 77 Mich. 168; Palmer v. Palmer, 36 Mich. 487. Limitation laws are entitled to a fair construction, Palmer v. Palmer, 36 Mich. 487. They must not be defeated by a strictness of construction, it was never designed they should be subject to. Toll v. Wright, 37 Mich. 102; McKisson v. Davenport, 83 Mich. 215. And they are to be construed to operate only prospectively unless their terms clearly indicate a different intent. Harrison v. Metz, 17 Mich. 377; Ludwig v. Stewart, 32 Mich. 27; Price v. Hopkin, 13 Mich. 318; Stambaugh v. Snoblin, 32 Mich. 296; Smith v. Aud. Gen., 20 Mich. 398; McKisson v. Davenport, 83 Mich. 215. The idea of a statute of limitations is to take away the remedy of a party who has been unreasonably negligent in the assertion of his rights. Toll v. Wright, 37 Mich. 102; Showers v. Robinson, 43 Mich. 505; Call v. O'Harrow, 51 Mich. 100. Such laws are founded (1) on the probability that the claim is satisfied; (2) on the inexpediency of letting a stale claim be raised after long acquiescence; the statute is one of repose as well as a presumption. Jewett v. Pettit, 4 Mich. 510; Jenny v. Perkins, 17 Mich. 33. It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought. Price v. Hopkin, 13 Mich. 324; McKisson v. Davenport, 83 Mich. 215. Statutes of limitation place one's title beyond question; not only as defendant but as plaintiff. Toll v. Wright, 37 Mich. 97. Limitation laws do not apply to those actually or constructively in possession. Groesbeck v. Seeley, 13 Mich. 343. Limitation laws cannot run against the state unless expressly permitted. Crane v. Reeder, 21 Mich. 24. See Compilers' Section (12321). And yet the state cannot give a valid title, if the limitation law has established an adverse one. Chamberlain v. Ahrens, 55 Mich. 111. The general provisions of the statute of limitations apply to claims against decedents' estates. Sperry v. Moore's Estate, 42 Mich. 353. When once the statute begins to run, no subsequent disability will arrest it. Ten Eyck v. Wing, 1 Mich. 45. An injunction restraining the prosecution of legal proceedings interrupts the running of the statute of limitations. Steele v. Bliss, 166 Mich. 595. But not as to one not a party to suit. Park Ass'n v. Railroad, 172 Mich. 190. It is a uniform rule that the law of the forum applies. Home Life Ins. Co. v. Elwell, 111 Mich. 689, citing Howard v. Coon, 93 Mich. 442. Knowledge of hostile possession starts the running of the statute. Howatt v. Green, 139 Mich. 292. The statute does not begin to run against a remainderman until the termination of the precedent estate. Porter v. Osmun, 135 Mich. 362. A right of way arising from necessity is limited in duration to the continuance of the necessity, and the statute does not commence until the necessity ceases. Ann Arbor Fruit Co. v. Railroad, 136 Mich. 604. As to the user of highways, see Campau v. Detroit, 104 Mich. 560. An action for a continuing nuisance to real property is not barred by limitation except as to accrued damages that have already come within statute. Phelps v. Detroit, 120 Mich. 452. See also, Felton v. Wedthoff, 185 Mich. 72. An expectant estate cannot be defeated by the act of a life tenant. Jeffers v. Sydnam, 129 Mich. 443. See Compilers' Section (11550). When the chain of record title is broken, law presumes those long in possession to have acquired title through owners holding prior to defect in record. Dawson v. Boat

Club, 125 Mich. 441. When the statute of limitations is pleaded the burden is upon the plaintiff to show that he began his action within the statute period. *Offley v. Garlinger*, 161 Mich. 355. As to riparian rights by prescription, see *Rickels v. Booming Co.*, 189 Mich. 111. Statutes of limitations barred by estoppel, see *Albert v. Patterson*, 172 Mich. 641. See *Ford v. Wright*, 114 Mich. 127; *Sheldon v. Railroad*, 161 Mich. 503; *Klatt v. Detroit*, 162 Mich. 186; *LeRoy v. Collins*, 176 Mich. 465.

**LIMITATIONS IN EQUITY:** Equity gives no relief to one who has allowed his legal remedy to become outlawed. *Webster v. Gray*, 37 Mich. 37; *Smith v. Davidson*, 40 Mich. 632; *Lashbrooks v. Hatheway*, 51 Mich. 124; *Baent v. Kennicutt*, 57 Mich. 268. Neither does the equitable action of assumpsit. *Germ. Am. Seminary v. Keifer*, 43 Mich. 112. Equity applies the statute of limitations by analogy. *Id.* As often as parliament limited the time of actions and remedies in legal proceedings to a certain period, the court of chancery adopted that rule and applied it to similar cases in equity. *Campau v. Chene*, 1 Mich. 405. See further as to limitations in equity. *McLean v. Barton*, Har. 279; *Campau v. Van Dyke*, 15 Mich. 371; *Jenny v. Perkins*, 17 Mich. 33; *McKinney v. Miller*, 19 Mich. 142; *Harlow v. L. S. Iron Co.*, 41 Mich. 583; *Hatch v. St. Joseph*, 68 Mich. 230; *Young v. Young*, 200 Mich. 236.

Adverse possession may divest an equitable title as well as a legal title. *Klatt v. Detroit*, 162 Mich. 191. While equity regards limitation laws, they are often disregarded when applying the rule of laches. *Rodgers v. Beckel*, 172 Mich. 544. In construing limitation laws equity regards the property affected rather than the character of the instrument which may affect it. *McKinney v. Miller*, 19 Mich. 151.

**MORTGAGE FORECLOSURE:** Outlawry of a debt will not affect the remedy by foreclosure, except that no personal decree can be taken. *Mich. Ins. Co. v. Brown*, 11 Mich. 265; *Powell v. Smith*, 30 Mich. 451; *Webber v. Ryan*, 54 Mich. 70; *Lashbrooks v. Hatheway*, 52 Mich. 124; *Baent v. Kennicutt*, 57 Mich. 268. See also, *Goodrich v. Leland*, 18 Mich. 110; *McKinney v. Miller*, 19 Mich. 142; *Detroit Sav. Bank v. Truesdall*, 38 Mich. 431; *Shelden v. Warner*, 45 Mich. 638; *Curtis v. Goodenow*, 24 Mich. 18; *McIntire v. Conrad*, 93 Mich. 533; *Stringer v. Gamble*, 155 Mich. 300. The statute of limitations cannot be enforced against a mortgagee when it is not shown when the mortgage matured. *McCrath v. Myers*, 126 Mich. 204.

**DOWER:** Ejectment for dower is barred by lapse of time under the provisions of this statute. *Proctor v. Bigelow*, 38 Mich. 282; *King v. Merritt*, 67 Mich. 215; *Beebe v. Lyle*, 73 Mich. 122. But prior to this statute, see *May v. Rumney*, 1 Mich. 1; *Proctor v. Bigelow*, 38 Mich. 283. A widow occupying land under her dower cannot acquire adverse possession against the heir. *Carpenter v. Carpenter*, 126 Mich. 222. A widow's right of action for dower accrues upon the death of the husband or upon divorce under Compilers' Section 11415, and is not barred for limitation until fifteen years therefrom. *Moross v. Moross*, 132 Mich. 203. Dower may be barred by adverse possession. *Butcher v. Butcher*, 137 Mich. 392.

**RIGHT OF ENTRY:** Must be enforced within the period limited by the statute. *Cook v. Hopkins*, 68 Mich. 518.

**ADVERSE POSSESSION:** Adverse possession of lands for the

statutory period bars action for their recovery. *Bower v. Earle*, 18 Mich. 367; *Campau v. Dubois*, 39 Mich. 274; *Campau v. Campau*, 14 Mich. 31; *Burr v. Stark*, 66 Mich. 656. That adverse possession, which is required to constitute a bar to the assertion of a legal title by the owner of it, or by one against whom the adverse occupant brings ejectment, must be an actual, continued, visible, notorious, distinct and hostile possession. *Yelverton v. Steele*, 40 Mich. 541-2; *Sparrow v. Hovey*, 44 Mich. 63; *Cook v. Clinton*, 64 Mich. 314; *Beecher v. Ferris*, 101 Mich. 537. A claim under a tax title is necessarily hostile to the owner of the original title. *Sparrow v. Hovey*, 44 Mich. 63. The word "adverse" in itself means "hostile and distinct" when applied to qualify or define the possession of lands. *Miller v. Beck*, 68 Mich. 79. Adverse possession requires exclusive occupancy known to, and against the will and consent of, those who are interested and have the right to contest the possession. *Marble v. Price*, 54 Mich. 466. There must be actual occupancy, as distinguished from constructive possession of a portion or all of the premises claimed. *Cook v. Clinton*, 64 Mich. 314. Not necessarily living upon the property; if the property is enclosed and cultivated, that would be sufficient occupancy, and if crops are continually growing upon the premises, that will be a visible occupancy. *Id.* An owner of outlots which he does not fence or cultivate may establish adverse possession by cutting grass and timber, ditching, paying general and special taxes and openly claiming and using the land. *Curtis v. Campbell*, 54 Mich. 340. Adverse possession does not require that the premises be enclosed. *Sauers v. Giddings*, 90 Mich. 54. Nor require *pedis positio*. *Sherrard v. Cudney*, 134 Mich. 200. Adverse possession distinguished from intermittent trespass. See *Kingston v. Guck*, 155 Mich. 265. One in possession may buy outstanding claims of title, without acknowledging the validity of the title bought. *Ripley v. Miller*, 165 Mich. 51. When one enters upon land under color of title, with claim of ownership, acts of user which are continuous and indicate unequivocally that it is appropriated exclusively to the individual use and ownership of the person making such entry are sufficient to render possession adverse. *Murray v. Hudson*, 65 Mich. 675. Adverse possession need not be based on color of title, and it may become perfect even though the possessor originally had no shadow of title. *Campau v. Lafferty*, 50 Mich. 114. But the possession must be such as to give the real owner cause of action. *Id.* *Klatt v. Detroit*, 162 Mich. 191. Actual knowledge of adverse possession is not required when the circumstances are such that the contiguous holder ought to have such knowledge. *Bird v. Stark*, 66 Mich. 656. Hostile claim known to the owner not sufficient; there must be adverse possession against the owner. *Lasley v. Kniskern*, 152 Mich. 247. Adverse possession against third parties not sufficient. *Id.* In order to advise the public of title by adverse possession, notice of, and acquiescence in, the same, must be shown. *Village of Red Jacket v. Pinton*, 126 Mich. 194. See also, *Williams v. Fox*, 152 Mich. 216. Entry under the deed describing land as a single tract gives possession co-extensive with the deed. *Bingham v. Reau*, 139 Mich. 256. See also *Lang v. Mining Co.*, 145 Mich. 372. Adverse possession cannot be acquired by collusively obtaining possession from the tenant. *Williams v. Fox*, 152 Mich. 217. Possession under a void lease is not ad-

verse. *Jasper v. Martin*, 161 Mich. 341. A mere permissive possession, however long continued, cannot ripen into a title by adverse possession. *Id.* Possession by authority of a public dedication is not adverse possession. *Patrick v. Association*, 120 Mich. 185. Continued wrongful diversion of water by a riparian owner becomes adverse. *Kennedy v. Water Co.*, 173 Mich. 474. A boundary fence not on the correct line, but built as a temporary expedient, cannot give adjoining owner adverse possession. *Pugh v. Shindler*, 127 Mich. 194. But this rule is not applicable to grantee without notice of the nature of the fence. *Id.* See also, *F. H. Wolf Brick Co. v. Lonyo*, 132 Mich. 166; *Lamb v. Lamb*, 139 Mich. 168; *Dawson v. Boat Club*, 142 Mich. 619; *Veltmans v. Kurtz*, 167 Mich. 416; *Sheldon v. R. R.*, 161 Mich. 514. Adverse use of right of way over private property for the statutory period creates a private alley. *Leete v. Roney*, 127 Mich. 92. A right of way can be acquired by adverse possession, the same as title to the fee. *Bean v. Bean*, 163 Mich. 398. When a right of way is first held by permission, and then adversely, the time when it was used by permission cannot be added to the period of hostility, to come within the statute. *Moore v. Bulgreen*, 153 Mich. 265. The actual possession of a tenant in common will not be presumed adverse to that of his co-tenants, and will not affect their rights unless under a claim of exclusive right. Such exclusive claim and denial of their right should be clear and unambiguous and brought home to the knowledge of the co-tenants, either by express notice or by implication. *Campau v. Campau*, 44 Mich. 34. For effect of a deed of the entirety of the property, by a tenant in common, see *Brigham v. Reau*, 139 Mich. 256. A husband cannot hold adversely to his wife, premises of which they are in joint occupancy as a family. *Hendricks v. Rasson*, 53 Mich. 575. If the land owner remains inactive or acquiesces in the possessions the holding will be deemed adverse. *Bower v. Earle*, 18 Mich. 367. But the statute does not run against such owner so long as the occupant acquiesces in his right to possession.—*Id.* Adverse possession cannot begin until there is some one to dispute adverse right claimed. *Marvin v. Price*, 54 Mich. 466. Adverse possession must be clearly shown and not left to inference. *Yelverton v. Steele*, 40 Mich. 538. It may be shown by the claims and assertions of tenants, and if these are made in the ordinary course of possession and not under a dispute or litigation, they are admissible as explanatory and for what they are worth. *Jacobs v. Callaghan*, 57 Mich. 13. A question for the jury. *McCall v. Wells*, 55 Mich. 171; *Whitford v. Crooks*, 54 Mich. 261. See, also, as to adverse possession. *Price v. Hopkins*, 13 Mich. 322; *Hamblin v. Warner*, 30 Mich. 95; *Perkins v. Nugent*, 45 Mich. 156; *Case v. Green*, 53 Mich. 615; *Cook v. Rounds*, 60 Mich. 310; *Kirby v. Bellemer*, 70 Mich. 106; *Beecher v. Galvin*, 71 Mich. 392; *Gifford v. Gifford*, 100 Mich. 258; *Watkins v. Green*, 101 Mich. 499; *Chabert v. Russell*, 109 Mich. 571; *Matthews v. Ry. Co.*, 110 Mich. 170; *Harrison v. Spencer*, 110 Mich. 215; *Lumley v. Haggerty*, *Id.* 552; *Beck v. Schick*, *Id.* 665; *Schafer v. Hauser*, 111 Mich. 622; *Tole v. Wright*, 37 Mich. 93; *Beecher v. Ferris*, 110 Mich. 537; 112 Mich. 584; 117 Mich. 108; 124 Mich. 9; *Burke v. Douglas*, 115 Mich. 197; *Rogers v. Day*, 115 Mich. 664; *People v. Warner*, 116 Mich. 228; *Smeberg v. Cunningham*, 96 Mich. 378, (and cases cited in note); *Dawson v. Boat Club*, 125 Mich. 441; *McKee v. Grand Rapids*, 133 Mich. 279; *St. Mary's Power*

Co. v. Water Power Co., 133 Mich. 470; Howatt v. Green, 139 Mich. 291; S. G. R. Mining Co. v. R. R., 142 Mich. 620; Ross v. Guentherodt, 142 Mich. 603; Triece v. S. Haven, 154 Mich. 129; Dille v. Longwell, 163 Mich. 439; Tyler v. Wright, 164 Mich. 606; Merritt v. Westerman, 165 Mich. 536; Stearns Salt & Lumber Co. v. Newburgh, 170 Mich. 324; Walton Cranberry Co. v. Seamon, 171 Mich. 539; Fuller v. Swensberg, 106 Mich. 305; Henry v. Henry, 122 Mich. 6; City of St. Joseph v. Seel, 122 Mich. 70; Heiss v. Adams, 149 Mich. 645; Lamb v. R. R., 150 Mich. 340; L. S. & M. S. Ry. Co. v. Johnson, 157 Mich. 115; Weher v. Detroit, 159 Mich. 14; Menter v. Baptist Church, 159 Mich. 21; Butcher v. Burns, 181 Mich. 17; Conner v. Detroit Terminal R. R. Co., 183 Mich. 241; Carlson v. Wis. Land & Lumber Co., 186 Mich. 212; Donahue v. Vosper, Dec. 1915, 189 Mich. 78; L. S. & M. S. Ry. Co. v. Sterling, Dec. 1915, 189 Mich. 366.

**CONTINUITY OF POSSESSION BROKEN:** The continuity of adverse possession is broken by a decree requiring the occupant to convey the land, even if the actual possession is not disturbed. The decree has the effect of a voluntary conveyance. Gower v. Quinlan, 40 Mich. 572. Tearing down a fence between one's self and next door neighbor, after asserting a right to premises enclosed by it, is a mere trespass and does not break his adverse possession. Donavan v. Bissell, 53 Mich. 462. It is not broken by deeding the land away, if the grantor continues in possession and takes back a mortgage for purchase money, which he forecloses and becomes himself the purchaser. Whitford v. Crooks, 54 Mich. 261. Mere assessment of land to a claimant and payment of taxes by him are not in and of themselves sufficient to continue an adverse possession. Miller v. Davis, 106 Mich. 303.

Separate successive dispossessions cannot be tacked so as to constitute a single continuous possession unless there is privity of estate between them. Sheldon v. Railroad, 161 Mich. 510; L. S. & M. S. Ry Co. v. Sterling, Dec. 1915, 189 Mich. 366. But a grant of property may include other land held adversely in the same inclosure and not excepted or described in the deed without breaking the continuity of possession. Gildea v. Warren, 173 Mich. 28; See also, Harrison v. Spencer 110 Mich. 215; Darrow v. Village of Homer, 122 Mich. 229; Dawson v. Boat Club, 125 Mich. 441.

**TITLE BY ADVERSE POSSESSION:** The doctrine of title by adverse possession must be strictly construed. Yelverton v. Steel, 40 Mich. 538. The title acquired by adverse possession constitutes a legal title. Miller v. Miller, 100 v. 563. See Barnard v. Brown, 112 Mich. 452. Where the adverse holder has acquired a perfect right in the law to defend his possession, he has for all practical purposes a title and may maintain suits upon it against parties afterwards found upon the land. Bunce v. Bidwell, 43 Mich. 546. And this, notwithstanding his possession originated in error. *Id.*, citing Smith v. Hamilton, 20 Mich. 433; Dupont v. Starring, 42 Mich. 492; Chapman v. Crooks, 41 Mich. 595. In an action of ejectment, title by adverse possession may be shown by the defendant under a plea of the general issue. Miller v. Beck, 68 Mich. 76. The extent of the possession which secures a title in this way is a fact to be established on the trial. Green v. Anglemire, 77 Mich. 171. As to the rules respecting the acquisition of title by adverse possession as against a co-tenant,

see *Fuller v. Swensberg*, 106 Mich. 314, and cases cited. See, also, *Weshgyl v. Schick*, 113 Mich. 22; *Brigham v. Reau*, 139 Mich. 256. Title by adverse possession is a marketable title. *Barnard v. Brown*, 112 Mich. 454; *Cass Farm Co. v. Detroit*, 139 Mich. 319; See *Menter v. Church*, 159 Mich. 21.

**STREETS AND HIGHWAYS; ADVERSE POSSESSION:** It was formerly the rule that title could be acquired by adverse possession of property within the limits of a street. *Flynn v. Detroit*, 93 Mich. 590; citing *Big Rapids v. Comstock*, 65 Mich. 78; *Essexville v. Emery*, 90 Mich. 183. And in a public alley. *Vier v. Detroit*, 111 Mich. 646. See further, *Wyman v. St. Johns*, 100 Mich. 571. But this rule was abolished by Act 46, '07, re-enacted in substance by subsection 3 of this section. As to the effect of adverse possession of a city street acquired before the passage of Act 46, '07, and for a general review of the subject, see *Pastorino v. Detroit*, 182 Mich. 5. See also, *Crosby v. Greenville*, 183 Mich. 452; *Loranger v. Flint*, 185 Mich. 454; *Felton v. Wedhoff*, 185 Mich. 78; *Mendel v. Poland*, 200 Mich. 577.

**TAX DEEDS:** See Compilers' Section (4070)-(4071). Title by adverse possession can be acquired in five years under a void tax deed. *Pence v. Miller*, 140 Mich. 205. See also *St. Mary's Power Co. v. Water Power Co.*, 133 Mich. 475. But a tax deed void on its face affords no protection under the statute of limitations. *Fitschen v. Olson*, 155 Mich. 323. A husband cannot under a tax deed acquire adverse possession against his wife. *Ward v. Nestell*, 113 Mich. 189. The holder of a tax deed cannot acquire possession under his deed by collusively obtaining possession from a tenant. *Williams v. Fox*, 152 Mich. 217. As to land deeded to state for delinquent taxes, see *State Land Com'r v. Auditor General*, 131 Mich. 153; See also, *Chandler v. Clark*, 151 Mich. 167; *Groesbeck v. Seeley*, 13 Mich. 339; *Paldi v. Paldi*, 84 Mich. 346; *Jeffers v. Sydnam*, 129 Mich. 440; *Carnell v. Parr*, 161 Mich. 435; *Fitschen v. Olson*, 155 Mich. 320; *Merritt v. Westerman*, 180 Mich. 449; *Holmes v. Soule*, 180 Mich. 526; *Jacques v. Bosman*, 181 Mich. 495; *Marsh v. Breen Iron Co.*, 181 Mich. 204; *Wolverine Land Co. v. Jerome*, Sept., 1915, 188 Mich. 66; *McVicar v. Kneeland*, 196 Mich. 475.

**FIRST:** It is only when the suit brings in controversy the validity of the sale and the title thereunder that this five-year limitation applies. *Showers v. Robinson*, 43 Mich. 502; *Donavan v. Ward*, 100 Mich. 605. The statute was designed to compel parties who would contest judicial sales for irregularities or defects to do so within a reasonable time; but if the case is one in which there neither has been nor could be a judicial sale, because no action of a court has ever authorized one, the statute has no application. *Millar v. Babcock*, 29 Mich. 528. See *McVickar v. Filer*, 31 Mich. 304. An administrator's sale, when void for want of jurisdiction to order it, is not within the protection of this provision. *Toll v. Wright*, 37 Mich. 93. Where actions for the recovery of lands held under sales by executors, administrators or guardians are barred by this section, the lands cannot be reached in equity. *Smith v. Davidson*, 40 Mich. 632. See note "Limitation in equity" to this section.

The U. S. District Court is a tribunal "within the state," within the meaning of this subdivision. *Potter v. Martin*, 122 Mich. 547. Plaintiff must show that his action was commenced within the time al-

lowed. *Stewart v. Ashley*, 34 Mich. 187-8. See *Kelley v. Edwards*, 38 Mich. 213; *Watson v. Brewing Co.*, 61 Mich. 595, 607; *Averill v. Bank*, 114 Mich. 20; *Chandler v. Clark*, 151 Mich. 167; *Park Ass'n v. Railroad*, 172 Mich. 167; *Hunt v. Stevens*, 174 Mich. 508; *Semer v. Auditor Gen.*, 133 Mich. 576.

**SECOND:** To create a bar under this subdivision there must be shown an adverse holding under the tax deed for the period prescribed. *Yelverton v. Steel*, 40 Mich. 538; *Sparrow v. Hovey*, 44 Mich. 64; *Perkins v. Nugent*, 45 Mich. 156. See *Yelverton v. Hilliard*, 38 Mich. 355. A decree quieting title was granted upon a showing of an undisturbed possession for more than twenty years, without reference to the validity of the tax deed. *Hardy v. Powell*, 40 Mich. 413. Ejectment for land held under a tax deed is barred after ten years' adverse possession. *Chamberlain v. Ahrens*, 55 Mich. 111. After that length of occupancy, parties entering under tax titles whether good or bad, are unprotected. *Reilly v. Blaser*, 61 Mich. 399. See also, *Carmell v. Parr*, 161 Mich. 435; *Pence v. Miller*, 140 Mich. 204.

A widow's right or dower is based upon the statute and not upon decree, and therefore not barred within the fifteen years. *Moross v. Moross*, 132 Mich. 204. See also, *Hyne v. Osborn*, 62 Mich. 235; *Big Rapids v. Comstock*, 65 Mich. 78; *Bird v. Stark*, 66 Mich. 654; *Benedict v. Beurman*, 90 Mich. 400; *Dolahanty v. Lucey*, 101 Mich. 116, 118; *Chapman v. Sauk Ste. Marie*, 146 Mich. 24; *Kingston v. Guck*, 155 Mich. 269; *West Michigan Park Association v. Railroad*, 178 Mich. 179.

Where defendant claims title by adverse possession under P. A. '85, No. 153, Sec. 115, and he has been in possession of the premises for more than five years after the execution of the last tax deed, and where the plaintiff brought ejectment to recover possession of the premises under the tax deeds for the years '93 and '94 issued in '97 and '98 respectively, the case is controlled by a later statute, P. A. '93, No. 206, on the ground that the tax deeds under consideration were acquired after the passage of this act. Furthermore this act contained no limitation clause and in effect repealed all acts contravening its provisions. *Wolverine Land Co. v. Jerome*, 188 Mich. 66.

See *LeRoy v. Collins*, 173 Mich. 465; *Gildea v. Warren*, 173 Mich. 28; *Kennedy v. Niles Water Supply Co.*, 173 Mich. 474.

Recovery in a suit in ejectment may be defeated by estoppel, by deed, by judgment, and by the statute of limitations. *Park Ass'n v. Pere Marquette R. Co.*, 172 Mich. 190.

The defendants are estopped from pleading the statutes of limitations, where an ex parte order allowing defendant to file a bill of review and staying proceedings was improvidently granted. *Albert v. Paterson*, 172 Mich. 641; *Steele v. Bliss*, 166 Mich. 593, 37 L. R. A. (N. S.) 859. It is well settled in this State that the rights of flowage of lands may be gained by prescription. *Wallon Cranberry Co. v. Seamon*, 171 Mich. 101; *Williams v. Barber*, 104 Mich. 51; *Hoag v. Place*, 93 Mich. 450; 18 L. R. A. 39; *Cornwell Manfg. Co. v. Swift*, 89 Mich. 503; *Shearer v. Middleton*, 88 Mich. 621; *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797. Where, in an action of ejectment, there is evidence showing that the grantor of plaintiff recognized the title of the record owner by a deed being executed to one of them, but



which was found never to have been delivered, the conflicting evidence in regard to that transaction presented a question for the jury and was properly submitted. *Tyler v. Wright*, 171 Mich. 579; See 164 Mich. 606; *Thomas v. Sullivan*, 138 Mich. 265. It is for the jury to decide, under the circumstances in question, whether the open, visible, and notorious possession was, or was not, a hostile possession. *Stearns Salt & Lumber Co. v. Newberg*, 170 Mich. 330. An injunction taken out to restrain the sale of real estate under an execution levy interrupts the running of the Statute of Limitations relative to execution liens on real estate. *Steel v. Bliss*, 166 Mich. 593, 37 L. R. A. N. S.) 859. The right to and the use of the right of way may be acquired by adverse possession or prescription the same as title to fee of the land. *Bean v. Bean*, 163 Mich. 395. See *Dille v. Longwell*, 163 Mich. 439. The legislature has power to extend or repeal a statute of limitation or abolish the rule of adverse possession, and that such law will apply to cases where the period has not already run, or title been previously acquired, but that the provision as to the Statute of Limitations applies only to "the debt against the owner," etc, therein provided for, according to the words of the statute *Klatt v City of Detroit*, 162 Mich. 190.

A mere permissive possession, or one consistent with the title of another, however long continued, can never ripen into a title of adverse possession. *Township of Jasper v. Martin*, 161 Mich. 341; *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613; *Butler v. Bertrand*, 97 Mich. 59; *Perkins v. Nugent*, 45 Mich. 378. The general rule is that, when the statute of limitations is pleaded, the burden is upon the plaintiff to show that he began his action within the statute period. *Offley v. Garlinger*, 161 Mich. 355; *Belden v. Blackman*, 124 Mich. 667; *Ayres v. Hubbard*, 71 Mich. 594. It is the duty of the defendant to show that he has a prescriptive right. *Offley v. Garlinger*, 161 Mich. 667. Under C. L. '97, (9714), it has been held that this section of the statute protects the person entering under tax titles after ten years' occupancy. *Carmell v. Parr*, 161 Mich. 435; *Reilly v. Blaser*, 61 Mich. 399. The rule is that separate successive disseisins cannot be tacked so as to constitute one and a single continuous possession; unless there is privity of estate between the successive parties in possession, each coming in as the transferee of the possessory rights of his predecessor. *Sheldon v. Michigan Central R. Co.*, 161 Mich. 503. Notice to the plaintiff of the adverse claim was sufficient where the continued occupation of the premises by the defendant and their predecessors in title of the premises in question as a home, coupled with the payment of taxes thereon for upwards of forty years. *Lake Shore, etc., R. Co. v. Johnson*, 157 Mich. 115. The complainant is not precluded from claiming title by adverse possession of anything beyond the lot lines where he took title to lots by description according to numbers given on the recorded plat of the village. *Triece v. City of South Haven*, 154 Mich. 129.

See *Lamb v. Pontiac, etc., R. Co.*, 150 Mich. 344; *Robson v. State Land Commissioner*, 148 Mich. 21; *Chafman v. City of Sault Ste. Marie*, 146 Mich. 25; *Dawson v. Falls City Boat Club*, 142 Mich. 615; *South Grand Rapids Improvement Co. v. Michigan Central Railroad Co.*, 142 Mich. 620; *Ross v. Quentherodt*, 142 Mich. 636; *Rickels v.*

Log-Owners' Booming Co., 139 Mich. 111; *Lamb v. Lamb*, 139 Mich. 166.

It may be said that where the acts and conduct of defendants are such that they amount to an entry into possession of the premises, and constitutes thereby an occupation thereof jointly with complainants, such entry and possession would suspend the running of the statute, and would inure to the benefit of all tenants in common, but in the instance case no such entry or joint possession was shown in that the entry of complainants operated as an ouster of all co-tenants, for they went into possession as strangers to the interest of the other tenants, and under claims which denied their existence and validity. *Brigham v. Rean*, 139 Mich. 262. Where one had notice at the time of his purchase of another's hostile holding, and, unless something occurred to prevent it, the statute of limitations commenced to run at that time. *Howatt v. Green*, 139 Mich. 292. See *Cass Farm Co. v. City of Detroit*, 139 Mich. 318; *Dawson v. Falls City Boat Club*, 136 Mich. 260. It has been said that "the mere fact that the use of an easement was permissive in its inception does not preclude the acquirement of title by prescription, if it has subsequently become adverse and has so continued for the requisite period; but a use which begins under a license will not be considered adverse until the license is repudiated, and such repudiation is brought to the knowledge of the owner of the servient tenement; and the burden of proving that the use has become adverse is upon the party claiming the easement. Thus, it is concluded that complainant's user of the easement did not become adverse in that the statute of limitations did not commence to run until after the way of necessity ceased, and defendant or its predecessor in title had knowledge of a hostile claim. *Ann Arbor Fruit Co. v. Ann Arbor Railroad Co.*, 136 Mich. 607.

See *Sherrard v. Cudney*, 134 Mich. 200; *McKee v. City of Grand Rapids*, 133 Mich. 280.

P. A. '85, No. 153, Sec. 115, constitutes a statute of limitation and hence not open to the objection of taking property without due process of law. *St. Mary's Power Co. v. Chandler-Dunbar Water Power Co.*, 133 Mich. 475. The six-month limitation covers any case where one claims under a valid homestead certificate and the alleged abandonment of the homestead does not affect the case, for it is the duty of the state to enforce or waive the forfeiture, as it sees fit. *Semer v. Auditor General*, 133 Mich. 596.

See *F. H. Wolf Brick Co. v. Lonyo*, 132 Mich. 162; *Wolverine Land Co. v. Jerome*, 188 Mich. 66.

In a case of a divorced wife's right of dower in her husband's land it makes no difference whether the death be actual or legal, the statute of limitations in regard to real actions controls. *Moross v. Moross*, 132 Mich. 204. The possession of a life tenant cannot be adverse to the remainder-man. *Jeffers v. Sydnam*, 129 Mich. 443. The proofs in the case in question establish a continuous, notorious, and adverse user of the right of way over the land in dispute for the statutory period, at least as a private, if not a public alley. *Leete v. Roney*, 127 Mich. 92. *Campau v. City of Detroit*, 104 Mich. 560. A mere permissive possession, or one consistent with the title of another, however long continued, can never ripen into a title by adverse possession. *Pugh v. Schindler*, 127 Mich. 195; *City of St.*

Joseph v. Seel, 122 Mich. 70; Smeberg v. Cunningham, 96 Mich. 378, 35 Am. St. Rep. 613; Bird v. Stark, 66 Mich. 654; Bunce v. Bidwell, 43 Mich. 542; White v. Hopeman, 43 Mich. 267, 38 Am. Rep. 178; Perkins v. Nugent, 45 Mich. 156.

See Walker v. Gillman, 127 Mich. 271; Village of Red Jacket, v. Pinton, 126 Mich. 194.

It is manifest that in the absence of proof as to when a mortgage matured, no presumption can arise that the statute of limitations has run against it, even after the lapse of a long period of years. Mc. Crath v. Myers, 126 Mich. 215.

See Carpenter v. Carpenter, 126 Mich. 222; Dawson v. Fall City Boat Club, 125 Mich. 433; Hewitt v. Village of Reed City, 124 Mich. 10; Henry v. Henry, 122 Mich. 6; City of St. Joseph v. Seel, 122 Mich. 70.

Where the possession of the complainant and his grantor was for a much longer period that the statute requires to obtain title by adverse possession, he acquires a good title. Darson v. Village of Homer, 122 Mich. 229. Where the defendants have possession, the act of possession bars a right of entry, after the lapse of five years, against one occupying under a deed from a ministerial officer of a court of competent jurisdiction within the state. Potter v. Martin, 122 Mich. 547.

See Patrick v. Young Men's Christian Ass'n. 120 Mich. 196; Ford v. Wright, 114 Mich. 127; Weshgyl v. Schick, 113 Mich. 22; Ward v. Nestell, 113 Mich. 185; Barnard v. Brown, 112 Mich. 452; Beecher v. Ferris, 112 Mich. 584; Schafer v. Hauser, 111 Mich. 622; Vier v. City of Detroit, 111 Mich. 646.

It is a uniform rule that the law of the forum applies where the statute of limitations are concerned. Home Life Ins. C. v. Elwell, 111 Mich. 690.

### (12312). Right Accrues to Ancestor.

SEC. 2. If such right or title first accrued to an ancestor, predecessor, or grantor of the person who brings the action, or makes the entry, or to any other person from or under whom he claims, the said above periods of limitation shall be computed from the time when the right or title so first accrued to said ancestor, predecessor, grantor or other person.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 139, being C. L. '57, (5351); as Am. '63, p. 389, Act 227, Eff. Jan. 1, '64; C. L. '71, (7138); How 8699; C. L. '97, (9715), unchanged.

CONSTRUED: Since '46 a conveyance by an excluded owner of lands held adversely is valid to convey what title he has, and therefore a suit brought within the statutory period by such grantee would be maintainable as well as if brought by the first holder. Campau v. Dubois, 39 Mich. 284. The statute begins to run from the time when the claimant, or those under whom he holds title, first acquired the right of entry. Van Vleet v. Blackwood, 39 Mich. 728. Adverse possession must be continuous, and when one person seeks to unite his possession to the possession of the prior occupants, the several

titles must be connected by purchase or descent, for without some privity between the successive occupants the several possessions cannot be tacked together, so as to make continuity of possession. *Sheldon v. Michigan Central Railroad Co.*, 161 Mich. 512.

**(12313). Period When Right of Entry Accrues.**

SEC. 3. In the construction of this chapter, the right to make an entry or bring an action to recover land shall be deemed to have first accrued at the times respectively herein-after mentioned, that is to say:

1. Whenever any person shall be disseized, his right of entry or of action shall be deemed to have accrued at the time of such disseizen;

2. When he claims as heir or devisee of one who ded seized, his right shall be deemed to have accrued at the time of such death, unless there is another estate, intervening after the death of such ancestor or deviser, in which case his right shall be deemed to accrue when such intermediate estate shall expire, or when it would have expired by its own limitation;

3. When there is such an intermediate estate, and in all other cases, where the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof, for which he might have entered at an earlier time;

4. The preceding clause shall not prevent any person from entering, when entitled to do so by any forfeiture, or breach of condition, but if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred, or the condition broken;

5. In all cases not otherwise provided for, the right shall be deemed to have accrued when the claimant or the person under whom he claims, first became entitled to the possession of the premises, under the title upon which the entry or action is founded.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 139, being C. L. '57, (5352); C. L. '71, (7139); How. 8700; C. L. '97, (9716), except that it eliminates "tenancy by curtesy" in subdivision 2, modified.

**SUBDIVISION 1:** *Cook v. Hopkins*, 68 Mich. 517.

**SUBDIVISION 2:** *Pattison v. Dryer*, 98 Mich. 565; *Cook v. Hopkins*, 68 Mich. 517.

SUBDIVISION 3: *Cook v. Hopkins*, 68 Mich. 517; *Hatch v. St. Joseph*, 68 Mich. 229.

SUBDIVISION 4: *Van Vleet v. Blackwood*, 39 Mich. 730; *Hatch v. St. Joseph*, 68 Mich. 229; *Cook v. Hopkins*, 68 Mich. 517.

SUBDIVISION 5: *Van Vleet v. Blackwood*, 39 Mich. 730; *Hatch v. St. Joseph*, 68 Mich. 229; *Cook v. Hopkins*, 68 Mich. 517.

FORMER LAW CITED: *Watkins v. Green*, 101 Mich. 498. See *Township of Jasper v. Martin*, 161 Mich. 341, wherein it was held "a mere permissive possession, or one consistent with the title of another, however long continued, can never ripen into a title by adverse possession." The rule is well settled that, if possession of real estate is held by mere indulgence or by consent of the owner, and the person so going into possession understands this, the possession is not adverse, and cannot ripen into a title which will defeat the right of the legal owner. Adverse possession can only begin when the licensee notifies the licensor of a hostile claim. *City of St. Joseph v. Seel*, 122 Mich. 72.

#### (12314). Presumption as to Possession.

SEC. 4. In every action for the recovery of real estate or the possession thereof, the person establishing the legal title to the premises shall be presumed to have been in possession thereof within the time limited by law for bringing such action, unless it shall appear that the same has been possessed adversely to such legal title by the defendant or by those from or under whom he claims, or that the grantee, or his assigns, in a contract of purchase have been in possession claiming title by virtue of said contract of purchase for a period of twenty years after the last payment was due on said contract or after the last payment was made on said contract of purchase. The provisions of this section shall not apply to any contract of purchase which is now the subject of litigation.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 139, being C. L. '57, (5353); as Am. '63, p. 389, Act 227, Eff. Jan. 1, '64; C. L. '71, (7140); How. 8701; C. L. '97, (9717); as Am. '13, p. 664, Act 351, Eff. Aug. 14, changing "act" to "section," changed.

CONSTRUED: The constructive possession of vacant lands, as between mortgagor and mortgagee, must be deemed to be in the mortgagor. *Albright v. Cobb*, 34 Mich. 316. See *Bunce v. Bidwell*, 43 Mich. 546. For rule as to land contracts prior to the amendment of '13, see *Rodgers v. Beckel*, 172 Mich. 544..

Under this statute suit is commenced so as to prevent its running when a copy of the declaration with notice of the rule to plead is personally served upon the defendant. *Detroit Free Press Co. v. Bagg*, 78 Mich. 650. See 152 Mich. 248.

Does not apply to actions on bonds given on appeal from circuit court commissioners. *Hoffman et al v. Fidelity & Deposit Co. of Maryland*, 184 Mich. 210; 21 D. L. N., 1292; 150 N. W., 844.

Right of action under contract to redeem stock on certain notice accrues at times of such notice. *Weaver v. Collins*, 182 Mich. 255; 21 D. L. N., 995; 148 N. W., 712.

**ADVERSE POSSESSION:** See note to Compilers' Section (12311).

**CITED:** *State v. Railroad Co.*, 89 Mich. 481.

### (12315). Disability.

**SEC. 5.** If at the time when any right of entry, or of action as aforesaid, shall first accrue or have accrued, the person entitled to such entry or action shall be or shall have been, within the age of twenty-one years, insane, or imprisoned, such person, or any one claiming from, by or under him, may make such entry, or bring such action, at any time within five years after such disability shall be or shall have been removed, although the time limited therefor in the first section of this chapter may have expired.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 139, being C. L. '57, (5354); as Am. '63, p. 389, Act 227, Eff. Jan. 1, '64; C. L. '71, (7141); How. 8702; C. L. '97, (9718), omitting, however, "or a married woman" and "or absent from the United States, unless within one of the British Provinces of North America," modified.

**INFANT:** The mere delay or neglect, after arriving at majority, to make an actual disaffirmance of a deed executed during minority, will not operate as an affirmance or confirmation of the deed, until the time limited for bringing an action has elapsed. *Prout v. Wiley*, 28 Mich. 164.

Where the holders of the legal title are infants, one holding in subordination to them cannot acquire adverse title under a tax deed without actual notice to the owners when they become of age. *Nugent v. Peterman*, 137 Mich. 647, citing *Paldi v. Paldi*, 84 Mich. 346. See also, *Ford v. Wright*, 114 Mich. 127.

**MARRIED WOMEN:** At the time this section was first enacted, married women were included among those entitled to its privileges (see history above) but the Married Woman's Act passed in '55 left no reason to continue the rule in force. See *King v. Merritt*, 67 Mich. 217; *Curbay v. Bellewer*, 70 Mich. 110-11.

**FORMER LAW CITED:** *Price v. Hopkins*, 13 Mich. 323.

### (12316). In Cases of Death During Disability.

**SEC. 6.** If the person first entitled to make such entry, or bring such action, shall die, or shall have died during the continuance of any of the disabilities mentioned in the preceding section, and no determination or judgement shall have been had of, or upon the title, right or action, which accrued to him, the entry may be made or action brought by his heirs, or any one claiming under him, at any time within five years

after his death, although the time therefor in the first section of this chapter may have expired.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 139, being C. L. '57, (5355); as Am. '63, p. 389, Act 227. Eff. Jan 1, '64; C. L. '71, (7142); How. 8703; C. L. '97, (9719), unchanged.

**(12317). No Allowance of Time for Disability of Other Persons.**

**SEC. 7.** If, at the time when such right of entry or of action shall first accrue, the person entitled thereto shall be under any of the disabilities before mentioned, and shall die without having recovered the premises, no further time for making such entry or bringing such action, beyond that hereinbefore prescribed, shall be allowed by reason of the disability of any other person.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 139, being C. L. '57, (5356); C. L. '71, (7143); How. 8704; C. L. '97, (9720), unchanged.

**CONSTRUED:** When the limitation has lawfully commenced, its progress is not arrested by the devolution of the estate. *DeMill v. Moffat*, 49 Mich. 130.

**(12318). Mere Entry Insufficient.**

**SEC. 8.** No person shall be deemed to have been in possession of any lands, within the meaning of this chapter merely by reason of having made an entry thereon, unless he shall have continued in open and peaceable possession of the premises for at least one year next after such entry, or unless an action shall be commenced upon such entry and seizin, within one year after he shall be ousted or dispossessed of the premises.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 139, being C. L. '57, (5357); C. L. '71, (7144); How. 8705; C. L. '97, (9721), unchanged.

**CONSTRUED:** Mere disturbance of possession without the consent of the one claiming adversely, will not interrupt the running of the statute. *Place v. Place*, 139 Mich. 510.

**CITED:** *Riopelle v. Gilman*, 23 Mich. 35; *Donovan v. Bissell*, 53 Mich. 464.

**(12319). Rights to be Governed by Existing Laws.**

**SEC. 9.** All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry.

**HISTORY:** Re-enacts a part of Sec. 9, R. S. '46, Ch. 139, being C. L. 57, (5358); as Am. '63, p. 389, Act 227, Eff. Jan. 1, '64; as Am. '69, p. 11, Act 10, Imd. Eff. Jan. 30; as Am. '69, p. 219, Act 126, Eff. July 5; C. L. '71, (7145); How. 8706; C. L. '97, (9722), not substantially changed.

**CONSTRUED:** The provision of this section, that the rights of parties are to be determined by the law in force when the right of action accrued, relates, not to the subject of disabilities, but to the time when the statute became a law. *King v. Merritt*, 67 Mich. 218.

Right to new trial in ejectment within three years after judgment was saved, where the right accrued before the Judicature Act took effect, provided, that rights in respect to limitation of actions or rights of entry, should be governed by the act under which they accrued. *McBride v. Chippewa Circuit Judge*, 202 Mich. 61.

**FORMER LAW CITED:** *Lastly v. Cramer*, 2 Doug. 310; *Hulburt v. Merriam*, 3 Mich. 149; *Perry v. Hepburne*, 4 Mich. 167; *Price v. Hopkins*, 13 Mich. 323; *Stambaugh v. Snoblin*, 32 Mich. 296; *Van Vleet v. Blackwood*, 39 Mich. 730.

#### (12320). Action Abated by Death of any Party.

**SEC. 10.** If any action, of which the commencement is limited by this chapter, shall be abated by the death of any party thereto, or if, after verdict for the plaintiff, the judgment shall be arrested, or if judgment in any such action be given for the plaintiff, and the judgment shall be reversed for error therein, the plaintiff, or any person claiming from, by or under him, may bring an action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 139, being C. L. '57, (5359); C. L. '71, (7146); How. 8707; C. L. '97, (9723), omitting "demandment or," substantially unchanged.

**CITED:** *McKenzie v. A. P. Cook Co.*, 113 Mich. 452; *Conley v. Sinclair*, 163 Mich. 309.

Where an action was not prosecuted or revived against the heirs of either defendants for upwards of 15 years after their death, the action is not subject to demurrer on the ground that there is an ejectment suit pending. *Conley v. Sinclair*, 163 Mich. 309. It may be said that the period of limitations in which a title becomes absolute depends upon the statute in force at the time the right of action accrues to the owner. *McKenzie v. A. P. Cook Co.*, 113 Mich. 456. This section, limiting time for reviving actions to one year, applies to cases abated by the death of any party thereto, but has no application to an action which did not abate upon the death of the plaintiff. *Sayre v. Detroit, Grand Haven & Milwaukee Railway Co.*, 205 Mich. 294; 171 N. W., 502.

#### (12321). Suits by People.

**SEC. 11.** No suit for the recovery of any land, shall be



commenced by or in behalf of the people of this state, unless within fifteen years after the right or title of the people of the state therein first accrued, or within fifteen years after the said people or those from or through whom they claim, shall have been seized or possessed of the premises, or shall have received the rents and profits of the same, or some part thereof.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 139, being C. L. '57, (5360); C. L. '71, (7147); How. 8708; C. L. '97, (9724), except the twenty years' limitation is here changed to fifteen, modified.

**LIMITATIONS OF ACTIONS:** The only change in the statute of limitations as to real actions is that making the period within which the state may bring actions uniform with that applicable to others.

In personal actions instead of the period of limitations being determined by the *form* of action, it is determined by the *cause* of action. The effect of a seal in preserving a right of action is done away with. Heretofore actions of slander could be brought at any time within two years, but actions of libel were required to be brought within one year, that is, in the action where the evidence to prove or disapprove the right of action would be more likely to be lost and the effect of the defamation would be more transitory, a longer period was given than in a case where the evidence and the effects are of a more permanent character. In the new statute, the period of two years is fixed for actions of both libel and slander; also, for actions against Sheriffs for misconduct of themselves or their deputies. The provisions limiting the right of action against sureties on bonds of guardians to four years from the time of the discharge of such guardians, has been extended to include the case of executors and administrators.

Under existing law, even though a party against whom a cause of action accrued while in the state, remains out of the state for any period of time no matter how long, if still a resident of the state, the period of his absence is not to be deducted in determining when the bar of the statute would be complete. He must be absent from and *reside* out of the state in order to affect the running of the statute. This has been changed so that any and all periods of absence exceeding two months shall not be taken as any part of the time limited for the commencement of suit.

**PEOPLE:** Limitation laws cannot run against the state, unless expressly permitted. *Crane v. Reeder*, 21 Mich. 24. See *Chamberlain v. Ahrens*, 55 Mich. 111. The occupation of land by a city for market purposes is not a public easement, but a proprietary occupation, and private adverse rights will be barred by the same lapse of time as if the occupation was by a private person. *Cooper v. Detroit*, 42 Mich. 584. Whatever the effect of the statute of limitations have upon money claims against the state, it has no application to the case in question, for the legislature has recognized a continuous right of selection without reference to time. *Robson v. State Land Commissioner*, 148 Mich. 18. The state is bound by the statutes of limitations. *Chamberlain v. Ahrens*, 55 Mich. 111. *State v. Land Co.*, 160 Mich. 702, citing the dissenting opinion in *State v. Fishing & Shooting Club*, 127 Mich. 581. See also *Compilers' Section* (12338) and note.

**(12322). Foreclosure of Mortgage.**

**SEC. 12.** No suit or proceedings shall be maintained to foreclose a mortgage on real estate, either at law or in equity, unless commenced within fifteen years from and after such mortgage shall become due and payable, or within fifteen years after the last payment was made on said mortgage.

**HISTORY:** Supersedes without change the first part of Sec. 12, R. S. '46, Ch. 139, as Added '79, p. 186, Act 204, Eff. Aug. 30; How. 8709; C. L. '97, (9725), omitting the proviso relating to mortgages due at the time the section was added in '79, unchanged.

**LIMITATION OF FORECLOSURE:** As to the presumption of payment of the mortgage, in equity, from lapse of time, see *Abbott v. Godfrey's Heirs*, 1 Mich. 184. The defense of the statute of limitations can be raised as well under the answer of the defendant as by demurrer. *Highstone v. Franks*, 93 Mich. 54. This section is not retroactive; the proviso provides for a reasonable time within which to commence such suits or proceedings. *McKisson v. Davenport*, 83 Mich. 211. The indorsement by a mortgagee of a second mortgage as a payment upon the first, under an agreement that it should be so treated, comes within the terms of this section and saves the debt from the operation of the statute of limitations. *Blair v. Carpenter*, 75 Mich. 167. Equity will compel the discharge of an outlawed mortgage, without requiring proof of the actual payment of the mortgage debt. *Kingman v. Sinclair*, 80 Mich. 427.

Payment by a grantee of mortgaged premises unless authorized by mortgagor will not stop the running of the statute. *Home Life Ins. Co. v. Elwell*, 111 Mich. 690. Indorsement on a mortgage note of part payment without consideration will not stop the running of the statute. *Rodgers v. Robson*, 147 Mich. 657. Neither will a written acknowledgment of the obligation.—Id. A lien on real estate to secure payment of an annuity created by a will is within the meaning of this section. *Stringer v. Gamble*, 155 Mich. 295. See, also, *Highstone v. Franks*, 93 Mich. 54; *McIntire v. Conrad*, 93 Mich. 531-2; *McCrath v. Myers*, 126 Mich. 215; *Walker v. Gilman*, 127 Mich. 271; *Townsend v. Kreigh*, 133 Mich. 245; *Carr v. Carr*, 138 Mich. 399; *Brown v. Hayes*, 146 Mich. 476. See note "Mortgage foreclosure" to Compilers' Section (12311). It is not the indorsements of payment that will satisfy the statute. *Rodgers v. Robson*, 147 Mich. 658.

The rule at common law, according to the weight of authority, was that a payment by one jointly bound was, unless the statute established a different rule, sufficient to prevent the running of the statute. *Brown v. Hayes*, 146 Mich. 476; *Mainzinger v. Mohr*, 41 Mich. 685; *Whitcomb v. Whitney*, 2 Doug. 652. Where the complainant did not appeal from the finding that the limitation pleaded had not run against the mortgage, the decision upon the issue of limitation is not reviewable on the appeal of defendant. *Carr v. Carr*, 138 Mich. 399; See *Townsend v. Kreigh*, 133 Mich. 245; *Abbot v. Godfrey's Heirs*, 1 Mich. 184; The defense of the statute of limitations can be raised as well under the answer of the defendant as by demurrer. *Highstone v. Franks*, 93 Mich. 54. This section is not retroactive, and the proviso

provides for a reasonable time within which to commence such suits or proceedings. *McKisson v. Davenport*, 83 Mich. 211.

## LIMITATION OF PERSONAL ACTIONS

## (12323). Period Within Which to Bring Personal Actions.

SEC. 13. All actions in any of the courts of this state shall be commenced within six years next after the causes of action shall accrue, and not afterward, except as hereinafter specified: *Provided, however,*

1. That actions founded upon judgments or decrees rendered in any court of record of the United States, or of this state, or of some other of the United States, and actions founded upon bonds of public officers, actions founded upon (covenants) in deeds and mortgages of real estate, may be brought at any time within ten years from the time of the rendition of such judgment, or the time when the cause of action accrued on such bond or covenant;

2. Actions to recover damages for injuries to person or property shall be brought within three years from the time said actions accrue, and not afterwards: *Provided further;*

3. Actions against sheriffs for the misconduct or neglect of themselves, or their deputies, actions for trespass upon lands, for assault and battery, for false imprisonment, for malicious prosecution, for libel or slander, for malpractice of physicians, surgeons or dentists, all actions for the recovery of any penalty or forfeiture on any penal statute brought in the name of the people of this state, and actions brought to charge any surety for costs, or on bond or recognizance given on appeal from any court in this state, shall be brought within two years from the time the cause of action accrues, and not afterwards:

4. *Provided further,* That actions brought to charge any surety on any bond of an executor, administrator or guardian, may be, and in all cases shall be brought at any time within four years after the discharge of such executor, administrator or guardian.

HISTORY: This section merges and supersedes Sec. 1, R. S. '46, Ch. 140, being C. L. '57, (5361); C. L. '71, (7148); How. 8713; C. L. '97, (9728); and Sec. 2, R. S. '46, Ch. 140, being C. L. '57, (5362); C. L. '71, (7149); How. 8714; C. L. '97, (9729); as Am. '05, p. 235, Act 168, Eff. Sept. 16; as Am. '09, p. 422, Act 239, Eff. Sept. 1; and Sec. 3, R. S. '46, Ch. 140, being C. L. '57, (5363); C. L. '71, (7150); How. 8715; C. L. '97, (9730); and Sec. 21, R. S. '46, Ch. 140, being C. L. '57, (5381);

C. L. '71, (7168); How. 8733; C. L. '97, (9748); and Sec. 24, R. S. '46, Ch. 140, being C. L. '57, (5384); as Am. '67, p. 39, Act 30, Eff. June 27; as Am. '69, p. 155, Act 89, Eff. July 5; C. L. '71, (7171); How. 8736; C. L. '97, (9751); and Act 257 of '97, being C. L. '97, (9753); and Sec. 31, R. S. '46, Ch. 86, being C. L. '57, (3329); C. L. '71, (4840); How. 6332; C. L. '97, (8727); and Sec. 7, R. S. '46, Ch. 140, being C. L. '57, (5367); C. L. '71, (7154); How. 8719; C. L. '97, (9734); and Sec. 5 of Act 104 of '09, and Act 155 of '99, unchanged.

**LIMITATION OF ACTIONS:** See note to section 11.

**STATUTE OF LIMITATIONS:** For the general principles involved in these statutes, see note to Compilers' Section (12311). Where a demand is necessary to found an action upon, the demand must be made within the period of limitation or it will be barred. *Palmer v. Palmer*, 36 Mich. 487; *Freeman v. Ingerson*, 143 Mich. 9. An action for a continuing nuisance to real property is not barred by limitation except as to accrued damages that have already come within the statute. *Phelps v. Detroit*, 120 Mich. 452. When money due by installments. See *Field v. Loveridge*, 114 Mich. 227. An action for conversion of corporate property, if barred by limitation against the corporation is also barred against a stockholder. *Bates v. Boyce's Estate*, 135 Mich. 541. A debt barred by limitation cannot be reviewed by a subsequent transaction having no relation to the former debt. *McCarron v. Wheeler*, 151 Mich. 224. Payment of interest by an executor does not suspend the running of the statute in favor of the estate. *Draper v. Brown*, 153 Mich. 138. In equity, cases of actual trust are not barred by limitation, but cases of constructive trust founded upon fraud come within this rule. *German Am. Seminary v. Keifer*, 43 Mich. 112. As to effect of fiduciary relations on running of the statute, see *Harper v. Corcoran*, 166 Mich. 483; *Myers v. Improvement Co.*, 169 Mich. 694. In *re Sellman's Estate*, 175 Mich. 700; *Hatt v. Green*, 180 Mich. 384; *Edgar v. Parsell*, 184 Mich. 522. Conversion of property. *Knisley v. Stein*, 52 Mich. 380. Statute barred by estoppel, see *Klass v. Detroit*, 129 Mich. 35; *Albert v. Patterson*, 172 Mich. 635. As to administrator's bond. *Perkins v. Cheney*, 114 Mich. 567. As to limitation of personal actions in general, see *Pillen v. Erickson*, 125 Mich. 68; *Rodgers v. Lamb's Estate*, 137 Mich. 241; *Spring v. Perkins*, 156 Mich. 327; *Hebinger v. Ross*, 175 Mich. 241.

**FORMER LAW; FORM OF ACTION:** It was formerly held that the form of the action governed in determining the period of limitation.—*Sigler v. Platt*, 16 Mich. 206; *Goodrich v. Leland*, 18 Mich. 110; *Christy v. Farlin*, 49 Mich. 319; *Sherwood v. Landon*, 57 Mich. 219; *Avery v. Miller*, 81 Mich. 85.

**CONTRACTS UNDER SEAL:** Prior to this act (C. L. '97, 9734) an action could be brought on a contract under seal within ten years. *Goodrich v. Leland*, 18 Mich. 110; *Stewart v. Sprague*, 71 Mich. 50; *Clinton v. Clinton's Estate*, 148 Mich. 496; *Post v. Campau*, 42 Mich. 94.

**BANK NOTES:** Under the former statute bank notes were expressly excluded from the provisions of the limitation laws. (C. L. '97 9731); *Tripp v. Curtenius*, 36 Mich. 499; *Kimball v. Kimball*, 16 Mich. 211.

**CONFLICT OF LAWS:** The statute of limitations in force in this state applies to actions brought here, rather than the statute of the place where the cause of action arose, or the parties formerly

resided. *Dowse v. Gaynor*, 155 Mich. 39. See also *Home Life Insurance Co. v. Elwell*, 111 Mich. 689. A foreign plaintiff is not relieved from the force of the statute by his ignorance of the defendant's residence in this state. *Dowse v. Gaynor*, 155 Mich. 39. When a cause of action arises in a foreign jurisdiction, recovery cannot be had in this state if already barred by the limitation laws of the jurisdiction where the cause of action arose. *Wingert v. Judge*, 101 Mich. 397. But see *Blackburn, v. Blackburn*, 124 Mich. 191. See also *Sproat v. Hall*, Dec., 1915, 189 Mich. 28; *Millar v. Hilton*, Dec., 1915, 189 Mich. 635.

**WHEN THE STATUTE BEGINS TO RUN:** In case of infants, see notes to Compilers' Section (12325). On mutual accounts, see notes to Compilers' Section 12324. Upon a receipt for property to be returned by receptor; or for money to be paid to a third party. *Kimball v. Kimball*, 16 Mich. 211. Upon a promise to compensate or make provision for another by will. *Sword v. Kieth*, 31 Mich. 247, 255. Upon a claim for money to redeem. *Goodrich v. Leland*, 18 Mich. 110. Upon breach of covenants in deeds. *Matteson v. Vaughn*, 38 Mich. 373; *Vaughn v. Matteson*, 39 Mich. 758; *Post v. Campau*, 42 Mich. 90; *Bray v. Fletcher*, 132 Mich. 272. Upon a judgment. *Warren v. Slade*, 23 Mich. 1; *Snyder v. Hitchcock*, 94 Mich. 313. In case of continuous service for an indefinite period, the statute does not begin to run, until the services are completed. *Carter v. Carter*, 36 Mich. 207. An administrator's bond has no independent force apart from the administration proceedings, and if a liability, which it was meant to secure, is barred, action on the bond to enforce that liability is barred also. *Biddle v. Wendell*, 37 Mich. 452. Where a contract for the sale of machinery contemplates that it shall be tested and put in running order, the cause of action does not arise upon the warranty, until a reasonable time has been allowed for the necessary tests. *Felt v. Reynolds R. F. Evap. Co.*, 52 Mich. 602. The statute does not begin to run against an action for the conversion of the personal property of an intestate, until an administrator is appointed. *Parks v. Norris*, 101 Mich. 71. The statute does not begin to run on a deposit note given by a member of a mutual insurance company, whereby he agrees to pay a sum certain or any part thereof, when required, and which by its terms is part of the absolute funds of the company, until an assessment is laid. *Wardle v. Hudson*, 96 Mich. 436. In case of an express trust. *Frank v. Morley's Estate*, 106 Mich. 635; *German Am. Seminary v. Kiefer*, 43 Mich. 112. Against entry of transcript under Compilers' Section 14282. *Wilcox v. Lantz*, 107 Mich. 1. In case of creation of new township. *Grant Twp. v. Reno Twp.*, 107 Mich. 409. In case of fraudulent concealment of cause of action. *Stebbins v. Patterson*, 108 Mich. 537; *Tompkins v. Hollister*, 60 Mich. 470. On installments due on contracts with laborers and material men. *Staffon v. Lyon*, 110 Mich. 260. Where logs of a like quality are to be returned on demand, the demand will be presumed to have been made, in the absence of testimony as to its date, at the expiration of six years from the time of the receipt of the logs, at which time the statute begins to run. *Smith v. Smith's Estate*, 91 Mich. 7. When the statute has once begun to run, no subsequent disability will restrain it. *Ten Eyck v. Wing*, 1 Mich. 45. And a

common law assignment for the benefit of creditors does not operate to prevent the running of the statute. *Parsons v. Clark*, 59 Mich. 414. The right of action of a co-surety for contribution does not accrue until payment made. *Kelly v. Sproul* 153 Mich. 692. An action by a corporation for an assessment against a member begins to run when the assessment is made. *Pratt v. Broadwell*, 159 Mich. 378. The statute begins to run in favor of a member of a mutual fire insurance company for an assessment from the date of the assessment. *Nichol v. Newman*, 160 Mich. 582. An action for fraud accrues at the time the fraud is perpetrated. *Briggs v. Brushaber*, 43 Mich. 332; *First Nat. Bank of Ovid v. Steel*, 146 Mich. 332, and according to the following case, upon ascertaining its falsity. *Short v. Cure*, 100 Mich. 420. The death of the debtor suspends this section. *Field v. Loveridge*, 114 Mich. 227; *Baker v. Halleck's Estate*, 128 Mich. 181. A principal's right of action against his agent for collections, accrues when the money is collected. *Jewell v. Jewell's Estate*, 139 Mich. 585. As to money advanced by wife to husband, see *Wilcox v. Wilcox*, 139 Mich. 371. Justice's judgment when docketed upon transcript in the Circuit Court. *Wilcox v. Lantz*, 107 Mich. 1. When demand is necessary to create a cause of action.—*Freeman v. Ingerson*, 143 Mich. 9. As to negotiable paper. *Jocque v. McRae*, 142 Mich. 370; *Webber v. Webber*, 146 Mich. 31. See also *Staffon v. Lyon*, 110 Mich. 261; *Weaver v. Collins*, 182 Mich. 255.

**AMENDING DECLARATION:** An amendment of a declaration which introduces a new cause of action cannot be permitted after the statute has run against the cause of action so sought to be set up. *Pratt v. Davis*, 106 Mich. 499; *Gorman v. Judge*, 27 Mich. 138; *Wingert v. Judge*, 101 Mich. 395; *Fisher v. Redford*, 153 Mich. 385. But when the amendment does not introduce a new cause of action, the running of the statute is arrested at the date of the institution of the suit. *Belden v. Blockman*, 124 Mich. 667.

**PLEA OR NOTICE:** A plea that plaintiff's cause of action did not accrue within six years next before the filing of the plaintiff's amended declaration is bad. *Wilcox v. Kassick*, 2 Mich. 178. The amendment of the plea by interposing the defense of the statute of limitations is discretionary with the trial court and its denial will not be reviewed. *Ripley v. Davis*, 15 Mich. 78-9. In order that the defense of the statute of limitations can be availed of, notice of such defense must be given. *Conger v. Hall*, 158 Mich. 448; *Modern v. Supts. of Poor*, 183 Mich. 120; *Supervisors v. Bennett*, 185 Mich. 546. Also in answer in equity. *Harper v. Corcoran*, 166 Mich. 483. It cannot be raised on demurrer. *Forest Twp. v. Bonding Co.*, 180 Mich. 90.

**SUBDIVISION 1; JUDGMENT OR DECREE:** A judgment of a court of record runs for ten years.—*Ward v. Citizens' Bank*, 46 Mich. 332; *Lundeman v. Hirth*, 96 Mich. 19; *Snyder v. Hitchcock*, 94 Mich. 313. A justice's judgment reviewed by transcript and docketed in the circuit court also runs for ten years. *Arnold v. Thompson*, 19 Mich. 333; *Wilcox v. Lantz*, 107 Mich. 1. In computing the time, the day the judgment was entered is excluded. *Warren v. Slade*, 23 Mich. 1. The issue of execution does not arrest the running of the statute. *Ten Eyck v. Wing*, 1 Mich. 54-5. Execution cannot issue on an outlawed judgment. *Parsons v. Judge*,

37 Mich. 287. A decree of deficiency in a foreclosure proceeding is barred ten years from the date of the decree of deficiency.—*Albert v. Patterson*, 167 Mich. 162, citing *Quinnin v. Quinnin*, 144 Mich. 233. When an execution is issued and levy made before the judgment is barred by limitation a valid sale can be had thereunder after the limitation period has expired. *Lundeman v. Hirth*, 96 Mich. 19; *Mosher v. Borden*, 201 Mich. 109. A wife's right of dower in case of divorce is not based upon a decree but upon the statute and her right to recover is not based on this section. *Moross v. Moross*, 132 Mich. 204. The rule as to debtor's absence from the state applies to this section. *Newlove v. Pennock*, 123 Mich. 262, citing *Shelden v. Barlow*, 108 Mich. 376. A justice's judgment is barred in six years. *Jerome v. Williams*, 13 Mich. 526. An execution cannot issue on a barred judgment. *Id.*; *Parsons v. Judge*, 37 Mich. 287. But a justice's judgment duly certified to and docketed in the circuit court has the same effect as a circuit court judgment and is not barred until ten years. *Arnold v. Thompson*, 19 Mich. 333. See also *Harrison v. Metz*, 17 Mich. 377; *Goodrich v. Leland*, 18 Mich. 110; *McKinney v. Miller*, 19 Mich. 151; *Conrad v. Nall*, 24 Mich. 277-8; *Smith v. Pegg*, 111 Mich. 232; *Field v. Loveridge*, 114 Mich. 220.

COVENANT IN DEED: *Post v. Campau*, 42 Mich. 94.

SUBDIVISION 2; PERSONAL INJURIES: An action for seduction is an action for personal injuries. *May v. Wilson*, 164 Mich. 27. See also *Watson v. Watson*, 53 Mich. 168. Conflicting provisions in city charter, see *Woodworth v. Kalamazoo*, 135 Mich. 235. Act 155, 1899, superseded by this section, had no retroactive effect. *Hathaway v. Milling Co.*, 139 Mich. 708.

INJURY TO PROPERTY: Under former laws *White River, Etc., Co. v. Nelson*, 45 Mich. 581.

SUBDIVISION 3; TRESPASS: *White River L. & B. Co. v. Nelson*, 45 Mich. 581; *Nat'l Copper Co. v. Minn. Mining Co.*, 57 Mich. 88; *Wood v. Railroad*, 90 Mich. 212; *Bellows v. Butler*, 127 Mich. 103. Malpractice of physician. *Groendal v. Westrate*, 171 Mich. 95. Appeal bond, former rule.—*Hoffman v. Fidelity Co.*, 184 Mich. 210.

SUBDIVISION 4: When the ward attains majority, the authority of the guardian to act in his stead expires. *Cheever v. Congdon*, 34 Mich. 297; *Probate Judge v. Stevenson*, 55 Mich. 320; Actions barred in four years. *Id.* 55 Mich. 320; *Landon v. Comet*, 62 Mich. 93. A guardian is discharged within the meaning of this section, when the guardianship is closed by removal, resignation or death of the guardian, the marriage of a female ward, or the majority of the ward. *Perkins v. Cheney*, 114 Mich. 567. See also *Murphy v. Cady*, 145 Mich. 36.

CITED: Under former law. *Bresnahan v. Nugent*, 92 Mich. 76; *Gray v. Jones*, 80 Mich. 508. See also *Erschine v. Messicar*, 27 Mich. 85; *Krone v. Krone*, 37 Mich. 308; *Oceana Co. v. Hart Twp.*, 48 Mich. 320; *Krueger v. Railroad*, 51 Mich. 142; *Wolf v. District Grand Lodge*, 102 Mich. 28; *Belden v. Blackman*, 124 Mich. 669; *Carter v. Reaume*, 159 Mich. 161; *Walker v. Gilman*, 127 Mich. 271; *Morse v. Hayes*, 150 Mich. 599.

The statutes of limitations should have been pleaded in the answer as a bar to a suit for accounting. *Harper v. Corcoran*, 166 Mich. 481. The action for seduction is an action for personal injuries with-

in the meaning of P. A. '99, No. 155 and it follows that plaintiff's case is barred by the statute. *May v. Wilson*, 164 Mich. 29.

The state has a right in mandamus proceedings to invoke the statute of limitations. *Wilkinson v. Auditor General*, 147 Mich. 13; *McRae v. Auditor General*, 146 Mich. 594.

A right of action cannot accrue on a demand note, until it was made, although antedated to cover interest, and the statute of limitations fixed the period within which action must be commenced at six years after the right of action accrued. *Webber v. Webber*, 146 Mich. 34. The rule is that where a demand is necessary to create a cause of action, such demand must be made within a reasonable time, which, by analogy to the statute of limitations, will be deemed to be six years. *Freeman v. Ingerson*, 143 Mich. 9; *In re Emmons' Estate*, 142 Mich. 299; *Jewell v. Jewell's Estate*, 139 Mich. 578; *Smith v. Smith's Estate*, 91 Mich. 10; *Palmer v. Palmer*, 36 Mich. 498; *Kimball v. Kimball*, 16 Mich. 220. When time is to be reckoned "from" or "after" a day named, such day is excluded in the computation. Thus a check made payable ninety days after date will not be affected by the statute of limitations until the day following the expiration of that point. *Jocque v. McRae*, 142 Mich. 371; *Doyle v. Mizner*, 41 Mich. 549; *Gorham v. Wing*, 10 Mich. 486. See in connection herewith: *Chaddock v. Barry*, 93 Mich. 542, 18 L. R. A. 337; *Shelton v. Gillett*, 79 Mich. 173; *Warren v. Slade*, 23 Mich. 1. The rule as to when a right of action accrues to a principal against his agent who collects his money is that, if the duty of the agent to remit is fixed, he is liable to an action for the money, and the statute of limitations begins to run when action might be brought, *Jewell v. Jewell's Estate*, 139 Mich. 585; *Kimball v. Kimball*, 16 Mich. 211. In an action of conversion brought by a stockholder, the statute of limitations would run against such action the same as it would had the action been brought by the corporation itself. *Bates v. Boyce's Estate*, 135 Mich. 541. The rule is well established that the statute does not prescribe what effect part payment of a demand shall have, but it is familiar law that it operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such lapse of time as may have occurred previous to the payment being made. *Neilands v. Wright*, 134 Mich. 77; *Miner v. Lorman*, 56 Mich. 216. The theory concerning part payment of a debt is that a payment made under this statute is equivalent to a new promise to pay. But in case of joint debtors, since one cannot make the express promise for the other, neither can he make for him the indirect promise which a payment implies. *Borden v. Fletcher's Estate*, 131 Mich. 228; *Mainzinger v. Mohr*, 41 Mich. 687. The rule is that where a defendant has, by its conduct, deceived a plaintiff into the belief that a suit to enforce his rights is unnecessary, and thereby lulled him into a feeling of security, and induced him to forego suit in expectation of a settlement, the statute will not bar an action. *Klass v. City of Detroit*, 129 Mich. 37. It is settled that the statute of limitations would be suspended at the death of the intestate, and would not commence to run until after letter of administration were granted. *Baker v. Halleck's Estate*, 128 Mich. 181; *Field v. Loveridge*, 114 Mich. 227; *First National Bank v. Sherman's Estate*, 117 Mich. 602; *McIntire v.*



Conrad, 93 Mich. 532. Where the elements of a contract were a Sunday transaction and therefore void and illegal, the running of the statute of limitations were not arrested upon the claim of plaintiff. *Pillen v. Erickson*, 125 Mich. 69. The rule is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, when the cause of the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrongdoer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance. Thus where the right of action for the erection of the nuisance is barred, the abutting property owner may recover the damages which accrue within the period of limitations. *Phelps v. City of Detroit*, 120 Mich. 448. The liability of the defendants, school officials, became fixed as each installment became due, and the statute of limitations then began to run. *Staffon v. Lyon*, 110 Mich. 260. Disability to me under the circumstances in question does not bar an action under the statute of limitations. *Stebbins v. Patterson*, 108 Mich. 542. The period of the statute of limitations is to be computed from the date of the rendition of the judgment by the justice, and not from the time of the entry at the circuit where the judgment in the justice's court was docketed upon transcripts in the circuit court. *Wilcox v. Lantz*, 107 Mich. 1.

Where a portion is carved out of a township for the purpose of forming a new township, the statute of limitations does not commence to run against the right of the old township to enforce a claim until the liability of the old township is established by the judgment of a court of competent jurisdiction. *Township of Grant v. Township of Reno*, 107 Mich. 413. Where such was actually commenced in the name of the infant, by his next friend, the statute was not set in motion, so that any lapse of time would bar it short of the time fixed by the statute, which is six years after his majority. *Keating v. Railroad Co.* 94 Mich. 220.

#### (12324). Accounts Current.

SEC. 14. In actions brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

**HISTORY:** Supersedes Sec. 5, R. S. '46, Ch. 140, being C. L. '57, (5365); C. L. '71, (7152); How. 8717; C. L. '97, (9732), omitting, however, of "of debt or assumpsit." Modified.

**MUTUAL OPEN ACCOUNT:** Such an account defined. *Kimball v. Kimball*, 16 Mich. 218. See *Campbell v. White*, 22 Mich. 186-7; *White v. Campbell*, 25 Mich. 471; *Sperry v. Moore's Estate*, 42 Mich. 354; *In re Hiscock*, 79 Mich. 536; *Lester v. Thompson*, 91 Mich. 245. Payments upon an account are sufficient to render it an open and mutual account, so as to prevent the remedy thereon from being barred. *Payne v. Walker*, 26 Mich. 60; *Hollywood v. Reed*, 55 Mich. 310. What is not such an account. *Mandigo v. Mandigo*, 26 Mich.

349. See *Hillebrands v. Nibbelink*, 40 Mich. 650. The cause of action accrues at the time of the last item proved in such an account. *Sperry v. Moore's Estate*, 42 Mich. 357.

FORMER LAW CITED: *Hebinger v. Ross*, 175 Mich. 244.

### (12325). Disability.

SEC. 15. If any person entitled to bring any of the actions mentioned in this chapter shall, at the time when the cause of action accrues, be within the age of twenty-one years, insane, or imprisoned in the state prison, such person may bring the action within the times in this chapter respectively limited, after the disability shall be removed.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 140, being C. L. '57, (5366); As Am. '71, p. 227, Act 145, Eff. July 18; C. L. '71, 7153; *Howe*, 8717; C. L. '97, (9733), omitting, however, "or absent from the United States and from the British Provinces of North America" and also the proviso relating to existing rights at the time of the passage of the former law. Modified.

INFANTS: The statute of limitations does not begin to run against an infant until he attains his majority, and the commencement of a suit by his next friend will not set the statute in motion so as to deprive him of its full benefit after he becomes of age. *Keating v. M. C. R. Co.*, 94 Mich. 219. An infant's right of action for seduction is not barred by the statute until after she has reached her majority, if the circumstances are such that she has to bring suit in her own name and not by another. *Watson v. Watson*, 53 Mich. 168.

The commencement of suit by an infant through a next friend will not start the running of the statute so as to deprive him of its benefit after he becomes of age. *Keating v. Mich. Cent. R. R.*, 94 Mich. 221. See also as to infants. *Hatt v. Green*, 180 Mich. 392.

INSANE: *Stebbins v. Patterson*, 108 Mich. 542.

NON-RESIDENTS: See History, above. For cases under the former statute, see *Krone v. Krone*, 37 Mich. 308; *Wolf v. Dist. Grand Lodge*, 102 Mich. 23; *Erskine v. Messicar*, 27 Mich. 84; *Hulburt v. Merriam*, 3 Mich. 144.

### (12326). Aliens.

SEC. 16. When any person shall be disabled to prosecute an action in the courts of this state, by reason of his being an alien, subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed a part of the respective periods herein limited for the commencement of any of the actions before mentioned.

HISTORY: Re-enacts Sec. 8 R. S. '46, Ch. 140, being C. L. '57, (5368); C. L. '71, (7155); *How*, 8720; C. L. '97, (9735). Unchanged.

**(12327). Absence of Defendant from State.**

SEC. 17. If at the time when any cause of action shall accrue against any person, he shall be out of the state, the action may be commenced within the time herein limited therefor, after such person shall come into this state; and if after any cause of action shall have accrued, the person against whom it shall have accrued shall be absent from this state, any and all periods of absence in excess of two months at one time, shall not be taken as any part of the time limited for the commencement of the action.

**HISTORY:** This section re-enacts and supersedes Sec. 9, R. S. '46, Ch. 140, being C. L. '57, (5369); C. L. (7156); How. 8721; C. L. '97, (9736). Changed.

**LIMITATION OF ACTIONS:** See note to section 11.

**ABSENCE OF DEFENDANT:** The purpose is to secure to the plaintiff the same time, and only the same time, in which to commence his action against an absent or non-resident defendant, that he would have if the defendant, were an actual resident of the state. But the plaintiff's privilege under this section extends only to the commencement of his suit. *Gray v. Jones*, 80 Mich. 509. When the defendant comes into the state, the statute commences to run and continues to run so long as he remains in the state, unless suit is begun. The commencement of a suit suspends the running of the statute as well against a non-resident as a resident. *Id.* Both absence and non-residence are necessary to suspend the operation of the statute. *Campbell v. White*, 22 Mich. 178. Under this statute "domicile" and "residence" are synonymous. *Id.* See *Conrad v. Nall*, 24 Mich. 275. Where the defendant claims the benefit of the statute and it appears that he has removed his residence and afterward returned, the burden of proof is on him to show that the sum of the times of his presence within the jurisdiction was sufficient to bar the claim. *White v. Campbell*, 25 Mich. 463. See *McKenzie v. Boylan*, 40 Mich. 329; *Shelden v. Barlow*, 108 Mich. 375.

It is only when the defendant is absent from the state that the statute is arrested. *Belden v. Blackman*, 124 Mich. 669, citing *Home Life Insurance Co. v. Elwell*, 111 Mich. 691. This section applies to "judgment" within the meaning of Compilers' Section (12323). *Newlove v. Pennock*, 123 Mich. 262. Ignorance of defendant's residence within the state does not bar the statute. *Dowse v. Gaynor*, 155 Mich. 42. This section applies where both debtor and creditors remove from the state and take up residence in the same jurisdiction. Especially if the cause of action is not barred by the statute of limitations. *Blackburn v. Blackburn's Estate*, 124 Mich. 191. *Shouldice v. McLeod's Estate*, 135 Mich. 338. The action is barred only when a new and different cause of action is introduced by the amendment, and never when it can fairly be said to be the same cause of action as that originally set up. *Belden v. Blackman*, 124 Mich. 669; *Smalley v. Terra Cotta Co.*, 113 Mich. 149; *Loranger v. Davidson*, 110 Mich. 607; *Pratt v. Montcalm Circuit Judge*, 105 Mich. 501; *Johnston v. Insurance Co.*, 106 Mich. 98; *Wingert v. Wayne*

Circuit Judge, 101 Mich. 397, 45 Am. St. Rep. 417. The limitation of this statute was adopted in analogy to that fixed by the statute of limitations, C. L. '97, (9751). *Newlove v. Pennock*, 123 Mich. 262; *Sheldon v. Barlow*, 108 Mich. 375. This statute is applicable to the ten year limitation imposed upon the right of the complainant in a foreclosure proceeding to take out an execution for a deficiency. *Sheldon v. Barlow*, 108 Mich. 375. The question of defendant's domicile should be submitted to the jury where defendants frequently changed their location and traveled about the country, but claimed their residence was in the state. It was the legislative intent in passing the statute that the operation of the exception should be concurrent with the existence of the obstacle which prevents service upon the debtor, and that neither absence from the state nor residence out of it will, of itself suspend the statute, both must exist to take it out of the statute. *Sproat v. Hall*, 189 Mich. 28; 22 D. L. N., 1074; 155 N. W., 361.

(12328). Death of Party.

SEC. 18. If any person entitled to bring any of the actions

(12328). Death of Party.

Section 18. If any person entitled to bring any of the actions before mentioned in this chapter, or liable to any such actions, shall die before the expiration of the time herein limited, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person or the claim may be proved as a debt against the estate of the deceased person, as the case may be, at any time within two years after granting letters testamentary or of administration, and not afterwards, if barred by the provisions of this chapter: *Provided, however, That in no event shall any action be brought under the statute by an executor or administrator unless commenced within three years after the expiration of the time limited in this chapter.*

HISTORY: Amendment by P. A. '23, Act No. 318. Approved May 25, 1923.

*See also* *Conroy v. McClellan*, 122 Mich. 602. A claim against an estate for work and labor for a period of ten years, terminating more than six years before the death of the deceased is barred by the statute of limitations. *Rodgers v. Lamb's Estate*, 137 Mich. 241. See also *Sword v. Keith*, 31 Mich. 263; *Ten Eyck v. Wing*, 1 Mich. 43; *Abbott v. Godfroy's Heirs*, 1 Mich. 185; *Poet v. Campau*, 42 Mich. 94; *Sperry v. Moore's Estate*, 42 Mich. 357; *Bresnahan v. Nugent*, 92 Mich. 90; *Field v. Loveridge*, 114 Mich. 220; *First National Bank v. Sherman's Est.*, 117 Mich. 603; *Baker v. Halleck's Estate*, 128 Mich. 181; *Murphy v. Cady*, 145 Mich. 36; *In re Sellman's Estate*, 175 Mich. 702. Under this statute the causes of action which may be enforced "at any time within two years"

are the causes of action which would otherwise become barred in the period ensuing between the thirty days before death and the two years after the granting of letters of administration. *Morse v. Hayes*, 150 Mich. 598. This case overrules *Stringer v. Stephens' Estate*, 146 Mich. 181.

The right of action, brought under the provision of C. L. '97, (10421), to recover for the fraud and deceit of defendants, whereby plaintiff was induced to discount certain notes and receive as collateral security certain corporate stock, accrues as soon as the notes were discounted and the worthless shares of stock accepted in reliance upon the fraudulent representations. *First National Bank of Ovid v. Steel*, 146 Mich. 315; *Briggs v. Brushaber*, 43 Mich. 330; *Short v. Cure*, 100 Mich. 418. The cause of action may be proved as a claim against the estate at any time within two years after the granting of letters of administration thereon. *Baker v. Halleck's Estate*, 128 Mich. 181.

The presentation of claims is not conditioned upon the inventory, nor does the statute require that the inventory precede the hearing of claims, where on this account claimant failed to file its claim and failed to improve the opportunity for its day in court, the statute bars its claim. *First Nat. Bank v. Sherman's Estate* 117 Mich. 603. The statute has not commenced to run since the death of decedent, so that under this statute, the complainants would have the right to recover for all installments falling due within ten years prior to decedent's death. *Field v. Loveridge*, 114 Mich. 227; *Luderman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588; *Snyder v. Hitchcock*, 94 Mich. 313. This statute applies to grant of ancillary letters on the probate of a foreign will. *McIntire v. Conrad*, 93 Mich. 526.

### (12329). Abatement of Action.

SEC. 19. If, in any action, duly commenced within the time limited in this chapter, and allowed therefor, the writ or declaration shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ be abated or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 140, being C. L. '57, (5371); C. L. '71, (7158); How. 8723; C. L. '97, (9738).

FAILURE OF ATTORNEY TO APPEAR: *Spier sued McQueen in*

justice's court and employed an attorney. The latter, not being able to attend requested another attorney to appear. McQueen objected to such appearance and required the substituted attorney to prove his authority and, upon his not being able to do so, the action failed. Held that this case did not fall within the saving clause of the statute, the demand of defendant for proof of authority not being a "matter of form," but a right conferred by statute.—*Spier v. McQueen*, 1 Mich. 252.

**DULY COMMENCED:** A suit commenced by declaration cannot be considered as "duly commenced" until a copy of the declaration with notice of the rule to plead is personally served upon the defendant; and the affidavit of personal service, by a private person, is open to contradiction by the defendant who may show that no such service was made. *Detroit F. P. Co. v. Bagg*, 78 Mich. 650. A suit is not begun, for the purposes of the statute of limitations, by merely filling out a summons and leaving it at a justice's office until the return day, or by retaining it in the plaintiff's custody, but it must be issued with the intention of service. *Howell v. Shepard*, 48 Mich. 472. /

**ONE YEAR:** Where a cause was adjourned in justice's court, by consent of parties, without pleadings, and the justice on the return day refused to proceed with the cause, it was held that such refusal might be treated as a judgment of nonsuit and an appeal would lie therefrom. Upon the dismissal of such appeal by the circuit court, the action was avoided for matter of form and the time for further suit ran from such dismissal. *Patridge v. Lott*, 15 Mich. 251. The new suit must be commenced within the statutory year. *Foote v. Pfeiffer*, 70 Mich. 581. This provision applies also to reversals on writ of certiorari. *McOmber v. Chapman*, 42 Mich. 117. When the case does not fall within the statute. *Johnson v. Mead*, 73 Mich. 326. Where a suit is abated because the sheriff has failed to make return of the original summons in time, the plaintiff may commence anew at any time within a year. *Ricaby v. Gentle*, 122 Mich. 337. Where the administrator of an estate sued in assumpsit to recover, for the benefit of the sole creditor of the estate, for personal property fraudulently conveyed by the deceased in his lifetime to the defendant, the defendant gave notice of the statute of limitations and it was held to be a good defense. *Bresnahan v. Nugent*, 92 Mich. 89.

Actions on Standard Fire Insurance Policies are not within this provision. *Dahrooge v. Insurance Co.*, 117 Mich. 443. This section has no application where in conflict with local act. *Wilton v. Detroit*, 138 Mich. 68.

**FORMER LAW CITED:** *Bresnahan v. Nugent*, 92 Mich. 89; *Ricaby v. Gentle*, 122 Mich. 337; *McMillan v. Reaume*, 137 Mich. 1.

### (12330). Fraudulent Concealment.

**SEC. 20.** If any person who is liable to any of the actions mentioned in this chapter, shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within two years after the person who is entitled to bring the

same shall discover that he had such cause of action, although such action would be otherwise barred by the provisions of this chapter.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 140, being C. L. '57, (5372); C. L. '71, (7159); How. 8724; C. L. '97, (9739). Unchanged.

**FRAUDULENT CONCEALMENT:** This provision was not meant to help parties who take no pains to see what is before their eyes. *Purdon v. Seligman*, 78 Mich. 132. The statute of limitations does not apply to a cause of action fraudulently concealed from the injured party, who may file his bill at any time within two years after the discovery of his rights and the deceit practiced upon him. *Tompkins v. Hollister*, 60 Mich. 470; *Stebbins v. Patterson*, 108 Mich. 537; *Ramsey v. Child, Hulswit & Co.*, 198 Mich. 658. A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood; and courts will not hesitate to sustain recoveries, where the truth has been suppressed with intent to defraud. *Id.* One cannot allege concealment of a cause of action appearing in the records of court proceedings in which he is interested. *Robert v. Morin*, 27 Mich. 307. The fraudulent concealment, which will take a claim out of the statute of limitations, must be that of the person sought to be charged and not that of his clerk without the employer's fault. *Stevenson v. Robinson*, 39 Mich. 160.

Where plaintiff has sufficient knowledge to put him upon inquiry. *First Nat. Bank of Ovid v. Steel*, 146 Mich. 315. As to burden of proof. *Dowse v. Gaynor*, 155 Mich. 42. Guardian's misappropriation of ward's property. *Allen v. Conklin*, 112 Mich. 74. See also *Krueger v. Railroad*, 51 Mich. 144; *Johnson v. Ins. Co.*, 12 Mich. 223; *Stebbins v. Patterson*, 108 Mich. 537; *Wolkins v. Knight*, 134 Mich. 348; *Ferguson v. Fink*, 134 Mich. 375; *Comfort v. Robinson*, 155 Mich. 143; An action for malpractice by a physician was not barred by the two year statute of limitations where the defendant fraudulently concealed from the plaintiff the cause of action. *Groendal v. Westrate*, 171 Mich. 95. The statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known, and the plaintiff must be held chargeable with knowledge of the facts, which it ought, in the exercise of reasonable diligence to have discovered. *First National Bank of Ovid v. Steel*, 146 Mich. 315; *Pardon v. Seligman*, 78 Mich. 132. If the duty of the agent is fixed, he is liable to an action for the money, and the statute of limitations begins to run when action might be brought. *Jewell v. Jewell's Estate*, 139 Mich. 586. In this case the cause of action was not barred by the statute of limitations until two years after the administratrix ascertained that the payment had not been made. *Wolkins v. Knight*, 134 Mich. 348. The statute of limitations begin to run from the time the fraud becomes known. *Allen v. Conklin*, 112 Mich. 77. This action was not barred by the statute of limitations, for the reason that a fraud had been committed in getting the certificate from decedent, without consideration, and at a time when she was non compos mentis. *Stebbins v. Patterson*, 108 Mich. 537. The rule is that the statute of limitations does not apply against a cause of action fraudulently con-

cealed before the fraud is discovered. Thus the complainant filed her bill within two years from her discovery of her rights as to this note and the deceit practiced upon her in reference thereto. She has thereby, if the fraud has been committed and concealed as claimed, saved her right of action, *Tompkins v. Hollister*, 60 Mich. 470. In an action on a note endorsed by an attorney, defendant and others, for whom the attorney was acting, where the attorney was also acting for the payee's estate and received moneys from collateral to the note which he did not apply on the note, and if he had applied them when received the statute of limitations would, nevertheless, have run, it was no answer to a plea of the statute of limitations by defendant endorser for plaintiffs to claim that defendants received the moneys from the collateral in trust for this was not a suit for such moneys within two years after discovery that the moneys had been converted, under C. L. '97 (9739), but an action on the note against defendant as an endorser. *Myers v. Muskegon Improvement Co.*, 193 Mich. 697; 160 N. W., 456.

**(12331). New Promise to be in Writing.**

SEC. 21. In actions founded upon contract express or implied, no acknowledgment or promise shall be evidence of a continuing contract, whereby to take a case out of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party to be charged thereby.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 140, being C. L. '57, (5373); C. L. '71, (7160); How. 8725; C. L. '97, (9740), unchanged.

**NEW PROMISE:** A verbal promise is not sufficient; it must be in writing. *Joy v. Thompson*, 1 Doug. 373; *Hillebrands v. Nibbelink*, 40 Mich. 646, 650. Whenever a new promise is set up to remove the bar of the statute, it ought to be proved in a clear and explicit manner, either expressly or by such an unqualified acknowledgment as authorizes its implication. The acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay, and be unaccompanied by any circumstances or declarations which repel the presumption of a promise or intention to pay. The acknowledgment or promise is deemed a new contract, springing out of and supported by the original consideration. *Ten Eyck v. Wing*, 1 Mich. 47-8. The statute remains in force unless the debtor renounces its benefit and protection and voluntarily makes a new promise to pay the old debt. Such new promise will be implied from the mere acknowledgment of the debt expressed by such words, and attended with such circumstances, as give it the meaning, and, therefore, the force and effect of a new promise. But if the acknowledgment be attended by any qualification tending to rebut the implication of a promise of payment, which would otherwise arise, there can be no recovery. *Jewett v. Petit*, 4 Mich. 510. See *Mainzinger v. Mohr*, 41 Mich. 685, 687; *Miner v. Lorman*, 56 Mich. 215; *Craig v. Seitz*, 63 Mich. 729; *Blair v. Carpenter*, 75 Mich. 180; *Atwood v. Gillett*, 2



Doug. 213. After an account has been left standing long enough to be barred, the production from it of an account stated by an oral process, will not revive it, unless the account stated be supported by written evidence, signed by the party to be charged. *Sperry v. Moore's Estate*, 42 Mich. 360. Sufficiency of new promise. In re *King's Estate*, 94 Mich. 411. Promise must be clear and explicit. *Halladay v. Weeks*, 127 Mich. 364; *Throop v. Russell*, 145 Mich. 482. Where acknowledgment not sufficient. *Rodgers v. Rodgers*, 147 Mich. 658; *Hebinger v. Ross*, 175 Mich. 244. See also *Perkins v. Cheney*, 144 Mich. 574; *Rumsey v. Settle's Estate*, 120 Mich. 375; *Borden v. Fletcher's Estate*, 131 Mich. 230; *Jewell v. Jewell's Estate*, 139 Mich. 589; *Myers v. Improvement Co.*, 169 Mich. 696. See also In re *Parsell's Estate*, 184 Mich. 523. Where the mortgagee received nothing, it would be a misnomer to call such a transaction a payment within the meaning of the statute, *Rodgers v. Robson*, 147 Mich. 658. There sufficient evidence to establish acknowledgment of the demand to which consideration was limited, within the meaning of this section. *Jewell v. Jewell's Estate*, 139 Mich. 589; *Rumsey v. Settle's Estate*, 120 Mich. 372.

A new promise to pay is implied where part payment of a debt is made to arrest the running of the statute of limitations. *Borden v. Fletcher's Estate*, 131 Mich. 231. Under conditional promises the promises cannot avail, except upon proof of the performance of the conditions. *Halladay v. Weeks*, 127 Mich. 365. Where the letter contained an acknowledgment of the debt, and a promise "that every cent I owe you will be paid," it clearly prevented the running of the statute for six years from the time it was written. *Rumsey v. Settle's Estate*, 120 Mich. 375. The bar of the statute is sufficiently removed where a surety on a guardian's bonds makes a verbal promise that he will pay. *Perkins v. Cheney*, 144 Mich. 574.

### (12332). Promise by One Joint Contractor.

SEC. 22. If there be two or more joint contractors or joint executors or administrators of any contractor, no such joint executor or administrator shall lose the benefit of the provisions of this chapter, so as to be chargeable, by reason of any acknowledgment or promise, made or signed by any other or others of them.

HISTORY: Re-enacts Sec. 14, R. S. '46, Ch. 140, being C. L. '57, (5374); C. L. '71, (7161); How. 8726; C. L. '97, (9741), unchanged.

JOINT OBLIGATIONS: A dissolution of partnership puts an end to the authority of one party to bind the other; and the acknowledgment of one partner will not revive a debt barred by the statute, as against the other partners. *Atwood v. Gillett*, 2 Doug. 216; *Pennoyer v. David*, 8 Mich. 407. See *Smith v. Sheldon*, 35 Mich. 42. Payment by one joint debtor in the presence of both. *Mainzinger v. Mohr*, 41 Mich. 685. Acknowledgment or new promise by one of two or more joint contractors. *Sigler v. Platt*, 16 Mich. 206; *Rogers v. Anderson*, 40 Mich. 290. See also *Tompkins v. Hollister*, 60 Mich. 480; *Littlefield v. Dingwall*, 71 Mich. 223; *Curtis v. Perry*, 126 Mich. 601; *Borden v. Fletcher's Estate*, 131 Mich. 220.

**(12333). Proceedings in Action Against Joint Contractor.**

SEC. 23. In actions commenced against two or more joint contractors or joint executors or administrators of any contractor if it shall appear on the trial or otherwise, that the plaintiff is barred by the provisions of this chapter, as to one or more of the defendants, but entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover, and for the other defendant or defendants against the plaintiff.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 140, being C. L. '57, (5375); C. L. '71, (7162); How. 8727; C. L. '97, (9742), unchanged.

**CONSTRUED:** Reading v. Beardsley, 41 Mich. 126; Parsons v. Clark, 59 Mich. 418. Action by co-surety for contribution, see Kelly v. Sprowl, 153 Mich. 691.

**(12334). Contents of Answer.**

SEC. 24. If in any action on contract, the defendant shall move to dismiss on the ground that any other person ought to have been jointly sued, it shall be a good answer to such motion, if true in fact, that the action was, by the provisions of this chapter, barred against the person so named in such motion, but was not so barred by reason of such acknowledgment or promise, as against such defendant.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 140, being C. L. '57, (5376); C. L. '71, (7163); How. 8728; C. L. '97, (9743), modifying the latter section, however, by substituting "move to dismiss" instead of "plead in abatement," and the further modification being made to correspond with such changes. Modified.

**(12335). Part Payment.**

SEC. 25. Nothing contained herein shall alter, take away, or lessen the effect of a voluntary payment of any principal or interest, made by any person; but no endorsement or memorandum of any such payment written or made upon any promissory note, bill of exchange or other writing by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this chapter.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 140, being C. L. '57, (5377); C. L. '71, (7164); How. 8729; C. L. '97, (9744), making, how-

ever, a few changes in the phraseology and inserting the word "voluntary" before "payment." Changed.

**PAYMENT:** No unusual meaning is to be attached to the word "payment" in this section. It is by no means true that it can be made only in money; on the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value. *Blair v. Carpenter*, 75 Mich. 179-80. Part payment of a demand, though neither a contract nor in itself a promise, is an acknowledgment of the continued existence of the demand and waives the right to plead the statute of limitations upon such lapse of time as may have preceded the payment; and it renews from its date whatever right of action existed before. *Miner v. Lorman*, 56 Mich. 212. But a part payment cannot give vitality to avoid promise to pay. *Id.* The indorsement by a mortgagee of a second mortgage, executed by the mortgagor and another, as a payment upon the first mortgage, under an agreement that it should be so treated, saves the debt from the statute. *Blair v. Carpenter*, 75 Mich. 167. A second settlement between partners after six years and payments made on the new balance found due, are sufficient to keep the old claim alive. *Miner v. Lorman*, 59 Mich. 480. The endorsement of a partial payment upon a promissory note, written by the party sought to be charged, is competent evidence of such payment, to take the case out of the statute. *Chandler v. Lawrence*, 3 Mich. 261. But not if the payment is accompanied with denials of liability or by circumstances rebutting the implication of a new promise. *Jewitt v. Pettit*, 4 Mich. 508; *Ten Eyck v. Wing*, 1 Mich. 40. As to the effect of a partial payment by one joint debtor in the presence of both. *Mainzinger v. Mohr*, 41 Mich. 685. Payments upon an account are sufficient to render it an open and mutual account so as to prevent the running of the statute. *Payne v. Walker*, 26 Mich. 60. Unexplained indorsements are not sufficient evidence of payment to take the case out of the statute. *Mich. Ins. Co. v. Brown*, 11 Mich. 273; *Rogers v. Anderson*, 40 Mich. 290; *Snyder v. Winsor*, 44 Mich. 140. An outlawed note cannot be revived by applying upon it a payment not intended to be made on it, nor supposed to be so by the parties. *Krone v. Krone*, 38 Mich. 661. A partial payment by an assignee upon a debt due from the assignor, which shows upon its face that it is to be applied as a final dividend upon the claim, will not save the debt from the operation of the statute. *Parsons v. Clark*, 59 Mich. 414. The rule is settled that part payment is but evidence of an admission of an indebtedness but an admission of an indebtedness, to take the case out of the statute, must be such as reasonably leads to the inference that the debtor intended to renew his promise to pay. *Lester v. Thompson*, 91 Mich. 254; *Sweet v. Ellis*, 109 Mich. 460. See also *Borden v. Fletcher's Estate*, 131 Mich. 221; *Bray v. Fletcher*, 132 Mich. 272; *Neilands v. Wright*, 134 Mich. 77; *Myers v. Improvement Co.*, 169 Mich. 689.

The theory upon which part payment takes a case out of the provisions of the statute is that it may be supposed to imply a new promise to pay the debt. *Home Life Insurance Co. v. Elwell*, 111 Mich. 692. But this result will not follow where the payment is accompanied by circumstances which preclude such inference. *Id.* Payment in order to stop the statute of limitations must be made to the creditor

or to the one interested. *Spring v. Perkins*, 156 Mich. 327. Payment to a stranger in interest not sufficient. *Id.* A Sunday transaction is not sufficient to arrest the statute. *Pillen v. Erickson*, 125 Mich. 68. Oral admissions of the debtor as to part payment may be shown. *Fowles v. Joslyn*, 135 Mich. 333. In *re Parsell's Estate*, 184 Mich. 525. Applying the proceeds of a chattel mortgage sale on a note which the mortgage was given to secure is not such a part payment as will arrest the running of the statute, there being no inference of a new promise to pay. *Westinghouse Co. v. Boyle*, 126 Mich. 680. Indorsement of payment by the owner of a note, not in the presence of the maker, not sufficient. *Fowles v. Joslyn*, 130 Mich. 274. Nor a verbal statement by the maker that plaintiff has his note. *Id.* Effect of payment by agent, see *Sweet v. Ellis*, 109 Mich. 460. This relates only to endorsement on behalf of the party to whom the payment shall be made, and not to the party making the payment. *Stretch v. Stretch*, 191 Mich. 416; 23 D. L. N., 286; 158 N. W., 185.

### (12336). Joint Contractors.

SEC. 26. If there are two or more joint contractors, or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of this chapter so as to be chargeable by reason only of any payment made by any other or others of them.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 140, being C. L. '57, (5378); C. L. '71, (7165); How. 8730; C. L. '97, (9745), unchanged.

**JOINT CONTRACTORS:** A joint maker of a note does not lose the benefit of the statute by payments made by another. *Rogers v. Anderson*, 40 Mich. 290; *Gates v. Fisk*, 45 Mich. 522; *Holcomb v. Sloan*, 39 Mich. 173. See *Mainzinger v. Mohr*, 41 Mich. 685; *Home Life Ins. Co. v. Elwell*, 111 Mich. 689; and cases cited. Payment by one of joint debtors without knowledge or consent of another will not affect such other. *Myers v. Erwin*, 180 Mich. 469; 21 D. L. N., 522; 147 N. W., 458.

*Myers v. Muskegon Improvement Co.*, 193 Mich. 697; 160 N. W., 456.

Payments made by a joint promisor in a mortgage do not stop the running of the statute as to an action on a personal obligation for which a mortgage is given as security. *Home Life Insurance Co. v. Elwell*, 111 Mich. 689; *Clinton v. Clinton's Estate*, 148 Mich. 499. This section does not apply to mortgages. *Perkins v. Cheney*, 114 Mich. 574. In matters not covered by this chapter the common law rule prevails. *Id.* *Brown v. Hayes*, 146 Mich. 476; *Atwood v. Gillett*, 2 Doug. 206; *Sigler v. Platt*, 16 Mich. 206; *Pennoyer v. David*, 8 Mich. 407; *Patterson v. College*, 113 Mich. 12; *Littlefield v. Dingwall*, 71 Mich. 223; *Rentchler v. Lawton*, 113 Mich. 14; *Curtiss v. Perry*, 126 Mich. 601; *Borden v. Fletcher's Estate*, 131 Mich. 222; *Fowles v. Joslyn*, 130 Mich. 274.

The rule is that, where part payment is made before the statute has run, that payment keeps the debt alive, both as against the payor and his co-obligor or surety as well. *Brown v. Hayes*, 146 Mich. 475; *Whitcomb v. Whiting*, 2 Doug. 652.

**(12337). Bar of Set-offs.**

SEC. 27. The provisions of this chapter shall not be deemed to bar a claim made by way of set-off, unless such claim for set-off was barred at the time plaintiff's cause of action accrued.

HISTORY: This section supersedes Sec. 19, R. S. '46, Ch. 140, being C. L. '57, (5379); C. L. '71, (7166); How. 8731; C. L. '97, (9746), unchanged.

CONSTRUED: Under this section, a debt alleged by way of set off is not barred, unless the statutory period has run against it before the accruing of the claim sued upon. *Busch v. Wilcox*, 106 Mich. 514. See *Carpenter v. Hood*, 172 Mich. 539.

**(12338). Actions by People.**

SEC. 28. The limitations hereinbefore prescribed for the commencement of actions, shall apply to the same actions when brought in the name of the people of this state, or in the name of any officer or otherwise, for the benefit of the state, in the same manner as to actions brought by individuals.

HISTORY: Re-enacts Sec. 20, R. S. '46, Ch. 140, being C. L. '57, (5380); C. L. '71, (7167); How. 8732; C. L. '97, (9747); unchanged.

PEOPLE: A claim by the state against the estate of one admitted to the asylum as an indigent insane person, for expenses incurred in his care, support or maintenance, is subject to the statute. *State v. Dunbar's Estate*, 99 Mich. 99. See also Compilers' Section 12321 and notes, *People v. Mich. Central R. R. Co.*, 145 Mich. 160; *McRae v. Aud. Gen.*, 146 Mich. 594; *Wilkinson v. Aud. Gen.* 147 Mich. 13. Certain trusts and duties cannot be enforced against the state by private parties, and cannot therefore affect the operation of statutes of limitations otherwise applicable. *Robson v. State Land Commissioner*, 148 Mich. 21.

**(12339). Time of Suit Pending in Chancery.**

SEC. 29. The time during which any case in chancery, commenced by any debtor, has or may be pending and undetermined, shall not be computed as constituting any part of the period limited or prescribed by any statute of limitations in force at the time of the commencement of such case in chancery, prescribing the time within which an action in relation to the debt or subject matter in dispute, as set forth in the proceedings in such case in chancery should or might be commenced.

HISTORY: Re-enacts Act 134 of 1857, being C. L. '57, (5386); C. L. '71, (7173); How. 8738; C. L. '97, (9754), unchanged.

Where an injunction is taken out for the purpose of restraining the sale of real property levied upon, the running of the statute of limitations relative to execution liens on real estate is interrupted. *Steele v. Bliss*, 166 Mich. 597. In *Sweet v. Haldone*, 68 Mich. 640, the court said: "The object of this statute is very clear. It is meant to prevent a debtor who has sought to remove litigation into the jurisdiction of an equitable tribunal, and stay or prevent legal proceedings, from getting any advantage in a suit at law by the delay which his own action in equity has caused. It does not make any equitable suit suspend the running of the statute except where instituted or prosecuted on behalf of the same person who wishes to plead the statute. Until this act was passed there was an object in procuring such delays, and gaining time, which might make the statute operate to bar a suit to which there was no honest defense. But where the plaintiff at law is the complainant in equity there is no such operation to stay the statute."

## CHAPTER X.

### PLACE FOR THE COMMENCEMENT OF ACTIONS AND CHANGE OF VENUE.

#### (12340). Commencement of Actions as to Place.

SECTION 1. Actions shall be commenced and tried in the proper county as follows:

1. Actions for the recovery of any real estate, or the possession thereof; for trespass on lands; and for injuries to real estate and actions of replevin shall be commenced and tried in the county where the subject of the action shall be situated;

2. All actions founded upon wrongs, and contracts, except as herein otherwise provided, shall be commenced and tried in the county where one of the parties shall reside at the time of commencing such action;

3. Suits may be commenced against any street railway or railroad company in any county where the principal office of such company within the state may be situated, or in any county traversed by a line of railroad, owned or operated by such company, or in any county in which such company shall be the owner or lessee of a right of way for a line of road: *Provided*, That if such line of road traverses the county of the plaintiff's residence, suit shall be brought in such county;

4. Suits may be commenced against foreign and domestic insurance companies, fraternal co-operative and mutual benefit associations, having for their object insurance against fire, death, sickness, accident, or any form or risk whatever; and against foreign and domestic surety and bonding companies, in the circuit court of any county in this state, in which the plaintiff resides, and in which such company is authorized to issue policies, or take risks.

5. In cases where the plaintiff is a resident of the state of Michigan, suits may be commenced in any county where the plaintiff resides, against any corporation not organized under the laws of this state; and where the plaintiff is a non-resident of the state of Michigan, where the cause of action accrued

within the state of Michigan, such plaintiff may bring action in the county where the cause of action accrued;

6. Suits may be commenced against any corporation doing a telegraph, telephone or an express business, in this state, in any county within which any such company maintains an office, or exchange, for the transaction of business;

7. Suits may be commenced against any person, firm or corporation, whether resident or non-resident, in the state of Michigan, engaged in the business of maritime commerce, or navigation, within the state, in the courts of any county in this state, in which the boats of such person, firm or corporation, call and do business;

8. Suits against public officers, or against any person specially appointed to execute orders of such officers, for any act done by them, by virtue of their offices respectively; and suits against other persons, who by the command of such officers, or in their aid or assistance, do anything touching the duties of such office, shall be commenced and tried in the county where the fact happened;

9. Every action for any penalty or forfeiture shall be commenced and tried in the county where the act was done, or where the act omitted was required in whole or in part to be done, upon which the penalty or forfeiture attached;

10. All suits commenced in this state by order of a probate court, upon any bond required by law to be filed with such court, shall be commenced and tried in the county where such bond is filed;

11. Suits may be commenced by attachment in any county, as provided in the chapter hereinafter contained relating to attachment proceedings;

12. Every suit in chancery shall be commenced in the circuit court for the county in which the property in dispute is situated, if the subject matter is local, and if it is not local, in the county where one of the parties in interest resides, if either is a resident of the state; but if the subject matter is not local, and neither party resides in the state, the suit may be brought in any county; and where it is necessary to file an information or bill in chancery, either to compel the specific performance of contract, cancellation of patents from the state, quiet title, or otherwise to affect real estate and when such real estate may be situated in different counties, it shall be competent to file such information or bill on the equity side of the circuit court of any one of said counties in which



a part of said real estate may be situate; and such court shall have complete jurisdiction in the premises as fully and effectually as if the whole of such estate were situate in the county in which suit may be commenced. And when it may be necessary to file a bill or information or to commence any proceedings in chancery on the party [part] of or in behalf of the state, the same may, at the election of the attorney general, be commenced in the circuit court for the county of Ingham on the equity side thereof, and said court shall have complete jurisdiction and full power and authority in the premises: *Provided*, That if the court shall deem it necessary for the convenience of parties and their witnesses, to order such issues to be tried in some other county, the same shall be tried in the county so designated: *Provided further*, That nothing in this section contained shall be construed to abrogate or repeal any provision of section seventeen of act number eighty-two of the Public Acts of eighteen hundred seventy-three, the same being section seven thousand two hundred eighty-two of the Compiled Laws of eighteen hundred ninety-seven, relating to suits by receivers of mutual fire insurance companies for assessments levied by them, nor of section eleven of act two hundred fifty-five of the Public Acts of eighteen hundred ninety-nine, relating to the prevention of trusts, etc.

**HISTORY:** This section merges and supersedes Sec. 22 of R. S. '46, Ch. 90, As Am. '47, p. 169, Act 105, Eff. May 16; As Am. '50, p. 417, Act 330, Eff. May 2; being C. L. '57, (3476); C. L. '71, (5058); As Am. '73, p. 31, Act 31, Imd. Eff. Mar. 14; How. 6612; C. L. '97, (434); and Sec. 110 of R. S. '46, Ch. 90, As Am. '48, p. 314, Act 206, Eff. June 2; being C. L. '57, (3563); As Am. '61, p. 54, Act 62, Eff. June 15; C. L. '71, (5146); How. 6700, C. L. '97, (515); and Sec. 1 of Act 266 of '95, As Am. '97, p. 116, Act 106, Imd. Eff. Apr. 29, being C. L. '97, (5196); As Am. '07, p. 455, Act 321, Eff. Sept. 28, and Sec. 5 of Act 292 of '87, being How. 21020; C. L. '97, (5520); and Sec. 37 of Act 113 of '77, being How. 4112; C. L. '97, (7027); and Sec. 4, R. S. '46, Ch. 128, being C. L. '57, (5114); C. L. '71, (6844); How. 8431; C. L. '97, (9800); and Act 47 of '97, being C. L. '97, (10027); and Sec. 2 of R. S. '46, Ch. 103, as Am. '47, p. 172, Act 105, Eff. May 16; As Am. '53, p. 190, Act 94, Eff. May 16; being C. L. '57, (4344); As Am. '69, p. 9, Act 8, Eff. July 5; C. L. '71, (5970); How. 7547; C. L. '97, (10216); and Sec. 1 of Act 127 of '61, re-enacted '71, p. 37, Act 37, Imd. Eff. Mar. 17; being C. L. '71, (5976); As Am. '83, p. 18, Act 26, Eff. Sept. 8; How. 7548; C. L. '97, (10217); and Sec. 3, R. S. '46, Ch. 103, being C. L. '57, (4345); C. L. '71, (5941); How. 7549; C. L. '97, (10218); and Sec. 2 of Act 174 of '85, being How. 3960b7; As Am. '93, p. 303, Act 188, Eff. Aug. 28; C. L. '97, (10430);

and Sec. 1 of Act 119 of '87, being How. 3775b; C. L. '97, (10433); and Sec. 1 of Act 256 of '81, being How. 8145; As Am. '95, p. 159, Act 61, Eff. Aug. 30; C. L. '97 (10442); and Sec. 1 of Act 178 of '81, being How. 4360; As Am. '83, p. 173, Act 160, Eff. Sept. 8; C. L. '97, (10444); As Am. '01, p. 79, Act 51, Eff. Sept. 5; and Sec. 3 of R. S. '46, Ch. 124, being C. L. '57, (5007); C. L. '71, (6728); How. 8317; C. L. '97, (10650); and Sec. 2, R. S. '46, Ch. 109, being C. L. '57, (4617); C. L. '71, (6267); How. 7851; As Am. '85, p. 40, Act 43, Eff. Sept. 19; C. L. '97, (11014), in so far as such sections relate to the commencement of suits, unchanged.

**PLACE FOR COMMENCEMENT OF ACTIONS:** The only change in the law relating to the place for commencement of actions is that suits against street railway and railroad corporations must be brought in the county where the plaintiff resides, if a line of road owned or operated by the defendant traverses that county.

**SUBDIVISION 1:** (C. L. '97, 10216, Subd. 1; 10650.)

**LOCAL ACTIONS:** This section provides that certain actions shall be tried in the county where the subject of the action shall be situated. *Graham v. Smith*, 62 Mich. 149.

**FORMER LAWS:** Under Act 127, '61, C. L. '97, (10217) superseded by this act, cases of trespass on lands could be brought in the county where the defendant resided. *Smith v. Webster*, 23 Mich. 300; *Haywood v. Johnson*, 41 Mich. 604. But the court could remove the case to the county where the cause of action arose upon proper cause shown. *Freud v. Judge*, 131 Mich. 606; *Bradley v. Watkins Co.*, 144 Mich. 142.

**SUBDIVISION 2:** (C. L. '97, 10216, Sub. 2; 7027).

**CONSTRUED:** This section does not apply where both parties are non-residents of the state. *Sleight v. Swanson*, 127 Mich. 436.

**RIGHT TO BE SUED AT HOME:** The right of a person to be sued at his own domicile is not a technical one, but one of importance and should not be taken away, except in strict compliance with law. And non-residents, as a rule, must sue their respondents at home. *Jacobson v. Judge*, 76 Mich. 236. And the provisions of this section are intended to save resident defendants from vexatious suits in places remote from their homes. *Atkins v. Borstler*, 46 Mich. 552. See also *Monroe v. Judge*, 125 Mich. 288. A defendant in a suit commenced by *capias ad respondendum* by plaintiffs out of the state, can be arrested only in the county where he resides. *Hatch v. Saunders*, 66 Mich. 185, citing *Detroit F. & M. Ins. Co. v. Judge*, 23 Mich. 492; *Haywood v. Johnson*, 41 Mich. 598; *Turrill v. Walker*, 4 Mich. 177; *Atkins v. Borstler*, 46 Mich. 552. The residence and local habitation of a private corporation is the town where its principal business office is located, and it can be sued only in the county where it is located, unless service is had personally on some officer thereof designated by law as the person to represent it for such purpose. *Detroit F. & M. Ins. Co. v. Judge*, 23 Mich. 492. For the purposes of jurisdiction a railroad company is deemed a resident of any county where the road is operated. *Pollock v. Railway*, 168 Mich. 581. See also subdivision 3 *supra*.

**TRANSITORY ACTIONS:** Transitory actions can be brought in those counties only, where the court would be legally entitled to try and decide them on their merits; they cannot be begun in a county

where neither party resides. *Haywood v. Johnson*, 41 Mich. 598. But transitory actions upon contracts can be brought against non-residents of the state in any county where service can be obtained upon them. *Atkins v. Borstler*, 46 Mich. 552; *Cofrode v. Judge*, 79 Mich. 339. See also *Millar v. Hilton*, Dec., 1915, 189 Mich. 635. Trover is a transitory action; and an action for the conversion of timber, even when brought against the original trespasser who cut the trees, is transitory. *Greeley v. Stilson*, 27 Mich. 153. An action on the case for obstructing a navigable stream was local at common law, but is transitory under this section. *Barnard v. Hinkley*, 10 Mich. 458. "Real estate," as used in this section, is the real estate of the plaintiff and not that of the public at large. *Id.* After a defendant in a transitory action has pleaded in bar of the action in a court of competent jurisdiction he must be held to have waived the question of jurisdiction. *Johnson vs. Burke*, 167 Mich. 355.

**NON-RESIDENT DEFENDANTS:** The provision for the trial of issues of fact, in actions upon contracts, in the county where one of the parties shall reside at the time of the commencement of suit, does not apply to non-resident defendants, nor to a resident plaintiff suing a non-resident defendant, who, from the necessity of the case, may be sued in any county in which he may be found. *Cofrode v. Judge*, 79 Mich. 332, citing *Atkins v. Borstler*, 46 Mich. 553. See also *Johnson v. Burke*, 167 Mich. 355.

**DETERMINATION OF JURISDICTION:** Jurisdiction of transitory actions may be questioned and decided on motion based upon affidavits, if the facts are not of record or within judicial notice. *Haywood v. Johnson*, 41 Mich. 605. As to plea in abatement, see *Jewell v. Lamoreaux*, 30 Mich. 155. When objection to the venue may be raised on the trial. *Morse v. Dunham*, 48 Mich. 590.

**FORMER LAW CITED:** *Smith v. Assurance Society*, 159 Mich. 168; *People v. Fidelity & Deposit Co.*, 163 Mich. 100.

**SUBDIVISION 3:** *Pollock v. Railway*, 168 Mich. 581.

**SUBDIVISION 4:** (C. L. '97, 5196, 10430, 10444). Insurance companies. Under former laws see *Monger v. Ass'n*, 145 Mich. 683.

**SUBDIVISION 5:** (C. L. '97, 10442). This section should be limited in its application to foreign corporations transacting interstate commerce business in this state. *Showen v. J. L. Owens Co.*, 158 Mich. 333. But in *Sherrill v. Railroad Co.*, 161 Mich. 495, the court held that C. L. '97, 10442, now superseded by this act, included foreign corporations engaged in local business in Michigan but not authorized to transact business in the state. A foreign railroad company doing business in Michigan is within the provisions of the statute superseded by this section. *Daniels v. Railway Co.*, 163 Mich. 468. This section provides for service upon corporations not organized under the laws of this state. *Grand Trunk Ry. Co. v. Judge*, 106 Mich. 249. A foreign corporation authorized to do business within this state is in effect a domestic corporation in so far as service of process is concerned, and as to such corporations this statute does not apply. *Yund v. Excelsior Wrapper Co.*, 185 Mich. 143. The court distinguishes corporations admitted to do business in the state, and thereby in a measure domesticated and domiciled here, and other foreign corporations. *Matthews v. Montreal Mining Co.*, 183 Mich. 541. See also *Wells v. Fidelity & Guaranty Co.*, 160 Mich. 213. Service of process in a cause

of action arising outside the state upon a corporation not transacting business within the state, service being by summons on an officer of the company transiently within the state, is void. *Matthews v. Montreal Mining Co.*, 183 Mich. 541. Actions commenced before justice of the peace. See Compilers' Sections 14170, 14175; *McLean v. Insurance Co.*, 130 Mich. 593; *Reath v. Telegraph Co.*, 89 Mich. 25. Service on agent of foreign corporations, see *Maxwell v. Speed*, 60 Mich. 36; *Daniels v. Railway Co.*, 163 Mich. 468. Act 266, 1881, (C. L. '97, 10442) was passed to remedy defects in prior laws indicated in *Newell v. Railway Co.*, 19 Mich. 336; *Iron Co. v. Construction Co.*, 61 Mich. 226. Service of process on a traveling salesman. *Ryerson v. Judge*, 114 Mich. 352. Where no service is had. *McLauren v. Byrnes*, 80 Mich. 279-8. Prior to 1909 foreign corporations could not be sued where the cause of action accrued outside the state. *Grand Trunk Ry. Co. v. Judge*, 106 Mich. 248. As to actions brought by corporations not authorized to do business in this state, see Compilers' Section 12369.

FORMER LAW CITED: *Bridge & Iron Works v. Judge*, 73 Mich. 157; *Molnet v. Burnham, Stoepel & Co.*, 143 Mich. 492; See *Young v. Reeves & Co.*, 172 Mich. 364.

SUBDIVISION 7: (C. L. '97, 10433).

SUBDIVISION 8: (C. L. '97, 10218). This subdivision applies to actions involving trespass on land and covers cases where the process was defective. *Morse v. Dunham*, 48 Mich. 590. Suits must be brought in the county where the act was done. *Graham v. Smith*, 62 Mich. 148; See also *Davis v. Township of Frankenlust*, 118 Mich. 496.

SUBDIVISION 9: (C. L. '97, 5520; 9800).

SUBDIVISION 10: (C. L. '97, 10027).

SUBDIVISION 12: (C. L. '97, 434, 515, 11014). Laws excepted from the provision of this section: Section 17, Act 82, '73, above referred to, is Compilers' Section 9578, and Section 11, Act 255, '99, is Compilers' Section 15023. Bills in equity affecting interest in real estate must be filed in the county where the lands, or some portion of them are situated. *Chapin v. Judge*, 104 Mich. 233; citing *Godfrey v. White*, 43 Mich. 171; *Krolick v. Bulkley*, 58 Mich. 411; *Rankin v. Rothschild*, 78 Mich. 10. See also *Richard v. Boyd*, 124 Mich. 396. A bill in equity to compel the production of a title deed in order that it may be recorded at complainant's expense does not come within the provisions of this section. *Roberts v. Roberts*, 124 Mich. 414. See also *Noble v. Grandin*, 125 Mich. 383, 388. A bill to set aside a foreclosure sale cannot be maintained in a county where no part of the land is situated. *Lawrence v. Hathaway*, 128 Mich. 119, 124. See also *Ulman v. Ulman*, 148 Mich. 353, 355. As to the foreclosure of a mechanic's lien, see *Eng. Co. v. Detroit, Etc., Ry. Co.*, 152 Mich. 582, 585. As to the jurisdiction of a court of equity where the parties are non-residents and the land in question is within the jurisdiction of the court, see *Morris v. Vyse*, 154 Mich. 253, 258. A resident of one county may not file a bill of complaint in the circuit court of another county against a party defendant who is a resident of Canada to restrain the taking of depositions in a criminal proceeding pending in the Canadian courts. *Titus v. Circuit Judge*, 168 Mich. 507. As to the state proceedings in Ingham County, see *McMullen v. Judge*, (and cases cited) 102 Mich. 611; *People v. Det., Etc., Ry. Co.*, 169 Mich. 75. C.

L. '97, 9549, (Compilers' Section 13612) was not intended to repeal C. L. '97, 434, which section is superseded by this section, or to divest other circuit courts of jurisdiction in chancery, when the subject matter was local. Chapin v. Judge, 104 Mich. 233; Steele v. Bliss, 170 Mich. 194. As to equity jurisdiction over national banks see Levitan v. National Bank, 174 Mich. 566. Where the real purpose of the bill of complaint was for the foreclosure of an equitable mortgage upon lands situated wholly outside the state of Michigan, and where jurisdiction thereof was in the courts of New York, the action was local, and trial must be had in the county where the lands lie. Richard v. Boyd, 124 Mich. 396. Land in different counties. Morris v. Judge, 130 Mich. 336. Lien on real estate. Ulman v. Ulman, 148 Mich. 355.

This section merges C. L. '97, (10216), (10217), (10218), (10650), (10432), (10439), (10442), (10444), (434), (10027), (7027), (515), (11014), (5520), (5196).

**TRANSFER OF CAUSES:** The law relating to the transfer of causes to another circuit for trial because of the disqualification of the judge of the circuit where the same is pending remains without change, except that it is provided that instead of making the transfer, the judge may call in any other judge, not disqualified, to sit in the case. Heretofore it would seem to have been mandatory to make the transfer, if application was made under the statute. It is further provided that the transfer may be made by stipulation without application to the court.

An action commenced in the county of plaintiff's residence against the defendant was improperly brought in a county other than that in which defendant's business was conducted and in which service of process was obtained. Yund v. Excelsior Wrapper Co., 185 Mich. 143; 22 D. L. N. 191; 151 N. W. 653. Service of process upon the agent and officer of a corporation which was domiciled in a foreign state, could not constitutionally be made if the company was not engaged in local business and the officer was not one that was empowered to accept service of process. Matthews v. Montreal Mining Co., 183 Mich. 542; 22 D. L. N. 1212; 150 N. W. 127; Buck v. Lockwood, 193 Mich. 254.

### Change of Venue.

#### (12341). Courts May Change Venue.

SEC. 2. Each of the circuit courts, upon good cause shown, may change the venue in any civil cause pending therein, and direct the issue to be tried in the circuit court of another county, and make all necessary rules and orders for certifying and removing such cause, and all matters relating thereto, to the court in which such issue shall be ordered to be tried, and such court shall thereupon have full jurisdiction of such cause the same as though such cause had been originally commenced therein; and in every such case, all expenses of such trial which would be chargeable to the county in which the suit originated, had the cause been tried therein, as determined by the circuit judge of the county to which said cause has

been transferred, shall be a charge upon the county in which the suit was commenced.

**HISTORY:** Supersedes a portion of Sec. 10 of Act 157 of '51, being C. L. '57, (3420); As Am. '71, p. 15, Act 12, Imd. Eff. Feb. 15; C. L. '71, (4946); As Am. '79, p. 86, Act 88, Imd. Eff. May 22; How. 6468; C. L. '97, (309); As Am. '05, p. 483, Act 309, Imd. Eff. June 17; As Am. '07, p. 212, Act 161, Imd. Eff. June 17; As Am. '09, p. 103, Act 67, Eff. Sept. 1; Sec. (309), C. L. '97, as Am. however, was expressly excepted from the repeal of Ch. 25, C. L. '97, by this act. See Compilers' Section (14563), changed.

**CHANGE OF VENUE:** Campau v. Dewey, 9 Mich. 381; Greeley v. Stillson, 27 Mich. 154; People v. Hurst, 41 Mich. 334; Haywood v. Johnson, 41 Mich. 602; Cofrode v. Judge, 79 Mich. 349; Simpson v. Judge, 81 Mich. 120; People v. Peterson, 93 Mich. 27; People v. Fuhrman, 103 Mich. 593; Bradley-Watkins Co. v. Judge, 144 Mich. 142; Comstock v. Judge, 152 Mich. 213; Silverstone v. Assurance Corporation, 176 Mich. 529; Hall v. Dickinson, 204 Mich. 545. Where the showing in a motion for a change of venue is insufficient, and the trial court ordered a change, a writ of mandamus will be granted to compel respondent to vacate an order changing the venue. Glinnan v. Judge of Recorder's Court, 173 Mich. 676. Where complainant filed a bill in chancery against several defendants and the cause was at issue as to the resident defendants but not as to the non-resident defendants who had not been served, when an application for change of venue was made and ordered, the application was not made prematurely. Detroit Cement Co. v. Circuit Court Judge, 148 Mich. 287.

As to liability of county: See Kent Co. Sup'r's v. Mecosta Co. Sup'r's, 126 Mich. 300.

**JUDGE DESIGNATING ANOTHER:** See Compilers' Section (12307).

**GOVERNOR DESIGNATING JUDGE:** See Compilers' Section (12144).

**PRESIDING JUDGE:** See Compilers' Section (14546).

**TRANSFER OF CAUSES:** Judge disqualified. See next section.

### Transfer of Causes.

#### (12342). Transfer of Causes.

Sec. 3. Whenever any civil suit or proceeding shall be pending in any circuit court in this state, either on the law or equity side of said court, in which the judge of said court shall be interested as a party, or as a member of any corporation which is a party to said suit, or has heretofore been consulted or employed as counsel in the subject matter to be litigated in said suit, or in which for any other reason he would be excluded from sitting as judge at the trial thereof the same may be transferred to some other circuit court in the manner hereinafter provided, or the judge of the circuit court in which such suit is pending may call in any other judge not disqualified to sit in such cause.

**HISTORY:** Re-enacts Sec. 1 of Act 124 of '55, being C. L. '57, (3445); C. L. '71, (4971); How. 6495; C. L. '97, (10105), modifying the same slightly and adding thereto the last clause of the above section, changed.

**TRANSFER OF CAUSES:** The law relating to the transfer of causes to another circuit for trial because of the disqualification of the judge of the circuit where the same is pending remains without change, except that it is provided that instead of making the transfer, the judge may call in any other judge, not disqualified, to sit in the case. Heretofore it would seem to have been mandatory to make the transfer, if application was made under the statute. It is further provided that the transfer may be made by stipulation without application to the court.

**TRANSFER OF CAUSES:** This statute provided for transfer only when the judge of the circuit is incompetent, for special reasons mentioned, to hear the cause or even the motion for its transfer. *Campau v. Dewey*, 9 Mich. 407. It is imperative when the application sets forth a proper cause for removal. *Pack v. Judge*, 74 Mich. 28. The power to transfer causes can be given only by statute and the statute must be complied with. *Shannon v. Smith*, 31 Mich. 452. Conditional transfer not complied with, of no force. *Palmiter v. Lumber Co.*, 31 Mich. 134-5. Transfer of criminal cases from circuit to municipal courts. *People v. Hurst*, 41 Mich. 323. Expenses of criminal cases transferred from one county to another. *Barry Co. v. Manistee Supervisors*, 33 Mich. 497. Where the motion for change of venue was based on a newspaper article but no showing made that any such interview took place, court did not abuse discretion in denying motion. *People v. Mfg. Co.*, 149 Mich. 580.

**DISQUALIFICATION OF JUDGE:** The words, "or has heretofore been consulted," must be construed as having reference to the time when the case shall be pending and when the application shall be made. *Whipple v. Judge*, 26 Mich. 347. A showing that the judge had assisted a party in selecting a jury on a former trial and that he had announced that he could not try the case on account of his former interest in it, is sufficient to give jurisdiction. *Fellows v. Canney*, 75 Mich. 445. See *Fraser v. Judge*, 48 Mich. 176; *Kittridge v. Judge*, 80 Mich. 200; *Chapin v. Judge*, 104 Mich. 234. On the hearing of an application for a transfer of a suit, affirmative proof should be made that the judge of the circuit to which the case is to be transferred is not disqualified. *Kelly v. Judge*, 79 Mich. 392; *People v. Mfg. Co.*, 149 Mich. 580. Judgments made by a disqualified judge are not voidable but void. They may be attacked collaterally. *Bliss v. Caille Bros. Co.*, 149 Mich. 606; *Davis Colliery Co. v. Sugar Co.*, 155 Mich. 223.

See cross references to the last preceding section.

No abuse of discretion was exercised where the error relates to a motion as to the disqualification of the trial judge on the ground that he was biased, prejudicial and interested and reliance for those facts were placed upon a newspaper article. *People v. Wolverine Manfg. Co.*, 142 Mich. 532. A judge is not disqualified to sit in a case where he is related by affinity to the wife, but not to the husband who is a party, however, he is disqualified where a blood relative

within ninth degree is a party. *Bliss v. Caille Brothers Co.*, 149 Mich. 609.

See *Freud v. Wayne Circuit Judge*, 131 Mich. 608.

This statute does not require that the application for the transfer of a suit, on account of the disqualification of the circuit judge, shall be verified, nor that it shall set forth that the judge of the circuit to which the suit is to be transferred is disqualified to sit. *Grostick v. D. L. & N. R. R. Co.*, 96 Mich. 496. It is unwarranted to make an order for the transfer of a cause on account of the disqualification of the circuit court, to a county in which neither of the parties or their attorneys reside. *Simpson v. Circuit Judge*, 81 Mich. 117. Where the application set forth a proper cause for removal, which was established by proof, the statute is imperative and the only matter left to the discretion of the judge is the circuit and county to which the cause shall be transferred. *Pack v. Circuit Judge* 74 Mich. 33. Where the testimony of the circuit judge shows that he had been consulted as to the subject matter to be litigated in a suit by one of the plaintiffs who also had employed him as counsel in reference thereto, it is sufficient to disqualify the judge. *Curtis v. Wilcox*, 74 Mich. 70. Where a circuit judge, considering himself disqualified, called in another judge to hear an application for a continuance under this section and the case was set for trial, the judge of an adjoining circuit was without jurisdiction to order a change of venue therein while said case was under said order. *Sharrar v. Ionia Circuit Judge*, 204 Mich. 500; 171 N. W. 353.

#### (12343). Application for Transfer.

SEC. 4. Any party desiring to transfer any such suit or proceeding as hereinbefore mentioned, may apply to the judge of any adjoining circuit, who is not within the disqualifications mentioned in the preceding section, for an order to transfer such suit; such application shall be in writing and shall set forth specifically the grounds for such transfer. The parties to any such suit may, by stipulation in writing, consent to the transfer of such suit or proceeding without any application to the judge, in which case the stipulation shall have the same effect as an order duly made for such transfer.

**HISTORY:** Re-enacts Sec. 2 of Act 124 of '55, without material change being C. L. '57, (3446); As Am. '58, p. 14, Act 4, Eff. May 6; C. L. '71, (4972); How. 6496; C. L. '97, (10106); As Am. '03, p. 313, Act 211, Eff. Sept. 5.

See note to Section 3, under black letter title.

**APPLICATION:** The statute does not require that the application for transfer, on account of the disqualification of the judge, shall be verified, nor that it shall set forth that the judge of the circuit to which the suit is to be transferred is qualified to sit. *Grostick v. Railroad Co.*, 96 Mich. 495.

Act 211 of '03, superseded by this section, took away the jurisdiction of circuit court commissioners to transfer causes. Transfer by judge of adjoining circuit. *Whipple v. Judge*, 26 Mich. 342. The order must



be made by the other judge and not by the disqualified judge. *Shannon v. Smith*, 31 Mich. 451. On certiorari to review proceedings for the transfer of a suit, in the absence of any real conflict in the testimony, the court will apply the law to the testimony without regard to the finding of the court, which must be considered a finding of law and not of fact. *Curtis v. Wilcox*, 74 Mich. 69; *Fellows v. Clanney*, 75 Mich. 445. See also *Comfort v. Stockbridge*, 37 Mich. 472. An order for the transfer of a cause on account of the disqualification of the circuit judge to a county in which neither of the parties or their attorneys reside, is not warranted under this act unless by agreement of the parties. *Simpson v. Judge*, 81 Mich. 117. For removal of cause in action, for trespass upon land. *Freud v. Judge*, 131 Mich. 608; See *Comstock v. Judge*, 152 Mich. 213; Circuit Court Rule 38 '16.

**WHAT MAY BE TRANSFERRED:** Proceedings on appeal from disallowance of claim against estate. *Fraser v. Judge*, 48 Mich. 176; *Kittridge v. Judge*, 80 Mich. 204. Upon application to the chancery court to exercise its supervisory powers over common law assignments, the assignment becomes a civil proceeding pending in the circuit court and subject to transfer. *Kittridge v. Judge*, 80 Mich. 200. See *Hall v. Dickinson*, 204 Mich. 545.

#### (12344). Hearing.

SEC. 5. On receiving such application the judge shall appoint a time and place of hearing the same, and shall from time to time, as may be necessary, direct the manner in which notice of such hearing shall be given to all parties interested in such application.

**HISTORY:** Re-enacts Sec. 3 of Act 124 of '55, being C. L. '57, (3447); C. L. '71, (4973); How. 6497; C. L. '97, (10107); As Am. '03, p. 313, Act 211, Eff. Sept. 5, changed.

#### (12345). Order for Transfer.

SEC. 6. On the day appointed for such hearing or on some other day to which said hearing may be adjourned, when it shall appear that the notice of such hearing has been duly given, the judge shall proceed to hear and determine the application for such transfer, and for this purpose may issue subpoenas for witnesses, and require their attendance as in other cases, and he shall hear the proofs and allegations of the parties touching the application before him, and if he shall be satisfied that the judge of the circuit court where such suit is pending is disqualified to sit in said cause within the intent and meaning of section three of this chapter, he shall grant an order for the transfer of said cause or proceeding to the circuit court of some other county, which county shall be specified in said order.

**HISTORY:** Re-enacts Sec. 4 of Act 124 of '55, without material

change, being C. L. '57, (3448); C. L. '71, (4974); How. 6498; C. L. '97, (10108), as Am. '03, p. 313, Act 211, Eff. Sept. 5, unchanged.

**DISCRETION OF COURT:** This section is imperative if the application sets forth a proper cause for removal, which is established by the proofs, the only matter left to the court's discretion being the circuit and county to which the cause shall be transferred. *Pack v. Judge*, 74 Mich. 33; *Grostick v. Railroad Co.*, 96 Mich. 497. In *Shannon v. Smith*, 31 Mich. 451, 452, it was held that the statute contemplates the exercise of some discretion in appointing the place of transfer. *Bolles v. Loan & Trust Co.*, 86 Mich. 231. Where there is a conflict of evidence, it is for the court alone to pass upon its sufficiency. *Curtis v. Wilcox*, 74 Mich. 71. The judge hearing the motion may transfer the cause to his own circuit. *Daniel v. Insurance Co.*, 149 Mich. 629.

**ORDER:** Form and sufficiency. *Shannon v. Smith*, 31 Mich. 451. An order made upon condition is not effective until the condition has been complied with. *Palmiter v. P. M. Lumber Co.*, 31 Mich. 183.

#### (12346). Determination of Court for Trial.

**SEC. 7.** In case the parties to said suit or proceeding shall by stipulation in writing or otherwise agree upon the circuit court of the county to which said cause shall be transferred, said circuit judge shall make an order of transfer in accordance therewith; but if no such agreement be reached said judge shall hear such proofs as may be offered by the parties, and such suit or proceeding shall be transferred to the circuit court of the county in which the same can be tried with the most convenience, expedition and economy to the parties interested, and in which the circuit judge shall not be disqualified to sit within the provisions of section three of this chapter.

**HISTORY:** Re-enacts without material change Sec. 5 of Act 124 of '55, being C. L. '57, (3449); C. L. '71, (4975); How. 6499; C. L. '97, (10109); as Am. '03, p. 314, Act 211, Eff. Sept. 5, unchanged.

**PLACE OF TRANSFER:** A case must be transferred, if possible, to a county where some party or his counsel resides. *Shannon v. Smith*, 31 Mich. 452. An order transferring a cause to a county where neither of the parties or the attorneys resides is unwarranted, unless made by agreement of the parties. *Simpson v. Judge*, 81 Mich. 116. It was held in *Stimson v. Shingle Co.*, 71 Mich. 374, and later in *Bolles v. Loan & Trust Co.*, 86 Mich. 229, that this section applies only to a party or the attorney or solicitor of record and that the removal to a county could not be based upon the residence of "counsel" who was not the attorney of record. *Davidson v. Elevator Co.*, 97 Mich. 458-9. Affirmative proof should be made on the hearing that the judge of the circuit to which the case is transferred is not disqualified. *Kelley v. Judge*, 79 Mich. 396.

#### (12347). Jurisdiction of Court to Which Transferred.

**SEC. 8.** On filing the order of the judge granted as aforesaid in which the proceedings before said judge shall be briefly

recited, with the clerk of the court to which said suit or proceeding is by said order directed to be transferred, the said court shall have jurisdiction of the same to the same extent as if said cause or proceeding had been legally commenced in said court and may grant such orders as may be necessary to procure the transfer of the existing files and orders in said cause or proceeding to said court, and to cause due notice of such transfer to be made.

**HISTORY:** Re-enacts without material change Sec. 6 of Act 124 of '55, being C. L. '57, (3450); C. L. '71, (4976); How. 6500; C. L. '97, (10110); As Am. '03, p. 314, Act 211, Eff. Sept. 5, unchanged.

**(12348). Clerk to Transfer Papers and Copies of Record.**

**SEC. 9.** Upon delivering to the clerk of the court where said cause or proceeding was pending before said transfer, a copy of said order of transfer duly certified by the clerk of the court in which said order shall be filed, the said clerk to whom said certified copy shall be delivered, shall attach together the originals of all the papers filed in said suit or proceeding, and shall make true copies of all the orders made therein, and which are entered upon books of record in said court, and shall transmit the same, certified under his hand and seal to be the originals of such files and true copies of such orders, to the clerk of the court in which said order of transfer shall have been filed; which files and copies when so filed and deposited in the office of the clerk to whom said transfer is to be made, shall have the same force and effect in all respects, and shall be subject to the rules and orders of said court as other original proceedings therein.

**HISTORY:** Re-enacts without material change Sec. 7 of Act 124 of '55, being C. L. '57, (3451); C. L. '71, (4977); How. 6501; C. L. '97, (10111), unchanged.

**(12349). Fees of Clerk.**

**SEC. 10.** The clerk who shall be required under the provisions of the preceding section to transmit the files and orders in any cause or proceeding, as herein provided, shall be entitled to six cents per folio for all copies of orders and proceedings which shall be necessarily made, and one dollar in addition thereto, which shall be in full for all services rendered under said section.

**HISTORY:** This section re-enacts without material change Sec. 8 of Act 124 of '55, being C. L. '57, (3452); C. L. '71, (4978); How. 6502; C. L. '97, (10112), unchanged.

## CHAPTER XI.

### FORMS OF ACTIONS.

#### (12350). Division of Civil Actions.

SECTION 1. Civil actions are divided into equitable actions and actions at law. The following actions at law are retained, namely, actions of assumpsit, trespass on the case, replevin, ejectment, certiorari, mandamus and quo warranto. All other forms of actions at law are abolished. In all cases where the actions of covenant or debt would be otherwise maintainable, the action of assumpsit shall hereafter be brought, and in all cases where actions of trespass or trover would be otherwise maintainable, the action of trespass on the case shall be brought: *Provided, however,* That in case of trespass on lands, and in cases where an action on the case for fraud or deceit may by law be brought, and in cases of the conversion of personal property into money, the plaintiff may bring and maintain either an action of assumpsit, or an action of trespass on the case. In all cases not otherwise specially provided for by law, where a pecuniary penalty or forfeiture shall be incurred by any person, and the act or omission for which the same is imposed, shall not also be a misdemeanor, such penalty or forfeiture may be recovered in an action of assumpsit. In all such cases where assumpsit is brought, a promise shall be implied by law to pay all just damages sustained by plaintiff and may be so declared upon. Actions pending at the time this act takes effect shall not in any wise be affected by the provisions of this section.

HISTORY: This section supersedes or eliminates parts of Sec. 30, R. S. '46, Ch. 107, being C. L. '57, (4531); C. L. '71, 6175; How. 7759; C. L. '97, (10400); As Am. '05, p. 104, Act 77, Eff. Sept. 16; and Sec. 1 of Act 195 of '97, being C. L. '97, (10421); and Sec. 49, R. S. '46, Ch. 107, being C. L. '57, (4550); C. L. '71, (6194); How. 7778; C. L. '97, (10417); and Sec. 1 of Act 165 of '75; as Am. '81, p. 255, Act 211, Eff. Sept. 10; being How. 8024; C. L. '97, (11207); and Sec. 1, R. S. '46, Ch. 108, being C. L. '57, (4554); C. L. '71, (6204); How. 7788; C. L. '97, (10947); and Sec. 29 R. S. '46, Ch. 107, being C. L. '57, (4530); C. L. '71, (6174); How. 7758; C. L. '97, (10399); and Sec. 1, R. S. '46, Ch. 128, being C. L. '57, (5111); C. L. '71, (6841); How. 8428; C. L.

'97, (9797); and Sec. 52, R. S. '46, Ch. 79, being C. L. '57, (3170); C. L. '71, (4679); How. 6159; C. L. '97, (9218), changed.

**FORMS OF ACTIONS:** All the forms of actions at law are abolished, except assumpsit, trespass on the case, replevin, ejectment, certiorari, mandamus and quo warranta. In all cases where covenant or debt might have been brought heretofore, the action must now be assumpsit. Case takes the place of trespass and trover. However, the former provisions permitting assumpsit to be brought in cases of trespass on lands, in cases of fraud and deceit, and in cases of conversion of personal property into money, are retained.

**PENALTIES, FINES AND FORFEITURES:** See Compilers' Section (13393) et seq.

**EJECTMENT:** Compilers' Section (13168) et seq.

**REPLEVIN:** Compilers' Section (13080) et seq.

**ASSUMPSIT:** This section authorizes the joinder of the common counts with special counts upon judgments, a count for use and occupation, a count upon a special contract to pay rent and a special contract to purchase a house and lot. *Stewart v. Sprague*, 71 Mich. 58-9; *Hogsett v. Ellis*, 17 Mich. 359. As to inconsistent counts, see *Capen v. Stevens*, 29 Mich. 496. This statute does not in express terms make any change in the rules of pleadings, a judgment cannot be proved under the common counts, but should be specially declared on. *Gooding v. Hingston*, 20 Mich. 440; *Curtis v. Railway Co.*, 32 Mich. 292. When an action on the common counts will lie. *Id.* 32 Mich. 292. Counts based on fraud and deceit may be joined with other counts. *Loudon v. Carroll*, 130 Mich. 79; *First Nat'l Bank of Ovid v. Steel*, 136 Mich. 590. Including the common counts. *Hogle v. Meyering*, 161 Mich. 485. An action by a husband for money expended for medical attendance on account of an injury to his wife cannot be brought in assumpsit. *Plefka v. Railway*, 147 Mich. 641. Where plaintiff sues in assumpsit for fraud and deceit, it must be shown by necessary averments in the declaration that the case comes within the provisions of the statute. *Anderson Carriage Co. v. Pungs*, 134 Mich. 82. Recovery for fraud and deceit under this section cannot be had under the common counts, but a special count is necessary. *Burchy v. Carpenter*, 181 Mich. 80; *Barbour v. Hurlburt*, 137 Mich. 539. In assumpsit for trespass on land it is necessary to allege in the declaration sufficient averments to show that the case comes within the statute; the common counts are not sufficient. *Weidman v. Willson*, 153 Mich. 83. A declaration in assumpsit for the value of timber cut and removed by a trespasser need not aver the tort. *Nelson v. Kilbride*, 113 Mich. 637.

**COVENANT OR DEBT:** *Bank v. Zeigler*, 49 Mich. 157; *Regents v. Detroit Y. M. Society*, 12 Mich. 157; *Goodrich v. Leland*, 18 Mich. 110; *Woods v. Ayres*, 39 Mich. 349; *Christy v. Farlin*, 49 Mich. 319.

**CONTRACTS UNDER SEAL:** See Compilers' Section 12534 and notes.

**TRESPASS ON THE CASE:** The declaration should advise the defendant whether the suit is brought to recover damages for the direct injuries resulting from a trespass or for consequential injuries. *Cribbs v. Stiver*, 181 Mich. 86. Trespass on the case for slander may be joined with case for false imprisonment. *Moore v. Thompson*, 92

Mich. 501. Rule prior to Act 77, 05 (superseded by this section). *Bellant v. Brown*, 78 Mich. 294; *Wood v. Railroad Co.*, 81 Mich. 358; *Wyant v. Crouse*, 127 Mich. 160. An action in assumpsit for fraud which is discontinued will not bar a subsequent recovery for the same cause in trespass on the case. *Mintz v. Jacob*, 163 Mich. 280.

**FRAUD AND DECEIT:** Assumpsit may be maintained. *Hallett v. Gordon*, 128 Mich. 365; See *First Nat. Bank of Ovid v. Steel*, 136 Mich. 591; *City of Battle Creek v. Haak*, 139 Mich. 521. Causes of action for deceit may be assigned. *Hicks v. Steel*, 142 Mich. 294; *Compilers' Section 12383*. *Bedler v. Fuller*, 116 Mich. 126; *Crawford v. Steel*, 137 Mich. 613; *Pinch v. Hotaling*, 142 Mich. 522; *Gibbins v. Ashley*, 146 Mich. 456; *Peters v. Birkett*, 153 Mich. 62; *Hokanson v. Oatman*, 165 Mich. 517; *Laubengayer v. Rohde*, 167 Mich. 612; *Scofield v. Clarke*, 179 Mich. 690; *Krolik v. Curry*, 148 Mich. 214; *Mott v. Penoyar*, 153 Mich. 274; *Ward v. Cook*, 158 Mich. 283. See further, *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 692.

**TRESPASS ON LANDS:** In authorizing assumpsit for trespass upon land, the statute does not purport to make contracts in fact, or to allow anything to be sued for except damages sustained by the trespass. *Lockwood v. Boom Co.*, 42 Mich. 541. In extending assumpsit to such actions, the statute does not create a contract, but implies one. *Bradley-Watkins Co. v. Judge*, 144 Mich. 146. To maintain assumpsit against a tortfeasor who converts personal property to his own use, it must appear that the property has been converted into money or money's worth. *Lyon v. Clark*, 129 Mich. 384. Assumpsit does not lie against one who merely purchases from a trespasser wood cut and removed from another's land. *St. John v. Antrim Iron Co.*, 122 Mich. 68. In authorizing assumpsit for trespass upon land, the statute does not purport to make contracts in fact, or to allow anything to be sued for except damages sustained by the trespass. *Lockwood v. Boom Co.*, 42 Mich. 541. Waiving the tort and suing in assumpsit amounts to an election to regard defendants as owners of the property converted. *Nield v. Burton*, 49 Mich. 53; See *Mason v. City of Muskegon*, 109 Mich. 637; *Anderson v. Besser*, 131 Mich. 485.

The declaration in question sounds in case, and not in trespass *quare clausum*. It was said in this case that under this statute there is no doubt as to the latter, i. e. the personal property, might sue in case, whether they would recover on trespass or not. *Wyant v. Crouse*, 127 Mich. 160. This section has no reference to trespass upon lands. *Word v. The Michigan Air Line R. R. Co.*, 81 Mich. 358. This section removes all objections to the joinder in the same declaration and should be liberally construed. *Bellant v. Brown*, 78 Mich. 294. See *Moore v. Thompson*, 92 Mich. 509.

In *Mintz v. Jacob*, 163 Mich. 283, the court said: "But our statute gives the right to a plaintiff in a case like this to set up the fraud and deceit, and recover the damages suffered either in an action of case, or, in form, assumpsit, and there is no inconsistency, for in each the same wrong is alleged and the same injury. The legislature has the power to permit recovery for a tort in an action in form *ex contractu* if it chooses to do so, as we intimated in *Hallett v. Gordon*, 122 Mich. 573 (81 N. W. 556, 82 N. W. 827), where we ordered a new trial in a case somewhat similar to this. (See, also, *Hallett v. Gordon*, 128

Mich. 364 (87 N. W. 261). A special count seeking to recover damages for the fraudulent conduct of the defendants might properly be united with the common counts, and recovery could be had under the common counts, and the bill of particulars as money which in equity and good conscience belonged to the plaintiff. *Hogle v. Meyering*, 161 Mich. 485; *First National Bank of Ovid v. Steel*, 136 Mich. 588; *Hallett v. Gordon*, 128 Mich. 364.

Where an action in assumpsit was brought for property seized on a writ of replevin and the property was not sold before the action of assumpsit was brought, later an action of trover was brought, these proceedings did not constitute an election of remedies, for the defendant was not guilty of a tort which might be waived. *Holmes v. Smith*, 149 Mich. 330. Where a litigant has chosen to proceed against the agents of a corporation for misconduct on their part and has been defeated, he is thereby barred from litigating the same cause of action against the principal. *Krolik v. Curry*, 148 Mich. 222. In *Plefka v. Detroit United Railway*, 147 Mich. 642, the court said: "At the common law a party suffering injury through the tortious wrong of another could waive the tort and sue in assumpsit only in case the tort arose out of contract relations between the parties or the tort consisted of a conversion of plaintiff's property into money or money's worth. *Watson v. Stever*, 25 Mich. 386; *Tuttle v. Campbell*, 74 Mich. 652; *Williams v. Rogers*, 110 Mich. 418. This rule has been modified by statute, and the right to waive the tort and to maintain assumpsit extended to cases of trespass on lands or injury to lands direct or consequential, 3 Comp. Laws, (11207), and to cases of fraudulent representations or conduct of any person producing an injury either to the person, property, or rights of another, for which an action on the case may by law be brought. 3 Comp. Laws, (10421). It is obvious that neither of these statutes has application to the case under consideration. As to plaintiff's case the rule of the common law prevails, and there exists no right to waive the tort and sue in assumpsit." This case was an action by a husband to recover money paid for medical attendance for his wife's injuries.

Where an action of assumpsit was brought under this section to recover for the fraud and deceit of defendants, whereby plaintiff was induced to discount certain notes and receive as collateral security certain corporate stock, the action accrues at the time the shares are accepted and the notes discounted in reliance on the representation. *First National Bank of Ovid v. Steel*, 146 Mich. 309. Under this section an action may be brought for the fraudulent conduct of a bank director. *Hicks v. Steel*, 142 Mich. 292. The general rule is that a statement of value was a mere matter of opinion and cannot be made the basis of an action for fraud; but the rule established by the weight of authority is that false statements of value intentionally made to one who is in ignorance of the quality and value, under circumstances indicating a purpose that such statements are to be relied upon, and where the party to whom they are made has no opportunity to examine the property, may be treated as affirmative of fact and fraudulent. *Pinch v. Hotelling*, 142 Mich. 525; *Yanelli v. Littlejohn*, 172 Mich. 91; *Mott v. Penoyar*, 153 Mich. 273; *Peters v. Birkett*, 153 Mich. 61; *Maxted v. Fowler*, 94 Mich. 109; *Collins v. Jackson*, 54 Mich. 186. This section is not unconstitutional. City of

*Battle Creek v. Haak*, 139 Mich. 520. Under this statute special counts in assumpsit to recover damages arising from fraudulent representations or conduct producing an injury may be joined with the common counts. *First National Bank of Ovid v. Steel*, 136 Mich. 590. Where the declaration does not, either by reference to the statute or by averment of the necessary facts, bring the case of the plaintiff within the provisions of the statute, he cannot invoke the same. *Anderson Carriage Co. v. Pungs*, 134 Mich. 82. It is not essential to set up the statute in a declaration in assumpsit for fraudulent representations, although it would be better pleading to do so. *Hallett v. Gordon*, 128 Mich. 365, 573. This section does not apply to the case in question which was commenced long before the act became a law, i. e., this statute is not to be construed retrospectively. *Bedier v. Fuller*, 116 Mich. 128.

An agricultural association, though it differs from the ordinary business corporations is nevertheless to be classified as a private corporation, and an unsealed conveyance executed by it is valid. *Ismon v. Loder*, 135 Mich. 350.

See *Blagborne v. Hunger*, 101 Mich. 377; *Mee v. Benedict*, 98 Mich. 270; *Stewart v. Sprague*, 71 Mich. 58; *Jerome v. Ortman*, 66 Mich. 670; *Barton v. Gray*; 57 Mich. 634; *Bank v. Ziegler*, 49 Mich. 157; *Lockwood v. Bassett*, 49 Mich. 549; *Christy v. Farlin*, 49 Mich. 319; *Fowler v. Hyland*, 48 Mich. 181; *Spicer v. Bonker*, 45 Mich. 635; *Woods v. Ayers*, 39 Mich. 349; *Curtis v. Railway Co.*, 32 Mich. 292; *Dalton v. Laudahn*, 30 Mich. 350; *Capen v. Stevens*, 29 Mich. 496; *Gooding v. Hingston*, 20 Mich. 439; *McKinney v. Miller*, 19 Mich. 151; *Goodrich v. Leland*, 18 Mich. 110; *Regents v. Detroit Y. M. Society*, 12 Mich. 157.

Where the declaration is on the common counts, and the statute is not referred to and counted upon, nor the fact of the trespass alleged in the declaration, the plaintiff is not entitled to recover on this theory. *Weidman v. Wilson*, 153 Mich. 83; *Barbour v. Hurlburt*, 137 Mich. 534; *Anderson Carriage Co. v. Pungs*, 134 Mich. 79. Where a married woman sustained an injury while riding upon defendant's car through its negligence and the husband sued the company for money paid for medical attendance, the statute does not apply. *Plefka v. Detroit United Railway*, 147 Mich. 642.

In *Bradley-Watkins Co. v. Circuit Judge*, 144 Mich. 146, the court said: "The statute must be construed as a whole and with reference to existing statutes. We do not think it will bear the construction claimed. The statute gives the right to waive the tort and sue in assumpsit. It does not create a contract, but implies one. Our construction of the statute is that the legislative intent in giving the right to bring assumpsit was to make the action in such cases transitory as in other cases of assumpsit. Both statutes above cited, sections 10216, 10217, 3 Comp. Laws, were in force at the time this statute was enacted. This act is entitled: "An act to facilitate the collection of damages for trespass on or other injuries to lands." The statute was for the benefit of the injured party whose lands had been trespassed upon and otherwise damaged. If the contention of defendants is to be sustained as the legislative intent in enacting this law, then instead of gaining any advantage by bringing the suit in assumpsit a plaintiff is put to disadvantage and positive loss. In-



stead of facilitating the collection of damages for trespass on, and other injuries to, lands, such construction of the statute would have a directly opposite effect. The question involved is one of practice. It relates to the method of applying a remedy and not to the substantive law. The statute provides a remedy to this case by an action of assumpsit. The rules governing assumpsit, and not those governing actions of trespass, must apply." *Bradley-Watkins Co. v. Circuit Judge*, 144 Mich. 146. Where a litigant has a choice of four remedies, i. e., trespass *quare clausum*, *replevin*, and he selects *trover*, he thereby waives the other remedies. *Anderson v. Besser*, 131 Mich. 485. Under this section, assumpsit will not lie in the case in question unless the property has been converted into money or its value. *Lyon v. Clark*, 129 Mich. 385; neither will it lie against a buyer of word from a trespasser. *St. John v. Antrim Iron Co.*, 122 Mich. 68. Recovery may be had on a count for money had and received, for the proceeds of timber cut and taken by a trespasser. *Nelson v. Kilbride*, 113 Mich. 637. See *Mason v. City of Muskegon*, 109 Mich. 457.

Waiving the tort and suing in assumpsit amounts to an election to regard defendants as owners of the converted property. *Nield v. Burton*, 49 Mich. 53. In *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 540, the court said: "This statute was chiefly intended to remedy the difficulty arising under the rule recognized in *Watson v. Stever*, 25 Mich. 386, which denied a right of action in assumpsit for property taken by trespass but not converted into money, which, if sold, the original owner might, if he chose, treat the proceeds as money had and received to his use, inasmuch as it was the price received for his property on an unauthorized sale which he was allowed to affirm. But there is no common law action of assumpsit for chattels had and received by wrong, and no method, therefore, of reaching such a case without going further in the way of legal fiction than could be done without legislation.

This statute is very broad in its language, and may perhaps allow a recovery for damages arising out of any trespass on lands in assumpsit. But it does not purport to make contracts in fact, or to allow anything to be sued for except as damages sustained by the trespass. It simply operated to provide that, when a trespass has been committed whereby damages accrue the duty to pay those damages may be treated as a debt or implied agreement.

To bring any case within the statute the damages must be shown in the declaration to have accrued out of a trespass. The statute gives no warrant for making any suggestion which is false in fact, or for turning an adverse holding into a contract of tenancy."

Where strict legal rights are involved and the legislature has defined the relative rights of owners of lands, courts must accept plain legislative definition of rights and enforce the law as they find it. *Powell v. Pierce*, 168 Mich. 432. *Olin v. Henderson*, 120 Mich. 149; *Austin v. Hyndman*, 119 Mich. 618.

Ejectment and the statutory proceedings to recover possession are the only possessory remedies known to this state. *Wilkinson v. Williams*, 51 Mich. 155. It is substantially a real action and is a proceeding to try titles as well as to determine the right of possession. It is the only action for determining titles to land. M. C.

*R. R.-Co. v. McNaughton*, 45 Mich. 87. It is a possessory action and does not necessarily involve the title, although not purely a possessory action, for it may determine the title. *Covert v. Morrison*, 49 Mich. 133; *Kinney v. Harrett*, 46 Mich. 89; *Bertram v. Cook*, 44 Mich. 396. It is the only proper remedy where the holder of a legal title seeks to enforce it against one in possession claiming under an invalid title, and against a party claiming adversely and furthermore it is the only proper action in which to try boundary lines. *King v. Carpenter*, 37 Mich. 363; *Hoffman v. Beard*, 22 Mich. 59; *Tabor v. Cook*, 15 Mich. 322; *Drake v. Happ*, 92 Mich. 580.

A court of law is the appropriate tribunal for the trial of titles to land. The claimant of a legal title has a right to have the facts, upon which his claim is based, submitted to a jury, and it is only when the remedy at law is inadequate that resort can be had to Equity. *Moran v. Palmer*, 13 Mich. 370; *Devaux v. Detroit*, Har. 98; *Douglass v. Boardman*, 113 Mich. 618; *Shaw v. Chambers*, 48 Mich. 358; *Bay City Bridge Co. v. Van Etten*, 36 Mich. 310; *Mears v. Howarth*, 34 Mich. 19; *Teft v. Stewart*, 31 Mich. 371; *Hoffman v. Beard*, 22 Mich. 63; *Tabor v. Cook*, 15 Mich. 325; *Bennett v. Nichols*, 12 Mich. 24; *Blackwood v. Van Vleet*, 11 Mich. 255. In ejectment the legal title is alone involved and not equitable interests or claims. *Moran v. Moran*, 106 Mich. 12; *Paldi v. Paldi*, 95 Mich. 410; *Mich. L. & I. Co. v. Thoney*, 89 Mich. 231; *Shaw v. Hill*, 83 Mich. 327; *Geiges v. Greiner*, 68 Mich. 153; *Yale v. Stevenson*, 58 Mich. 537; *Harriett v. Kinney*, 44 Mich. 457; *Jeffry v. Hursh*, 42 Mich. 563; *Van Auker v. Monroe*, 38 Mich. 725; *Hayes v. Livingstone*, 34 Mich. 384; *Conrad v. Long*, 33 Mich. 78; *Ryder v. Flanders*, 30 Mich. 336; *Whiting v. Butler*, 29 Mich. 122.

The plaintiff cannot recover upon the theory that the declaration was upon the common counts, no reference being made to the statute nor to the fact of trespass or tort alleged in the declaration. *Smith v. Haight*, 188 Mich., 512; 22 D. L. N. 954; 154 N. W. 563.

The declaration should advise the defendant in a suit for consequential injuries resulting from a trespass, although it may be framed in case pursuant to Act No. 77, P. A. '05, whether recovery is sought for direct injuries resulting from the wrongful entry or for consequential injuries other than damages to the freehold, or for both. *Cribbs v. Stiver*, 181 Mich. 83; 21 D. L. N. 468; 147 N. W. 587.

Do not apply to action for damages to credit and business for unlawful conspiracy to ruin same. (Divided court.) *Frohlich v. Deacon*, 181 Mich. 255; 21 D. L. N. 843; 148 N. W. 180. Damages for fraud and deceit are not recoverable under the common counts; a special count is necessary under the statute authorizing plaintiff to waive the tort and sue in assumpsit. *Burchy v. Carpenter*, 181 Mich. 78; 21 D. L. N. 592; 147 N. W. 612.

Under this section an action of assumpsit may be brought to recover damages caused by fraud and deceit; but a declaration containing four special counts and also all common counts in assumpsit, an election cannot be made upon which counts a verdict is sought, for the reason that the words fraud and deceit were used in the special counts. *Mahder v. Wax*, 192 Mich. 479; 23 D. L. N. 500; 158 N. W. 862; *Billig v. Goodrich*, 199 Mich. 423.

**(12351). Transfer of Suits and Actions to Proper Side of Court.**

**SEC. 2.** If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, or if it appear that an action commenced on the law side of the court should have been brought in equity, it shall be forthwith transferred to the proper side, and be there proceeded with, with only such alteration in the pleadings as shall be essential. .

**HISTORY:** New section.

**ACTIONS TRANSFERRED WHEN WRONGFULLY INSTITUTED:**

If the plaintiff mistakes his remedy and brings suit at law when he should have sued in equity or *vice versa*, the suit need not fail, but shall be transferred to the proper side and be there proceeded with, there being only such alternations in the pleadings as shall be essential.

Where plaintiff's suit in chancery amounted to a demand to a money judgment, for which it had an adequate remedy at law, a decree entered in such suit will be set aside and the cause remanded to the circuit court for transfer to the law side of the court, under authority of section 12351, C. L. '15. *City of Iron Mountain v. Iron Mountain Waterworks*, 206 Mich. 538; *Flint v. LeHeup*, 199 Mich. 50. But, under the practice existing prior to the Judicature Act taking effect, where a suit for specific performance was determined by the supreme court, and a final decree entered dismissing the bill, the cause became disposed of and the defeated party could not secure an order from the circuit court transferring the proceeding to the law side of the court. *Schook v. Iron Circuit Judge*, 192 Mich 103.

## CHAPTER XII.

### PARTIES TO ACTIONS.

#### (12352). Designation of Parties.

**SECTION 1.** In civil actions, both at law and in equity, the party bringing the action shall be described as plaintiff, and the party against whom the action is brought shall be described as defendant.

**HISTORY:** New section.

**PARTIES TO ACTIONS:** The party bringing any form of action at law or in equity is to be described as "plaintiff," and the party against whom the action is brought is in all cases to be designated as "defendant." This applies in mandamus, quo warranto and certiorari cases as well as in the common actions.

**REAL PARTY IN INTEREST MUST BE PLAINTIFF:** Under the present statute the assignee of a chose in action, may, at his option, bring suit in his own name or in that of his assignor, except that in the case of negotiable instruments assigned without endorsement, the assignee must bring suit in the name of his assignor. Nearly forty years ago, Mr. Justice Cooley called attention to the fact that no reason existed for this exception.

The new practice requires all suits to be prosecuted in the name of the real party in interest. However, executors, administrators, guardians, trustees of express trusts, parties with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining the parties for whose benefit the action is brought. But any person having a cause of action upon the bond of any public officer should sue thereon in his own name. The existing provisions relating to suits on bonds or other undertakings given to an officer of the state in which the state is the real party in interest, have been broadened so as to apply, in similar cases, to all the political subdivisions of the state and also to apply to the enforcement of any liability or duty enjoined by law to such an officer. In all such cases the suit should be brought in the corporate name of the body for whose benefit the undertaking was made or the duty or liability enjoined.

#### (12353.) Action Must be Brought in Name of Party.

**SEC. 2.** Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guar-

dian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought: *Provided*, That any person to whom a cause of action shall accrue upon the bond of any public officer, required to give bond to the people of this state, may prosecute a suit for recovery on said bond in his own name: *Provided further*, That actions upon any bond, contract or undertaking lawfully made with any officer of this state, or of any county, township, school district, city or village, or to enforce any liability or any duty enjoined by law to said officer, shall be brought in the corporate name of the body for whose benefit such contract was made, or such liability or duty enjoined.

**HISTORY:** This section merges and re-enacts parts of Sec. 1, R. S. '46, Ch. 120, being C. L. '57, (4918); C. L. '71, (6631); How. 8219; C. L. '97, (9781), and Sec. 7, 8, R. S. '46, Ch. 120, being C. L. '57, (4924)-(4925); C. L. '71, (6637)-(6638); How. 8225-6; C. L. '97, (9787)-(9788); and Sec. 15, R. S. '46, Ch. 120, being C. L. '57, (4932); C. L. '71, (6645); How. 8233; C. L. '97, (9795); and Sec. 1, R. S. '46, Ch. 99, being C. L. '57, (4155); C. L. '71, (5771); How. 7340; C. L. '97, (10050); and Sec. 5, R. S. '46, Ch. 99, being C. L. '57, (4159); As Am. '63, p. 102, Act 75, Eff. June 22; C. L. '71, (5775); How. 7344; C. L. '97, (10054); and Sec. 1-3, R. S. '46, Ch. 119, being C. L. '57, (4911)-(4912)-(4913) C. L. '71, (6624)-(6625)-(6626); How. 8212-4; C. L. '97, (10476)-(10477)-(10478); and Sec. 5, 6, R. S. '46, Ch. 119, being C. L. '57, (4915)-(4916); C. L. '71, (6628)-(6629); How. 8216-7; C. L. '97, (10480)-(10481); and Sec. 27, R. S. '46, Ch. 13, being C. L. '57, (326); C. L. '71, (458); How. 464; C. L. '97, (2466); and Sec. 18 of Act 204, of '81, being How. 7153; C. L. '97, (1081), and follows part of Fed. Equity Rule No. 37.

**OFFICIAL BONDS:** The party for whose use a sheriff's bond is sued is to be deemed the plaintiff in the action. *Jackson v. People*, 6 Mich. 155; *Bay Co. v. Brock*, 44 Mich. 50. An action on an official bond given by a public officer cannot be maintained for the use and benefit of a third person unless expressly authorized by statute. *City of Eaton Rapids v. Stump*, 127 Mich. 1. C. L. '97, 9781, superseded by this section, did not authorize suits by third parties on official bonds given by appointive municipal officers. *Id.* "Official bonds," within the meaning of Act 179 of '85, *Bissell v. Probate Judge*, 58 Mich. 237; See *Johr v. Supervisors*, 38 Mich. 532; *Buhrer v. Baldwin*, 137 Mich. 263; *People v. Banker's Surety Co.*, 158 Mich. 30; *Supervisors of Chippewa Co. v. Bennett*, 185 Mich. 544.

**ASSIGNEE OF CHOSE IN ACTION:** C. L. '97, (10054), superseded by this section, expressly authorized the assignee of any chose in action, not negotiable under existing law, and which may be assigned

to bring an action in his own name. The law authorizing an assignee to sue in his own name was evidently intended to remove the old method of suing in the name of the nominal for the use of the real owner. *Draper v. Fletcher*, 26 Mich. 154. The right of action for a tort is not the subject of assignment, but this rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him, while torts for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, may, it seems, be assigned, so as to pass an interest to the assignee which he can enforce by suit at law. *Final v. Backus*, 18 Mich. 230. An assignee of a mortgagee may sue upon it in equity in his own name. *Fisher v. Meister*, 24 Mich. 447. The assignment may be absolute or qualified, as the parties choose, so long as no one else is injured or defrauded, and the assignee may still sue in his own name. *Herbstreit v. Beckwith*, 35 Mich. 95. An equitable assignee of a debt secured by mortgage is entitled to have the mortgage follow the debt and is the proper party to foreclose. *Briggs v. Hannowald*, 35 Mich. 474. The construction of the provision which permits the assignee to sue in his own name has been liberal and covers the case of the assignment of an insurance policy to a corporation. *Watertown Ins. Co. v. G. & B. Sew. Mach. Co.*, 41 Mich. 137. It is no longer necessary for assignees to sue in the name of the assignor, or to bring an action in the name of one person for the use and benefit of another, even in cases of tort where the action is assignable. *Watson v. Watson*, 49 Mich. 545; *Cook v. Bell*, 18 Mich. 393. C. L. '97, (10054), was only permissive in its provisions, and the assignee was still at liberty to sue in the name of the contracting party. *Michigan Sugar Co. v. Moffett*, 183 Mich. 599.

See *Sissen v. Railroad Co.*, 14 Mich. 496; *Waldron v. Harring*, 28 Mich. 493; *Forrest v. O'Donnell*, 42 Mich. 560; *T. & A. A. R. R. Co. v. Johnson*, 55 Mich. 459; *Myers v. Yaple*, 60 Mich. 344-5; *Morrell v. Bissell*, 99 Mich. 410, and note; *Robinson v. Watson*, 101 Mich. 466; *Guerold v. Holtz*, 103 Mich. 118; *Barlow v. Twist Drill Co.*, 186 Mich. 46.

**WHAT IS ASSIGNABLE:** The statute reaches every right in property which was ever assignable in equity, or capable of survivorship to executors. *Cook v. Bell*, 18 Mich. 393. It covers every cause of action which survives to personal representatives. *Crippen v. Fletcher*, 56 Mich. 389; *Cook v. Bell*, 18 Mich. 387; *Final v. Backus*, 18 Mich. 218; *Brady v. Whitney*, 24 Mich. 154; *Grant v. Smith*, 26 Mich. 201; *Finn v. Corbitt*, 36 Mich. 318. The right of action upon a contract for breach of the warranty therein is assignable. *Felt v. Reynolds R. F. E. Co.*, 52 Mich. 602. It is no longer an open question in this state that accounts are the subject of assignment and may be mortgaged, and this applies as well to future accounts as to existing accounts. *Dunn v. Swan*, 115 Mich. 409, citing *Fuller v. Rhodes*, 78 Mich. 36; *Bank v. Purifier Co.*, 84 Mich. 364; *Id.* 102 Mich. 462.

As to an assignment of interest in a chose in action to an attorney for his services in the collection of the claim, see *Lehman v. Railway*, 180 Mich. 362. A company that takes over all of the business of an-

other corporation, including its contracts, is liable on those contracts. *Rehberg v. Tontine Surety Co.*, 131 Mich. 135. A lien for repairs to an automobile is assignable. *Gardner v. LeFevre*, 180 Mich. 219. Rights of principal in a security received by the surety for his own benefit, see *Steere v. Trebilcock*, 108 Mich. 472. Where there is an existing and continuing contract of employment, future wages may be assigned. *Kane v. Clough*, 36 Mich. 438.

**UNDIVIDED INTEREST:** The assignee of an undivided interest in a lease may join with the owner of the other undivided interest in a suit for rent. *Bly v. Bliss*, 123 Mich. 119.

**BY RIGHT OF SUBROGATION:** A fire insurance company cannot, by right of subrogation of the insured, sue the party responsible for the part only of the loss sustained by the insurance company, as this would constitute the splitting of an action. *Continental Insurance Co. v. H. M. Loud & Sons Lumber Co.*, 93 Mich. 139.

**HOW MAY BE ASSIGNED:** No particular method of assignment was required by C. L. '97, (10054). *Draper v. Fletcher*, 26 Mich. 154. A parol assignment when good in equity is equally good at law. *Id.* An assignment of the claims of a laborer against the company which employs him need not be in writing. *Donovan v. Halsey Fire Engine Co.*, 58 Mich. 38, 41. An assignment by gift is valid; and claims of different persons may be assigned to one person for the purpose of the adjustment of all in one suit. *Briscoe v. Eckley*, 35 Mich. 114. The indorsement and delivery of non-negotiable note by the payee operates as an assignment of the note. *Merchants' Nat. Bank v. Gregg*, 107 Mich. 146. *Hyma v. Three Rivers Nat'l Bank*, 79 Mich. 170.

**INTEREST OF ASSIGNEE:** A claim, when assigned, becomes due from the debtor to the assignee. *Hanselman v. Doyle*, 90 Mich. 144. The assignee of a chose in action takes it subject to all equities existing between the parties to the instrument, but not to any latent equities which some third person may have against the debtor or party bound by the instrument. *Bloomer v. Henderson*, 8 Mich. 402. See *Mattheson v. Morris*, 40 Mich. 52.

As to assignee of person paying illegal taxes, see *Laing v. Township of Forest*, 139 Mich. 162. The assignee of a chose in action not having the attribute of negotiability takes it subject to antecedent equities. *Spinning v. Sullivan*, 48 Mich. 8. See *Allen v. Antisdale*, 38 Mich. 229.

**WHAT IS NOT ASSIGNABLE:** Rights to recover damages for fraud or deceit are not assignable. *Felt v. Reynolds, R. F. E. Co.*, 52 Mich. 406; *Dickinson v. Seaver*, 14 Mich. 624; *Dayton v. Fargo*, 45 Mich. 153; see *Brush v. Sweet*, 38 Mich. 574. The statutory right of action to recover unassigned dower is vested solely in the widow and is not available to her assignee under this section. *Galbraith v. Fleming*, 60 Mich. 408. C. L. '97, (10054), expressly excepted negotiable paper from its provisions. *Brennan v. M. & M. Nat. Bank*, 62 Mich. 347; *Matteson v. Morris*, 40 Mich. 55; *Redmond v. Stansburg*, 24 Mich. 447; *Robinson v. Wilkinson*, 38 Mich. 301; *Gale v. Mayhew*, 161 Mich. 100; *Schmidt v. Pegg*, 172 Mich. 161.

**DECLARATION; AVERMENT OF ASSIGNMENT:** As to the necessity and sufficiency of averment of assignment and the requisites of the declaration in an action brought by an assignee of a chose in action

under this section, see *Robinson v. Watson*, 101 Mich. 466; *Powell v. Williams*, 99 Mich. 30; *Draper v. Fletcher*, 26 Mich. 154; *Blackwood v. Brown*, 32 Mich. 104, 107; *Snell v. Gregory*, 37 Mich. 500; *Rose v. Jackson*, 40 Mich. 30; *Cilley v. Van Patten*, 58 Mich. 404; *Warren v. Dwyer*, 91 Mich. 44; *Pierce v. Closterhouse*, 96 Mich. 124; *Brewing Co. v. McKittrick*, 86 Mich. 91, interpreting, *Bank v. Purdy*, 56 Mich. 6; *Altman v. Rittershofer*, 68 Mich. 287; *Altman v. Fowler* 70 Mich. 57; *Wright v. Traver*, 73 Mich. 493; *Bank v. Wheeler*, 75 Mich. 546; *Waldron v. Harring*, 28 Mich. 493. See synopsis of these cases in reporter's note, 99th Mich. 410-11.

The form of the bond prescribed by the statute would undoubtedly be construed as authorizing suits by third parties on constables' bonds, although the statute does not do so in express terms. *City of Eaton Rapids v. Stump*, 127 Mich. 3. The party for whose use a sheriff's bond is sued is to be deemed the plaintiff in the action. *Bay Co. v. Brock*, 44 Mich. 50; *Jackson v. People*, 6 Mich. 155. Bonds of the executors are such as do not come within this section. *Bissell v. Wayne Probate Judge*, 58 Mich. 239.

It may be said that, as a general rule, questions of pleading must be settled by the trial court, especially when the question relates to a change of the issue already formed. *Souvais v. Leavitt*, 53 Mich. 580. Where there is an objection to the misjoinder of counts, it should be settled before the commencement of the trial and the plaintiff made to elect which one he wishes to proceed upon. *Ives v. Williams*, 53 Mich. 638. It is manifest that a single count must cover a single cause. *Ives v. Williams*, 53 Mich. 638.

This statute was evidently intended to remove the old indirect method of suing in the name of the nominal, for the use of the real owner. *Draper v. Fletcher*, 26 Mich. 155.

See *Schmidt v. Pegg*, 172 Mich. 161; *Gale v. Mayhew*, 161 Mich. 99; *Laing v. Township of Forest*, 139 Mich. 161; *Bissell v. Hively*, 123 Mich. 107; *Steere v. Trebilcock*, 108 Mich. 470; *Raffel v. Epworth*, 107 Mich. 148.

The transfer of a plaintiff's title or interest in a pending suit at law does not abate it, but the suit may proceed as instituted so long as the assignee acquiesces in the proceeding, notwithstanding this section, providing that actions shall be prosecuted in the name of the real party in interest.

*Sayre v. Detroit, Grand Haven & Milwaukee Railway Co.*, 205 Mich. 294, 171 N. W. 502. See *Marshall & Iilsley Bank v. Mooney*, 205 Mich. 514; *In re Bush Estate*, 199 Mich. 193; *Sayre v. Detroit G. H. & M. R. R.* 199 Mich. 419. This statute, permitting the assignee of a claim to sue in his own name is not mandatory, and leaves the party to bring the action in his own name, if he so elects. *Michigan Sugar Co. v. Moffett*, 183 Mich., 590; 21 D. L. N., 1100; 149 N. W., 1025.

### (12354). Actions in Corporate Name.

SEC. 3. Any suit or proceeding brought for the enforcement of any corporate liability against any of the corporate bodies, enumerated in the second proviso of section two of this chap-



ter, shall be brought against them in their corporate name; but any suit or proceeding brought to enforce the performance of an official duty on the part of any officer of any such corporate body, shall be brought against such officer in his official capacity.

**HISTORY:** Supersedes Sec. 4, R. S. '46, Ch. 119, being C. L. '57, (4914); C. L. '71, (6627); How. 2815; C. L. '97, (10479), unchanged.

**PUBLIC OFFICERS AND PUBLIC CORPORATIONS:** See Const. Art. VIII, 1; *Johr v. Supervisors*, 38 Mich. 532; *Former Laws*, see *High Comrs. v. Martin*, 4 Mich. 557; *Com'r. of Highways v. Supervisor*, 77 Mich. 230; *Buckeye Twp. v. Clark*, 90 Mich. 434.

#### (12355). **Limited Partnership.**

**SEC. 4.** Suits by and against limited partnerships shall be subject to the provisions of section eighteen of chapter thirty-three of the revised statutes of eighteen hundred forty-six, the same being compiler's section six thousand seventy-two of the Compiled Laws of eighteen hundred ninety-seven.

**HISTORY:** New Section.

The section above referred to is *Compilers' Section* (7943).

#### (12356). **Married Women.**

**SEC. 5.** Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried, and in cases where the property of the husband cannot be sold, mortgaged or otherwise encumbered, without the consent of the wife, to be given in the manner prescribed by law, or when his property is exempted by law from sale on execution or other final process issued from any court against him, his wife may bring action in her own name, with the like effect as in cases of actions in relation to her sole property as aforesaid.

**HISTORY:** Re-enacts and supersedes Sec. 3 of Act 158, of '55; As Am. '57, p. 359, Act 132, Imd. Eff. Feb. 16; being C. L. '57, (3294); C. L. '71, (4865); How. 6297; C. L. '97, (8692), though such section was not expressly repealed by this act, unchanged.

**ACTIONS BY AND AGAINST:** Capacity to sue and be sued.—*Glover v. Alcott*, 11 Mich. 489; *Gavigan v. Scott*, 51 Mich. 373; *Colwell v. Adams*, 51 Mich. 491; *Hunt v. Eaton* 55 Mich. 365; *King v. Merritt*, 67 Mich. 217; *Howe v. North*, 69 Mich. 285; *Douglass v. Douglass*, 72 Mich. 98; *Artman v. Ferguson*, 73 Mich. 148. A married woman is allowed in many cases to contract and to sue and to be sued as though she were unmarried and her competency to assert and maintain her rights either as plaintiff or defendant is fully acknowledged. *Wilson v. Coolidge*, 42 Mich. 114. She may

sue for compensation for personal services rendered. *Mason v. Dunbar*, 43 Mich. 407. For damages for personal injuries. *Hyatt v. Adams*, 16 Mich. 198; *Berger v. Jacobs*, 21 Mich. 215. For slander. *Leonard v. Pope*, 27 Mich. 145. For damages for the alienation of her husband's affections and the consequent loss of his society, assistance and support. *Warren v. Warren*, 89 Mich. 123; *Green v. Muskegon Traction Co.*, 171 Mich. 18; *Winnett v. Detroit United Traction Co.*, 171 Mich. 629. But a divorced woman cannot maintain an action against the former husband for a personal tort committed while they were living together as husband and wife. *Banfield v. Banfield*, 117 Mich. 80. For personal injuries an action should be brought by the wife alone and not jointly with her husband; the statute supersedes the common law in this respect. *M. C. R. R. Co. v. Coleman*, 28 Mich. 440; *Burt v. McBane*, 29 Mich. 262. She may file a bill in her own name to enjoin the sale of her land on execution against her husband. *Hill v. Bowman*, 35 Mich. 191; *Patterson v. Fish*, 35 Mich. 209. And when the wife is the real owner of a chose in action, her right to recover is not barred by her husband's former recovery. *Blackwood v. Brown*, 32 Mich. 104. She may sue a partnership of which her husband is a member for pay for services. *Benson v. Morgan*, 50 Mich. 77. And the husband's settlement with the firm and receiving such pay is no defense to the action. *Id.* In *Moore v. Foote*, 34 Mich. 443, and *Osborne v. Osborne*, 36 Mich. 49, actions were brought by married women against members of firms in which their husbands were partners, and the actions maintained. *Id.* 79. Without the aid of a statute a wife may sue her husband in equity in respect to her separate property and, by virtue of the statute, she may sue him in the circuit court, or in a court of chancery. *Markham v. Markham*, 4 Mich. 307. See *Compilers' Section 11476*. And she needs the intervention of no trustee. *Randall v. Randall*, 37 Mich. 563. She may be sued alone upon contracts made in reference to her own property. *Starkweather v. Smith*, 6 Mich. 377; *Tillman v. Shackelton*, 15 Mich. 454; *Bank v. Miller*, 131 Mich. 564; But see *Judd v. Judd*, 187 Mich. 612. For property purchased by her on credit. *Id.*; *DeVries v. Conklin*, 22 Mich. 259. For household supplies purchased solely upon her own credit. *Campbell v. White*, 22 Mich. 178; See also *Fox v. Schumann*, June, 1916, 191 Mich. 331. In ejectment for premises claimed by her and occupied by both as a homestead, they should be joined. *Hodson v. Van Fossen*, 26 Mich. 68. See also *Devereaux v. Hubbard*, 117 Mich. 119. But in ejectment against her for other premises, he need not be joined as defendant. *Bunce v. Bidwell*, 43 Mich. 542. When she may be joined with her husband. *Post v. Shafer*, 63 Mich. 85. Where a wife has knowingly perpetrated a fraud in her husband's behalf, and as his agent, she need not be joined with him in an action of tort, unless they are both sued as wrongdoers. *Weber v. Weber*, 47 Mich. 569. A husband cannot sue his wife at law or in equity on a mere executory contract. *Jenne v. Marble*, 37 Mich. 319. And a married woman cannot be sued for a debt growing out of improvements to property held jointly with her husband. *Speier v. Opfer*, 73 Mich. 35; *Doane v. Feather's Estate*, 119 Mich. 691.

**EXEMPT PROPERTY:** For such property, see *Compilers' Sec-*

tion 12858 and notes. The provision, which authorizes a married woman to sue in her own name for exempt property seized on execution against her husband, applies only where the property is taken by some process adversary to the husband. *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639. And she can sue in her own name for exempt property taken on execution against her husband. *King v. Moore*, 10 Mich. 539; *Tunningly v. Butcher*, 106 Mich. 38. But not when a husband has abandoned his exemption. *Betz v. Brenner*, 106 Mich. 89. For exempt property unlawfully seized by a poundmaster, or taken on attachment. *Ingersoll v. Gage*, 47 Mich. 123. As to suit for exempt property taken by assignee in bankruptcy, see *Sheldon v. Rounds*, 40 Mich. 425. In making this provision as to the wife's suing for exempt property, it was not the object of the legislature to preclude the husband from suing or to compel either to sue alone. The purpose was to make the right more remedial, to increase the facilities for guarding it and a joint suit was not forbidden. *Shepard v. Cross*, 33 Mich. 98. The remedy given the wife does not depend upon the action of the husband. He has no more power to defeat her rights in the premises than any other person. She may join him in her suit, if she choose, but she is not obliged to do so. She has a perfect right of action in her own name independent of what he may see fit to do. *Hanselman v. Kegel*, 60 Mich. 548. The right of a married woman to sue to protect her homestead interest is, by the statute, placed upon the same basis as her right to prosecute in relation to her sole property. *Comstock v. Comstock*, 27 Mich. 97. She is a proper party to a bill filed to protect a homestead against a mortgage not signed by her. *Shoemaker v. Gardner*, 19 Mich. 96. Right to sue in case of property unlawfully incumbered. *Glover v. Alcott*, 10 Mich. 189; *Snyder v. People*, 26 Mich. 110. This statute does not expect a division of property on a separation of husband and wife. *Carpenter v. Carpenter* 154 Mich. 100.

Under this statute a married woman who was injured and was doing business on her own account employed a doctor who regarded himself in her employ and looked to her for his pay, may sue to recover for personal injuries sustained. *Green v. Muskegon Traction & Lighting Co.*, 171 Mich. 18. A married woman is also entitled to recover the cost of the services of her physician. *Winnett v. Detroit United Railway*, 171 Mich. 629. This section has no application to the rights of husband and wife under a separate agreement. *Carpenter v. Carpenter*, 154 Mich. 103. Where a husband sues to recover damages for fraudulently inducing her to part with title to her homestead, she is a necessary party to the proceedings. *Devereaux v. Hubbard*, 117 Mich. 119. A wife can bring an action for the alienation of her husband's affections. *Warren v. Warren*, 89 Mich. 129. In *Wilson v. Coolidge*, 42 Mich. 114, the court said: "By our law a married woman is allowed in many cases to contract and to sue and to be sued as though she were unmarried, and her competency to assert and maintain her rights either as plaintiff or defendant is fully acknowledged. In case she is sued upon a contract she has not capacity to make, or against which she has some other valid objections, the door of justice is open to her, and the law invites her to explain her case and expose her objection seasonably

and in due course of proceeding. The rule under the statute is that a married woman may bring suit in her own name concerning her separate interests and estate. *Speler v. Opfer*, 73 Mich. 35; *Howe v. North*, 69 Mich. 272; *King v. Merritt*, 67 Mich. 217; *Hunt v. Eaton*, 55 Mich. 365; *Glover v. Olcott*, 11 Mich. 489.

In *Artman v. Ferguson*, 73 Mich. 146, the court said: "Our statute has not removed all the common-law disabilities of married women. It has not conferred upon her the powers of femme-sole, except in certain directions. It has only provided that her real and personal estate acquired before marriage, and all property, real and personal, to which she may afterwards become entitled in any manner, shall be and remain her estate, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, and bequeathed by her as if she were unmarried; and she may sue and be sued in relation to her sole property as if she were unmarried. §§How. Stat. 6295-6297. In all other respects she is a femme-covert, and subject to all restraints and disabilities consequent upon that relation."

A married woman under this section may sue in her own name for property which is exempt and taken on execution against her husband. *King v. Moore* 10 Mich. 539. This provision as to exempt property applies only where the property is taken by some process adversary to the husband. *Singer Manuf. Co., v. Cullaton*, 90 Mich. 639.

**(12357). Married Woman May Sue and be Sued as if Sole.**

SEC. 6. Whenever a cause of action shall accrue to, or arise against any married woman, she may sue or be sued in the same manner as if she were sole.

HISTORY: New Section.

**(12358). Husband and Wife.**

SEC. 7. No suit shall be brought against husband and wife, jointly, or against the husband alone, for any tort of the wife, unless such tort was committed under such circumstances as to render them both liable.

HISTORY: New Section.

**(12359). Death Not to Abate Suit in Certain Cases.**

SEC. 8. When an action is authorized or directed by law to be brought by or in the name of a public officer, or by any trustee appointed by virtue of any statute, his death or removal shall not abate the suit, but the same may be continued by his successor, who shall be substituted for that purpose by the court and a suggestion of such substitution shall be entered on the record.

**HISTORY:** This section Re-enacts Sec. 20, R. S. '46, Ch. 101, being C. L. '57, (4223);—C. L. '71, (5843);—How. 7412;— C. L. '97, (10132), unchanged.

**(12360). Superintendent of Poor.**

**SEC. 9.** Causes of actions accruing to or against the superintendent of the poor of any county, shall be prosecuted by or against such superintendents of the poor in their corporate name.

**HISTORY:** New section.

This section is new and conforms to the law relating to superintendents of the poor.

**(12361). Plaintiff and Defendant in Equitable Actions.**

**SEC. 10.** In all equitable actions, all persons having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs, or defendants, but when any one refuses to join, he may for such reason be made a defendant.

**HISTORY:** New Section, following part of Fed. Equity Rule No. 37.

The owner of a copyrighted moving picture film and his lessees within a certain territory, who have contracted to return it on determination of the lease, may join in a suit to enjoin a third person from infringement by making or exhibiting copies of such film. *Gaumont Co. et al. v. Hatch*, 208 Fed. 378.

See. *Brown v. Safe Deposits Co.*, 128 U. S. 403; *Scott v. Mansfield, etc.*, R. Co., 5 Am. L. R. 436, Fed. Cases, 12541; *Howard v. U. S.*, 134 U. S. 680.

**RIGHT OF THIRD PARTY TO MAINTAIN SUIT:** Under this section, providing that "in all equitable actions, persons having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiff," a daughter, in whose interest a com-

**(12362). Intervention.**

**Section 11.** In an action either at law, or in equity, anyone claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding: *Provided, That in attachment actions any party, other than the original defendant, claiming to own any of the property attached may assert his rights by motion to release the attachment so far as it affects his property, which motion shall be heard and determined by the court under the same terms and conditions as motions in other cases.*

**HISTORY:** Amendment by P. A. '23, Act No. 280. Approved May 24, 1923.

vention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

**HISTORY:** New Section, following parts of Federal Equity Rule No. 37 making the same, however, applicable to both actions at law and suits in equity.

**INTERVENTION:** It is further provided that any one claiming an interest in litigation may be permitted to assert his rights by intervention.

Heretofore an infant could not prosecute or defend by his general guardian. The statute also provided in the past that the next friend or guardian ad litem should be appointed upon the petition of the infant, but it did not provide a method for making the appointment, in case the infant was too young to be capable of making the petition. The new provisions are that, if the infant be over the age of fourteen years, the appointment shall be made upon the petition of the infant. If not over fourteen, the appointment shall be made upon the petition of the next of kin or other relative or friend whom the officer to whom such petition shall be presented shall deem a proper person to make such petition. It is believed that these provisions cover all possible cases that may arise.

It is also provided that similar proceedings may be had in case a party to an action shall become insane during the progress of the suit.

**INTERVENTION:** A wife whose property was attached in a suit against her husband was properly allowed to intervene in the suit to protect her property rights, but not for the purpose of moving for a dissolution of the attachment proceedings, because that would not be, "in subordination to and in recognition of the propriety of the main proceeding," *Siddebottom v. Calhoun* Circuit Judge, 202 Mich. 116.

It was held also, that where an insurance company as surety on a physician's liability bond, appearing in a suit against the physician in pursuance to its agreement to defend him, in which it had been improperly made a joint defendant, it did not thereby intervene, although the same counsel appeared representing both parties, *Bowers v. Gates* 201 Mich. 146.

In equity proceedings by a mortgagee in the second mortgage to revive the first mortgage and subrogate it to the rights of the mortgagee therein, the executor of decedent's estate had such an interest in the litigation as to entitle him to intervene. *Detroit & Northern Mich. B. & L. Ass'n v. Oram*, 200 Mich. 485; And it was held in an action by a trustee in bankruptcy of a contractor against a school district, that the bondsmen of the contractor had such direct financial

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actions at law, or in chancery may be brought by or against such association, club or society by the name by which it is known: *Provided*, That this section shall not take away the right of the litigant to proceed against all the members of such association, club or society, if such litigant shall so elect to proceed.

**HISTORY:** Re-enacts without material change Sec. 1 of Act 25 of '97, being C. L. '97, (10025), unchanged.

**CONSTITUTIONALITY:** *U. S. Heater Co. v. Molders' Union*, 129 Mich. 354.

**INDIVIDUAL MEMBERS:** This provision is merely cumulative and does not take away the right to sue individual members of the association. *Jenkinson v. Mysner*, 125 Mich. 90. An individual member may be joined with the association as a defendant. *Light Guard Band v. First Mich. I L.*, 134 Mich. 598. An association can bring suit even if individual members are opposed to enforcing claim. *Id.* An unincorporated driving association may be sued as an entity or as individuals, *Inglis v. Millersburg Driving Ass'n*, 169 Mich. 311. Fraternal beneficiary associations organized under 2 C. L. '97, Chap. 212 may sue and be sued. *Golden Star Lodge, No. 1 v. Watterson*, 158 Mich. 696. The statute is a constitutional exercise of legislative power. *U. S. Heater Co. v. Molder's Union*, 129 Mich. 355. Under this statute the defendants are liable under the rule of *Clark v. O'Rourke*, 111 Mich. 108, 66 Am. St. Rep. 389.

**CITED; FORMER LAW:** *Inglis v. Driving Ass'n*, 169 Mich. 317; See *Golden Star Lodge v. Watterson*, 158 Mich. 700.

### (12364). Non-Joiner and Mis-Joiner.

**SEC. 13.** No action at law or in equity shall be defeated by the non-joinder or mis-joinder of parties. New parties may be added and parties mis-joined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require.

**HISTORY:** This and the following section are taken from Secs. 9 and 10 of the New Jersey Practice Act of '12. Supplement to the New Jersey Practice Act of 1903.

**NON-JOINDER OR MISJOINDER OF PARTIES:** For the practice of allowing an action to be defeated by reason of the non-joinder or mis-joinder of parties, has been substituted the practice of dropping parties mis-joined and bringing in parties who ought to have been joined. In the case of mis-joinder a motion to dismiss as to the parties mis-joined would be proper, or in case it appear upon the trial that any person was an improper party, an order dismissing the suit as to him would be entered.

At any stage of the case if it appears that a necessary party has been omitted, an order should be made making him a party and that he be brought in in the usual way.

**PARTIES; NON-JOINDER OR MIS-JOINDER:** Under the statute

intervenors must recognize the propriety of the main proceeding by accepting the proceeding as they find it, and cannot question its regularity, but are not precluded from attempting to defeat plaintiff's recovery. *Weatherby v. Kent Circuit Judge*, 194 Mich. 50. It is held, construing this section that where parties have been improperly joined they may be dropped by order of the court at any stage of the cause as the ends of justice may require, even though the plaintiff may not be required to discontinue as to them. *Bowers v. Gates*, 201 Mich. 150; see also *Grand Rapids-Ind. R. R. Co. v. Allegan Circuit Judge*, 203 Mich. 103.

**(12365). Change in Parties Not to Impair Action on Bonds.**

SEC. 14. No change in parties, made by order of court, shall impair any previous attachment of the estate or body of any person remaining a defendant in the action; nor impair bonds or recognizances of any person remaining a party either as against himself or his sureties; nor impair receipts to an officer for property attached; and, when parties are changed, the court may order new bonds if such new bonds are deemed necessary. Orders of court concerning change in parties may be upon terms at the discretion of the court.

HISTORY: New Section. See note to preceding section. This section is section 10 of the 1912 Supplement to the New Jersey Practice Act of 1903.

**(12366). Joinder of Defendants.**

SEC. 15. It shall be lawful for any plaintiff to include in one action as defendants, all or any of the parties who may be severally, or jointly and severally liable, and to proceed to judgment and execution according to the liability of the parties.

HISTORY: Supersedes Sec. 6, R. S. '46, Ch. 99, being C. L. '57, (4160); As Am. '71, p. 36, Act 36, Eff. July 18; C. L. '71, (5776); How. 7345; C. L. '97, (10055), changed.

CONSTRUED: A debtor cannot complain of failure to take judgment against any person joined with him as defendant. *Phelps v. Church*, 63 Mich. 231. An election to proceed against all of several joint obligors precludes plaintiff from bringing suit against individual obligors. *McKinley v. Small*, 178 Mich. 557. But when the death of one of the parties prevents suit against him, a claim presented against his estate is not a bar to action against the other obligors. *Id.*

In allowing the various parties to be joined in one suit, the statute does not make them liable in any different way than if they had been sued separately. *Sherman v. Palmer*, 37 Mich. 511. It does not make them joint defendants or joint debtors, as separate judgments may be rendered against each. *Hosie v. Judge*, 22 Mich. 496. See also *Rimmele v. Huebner*, March, 1916, 190 Mich. 247.



**FORMER LAW:** C. L. '97, (10055) applied only to the bringing of suit against those liable as makers, indorsers or acceptors of commercial paper, otherwise it was practically identical with the above. Under this statute suit may be brought against all parties to promissory notes, including guarantors of payment, and the declaration may be on the common counts, with service of a copy of the instrument and its indorsements. *Phelps v. Church*, 65 Mich. 233. The new rule brought in by this statute is the provision allowing a single suit against endorsers and other parties, as well as makers. So far as the makers are concerned, it has always been competent to sue them under the common counts. *Pt. H. & S. W. Ry. Co. v. Potter*, 55 Mich. 628. And a non-negotiable note, if given for a valuable consideration, and when it has become absolutely payable, may be sued for by the payee in the same way. *Id.* The contracts of the maker and the indorser are several and do not warrant a joint judgment upon lawful service on one only. *Church v. Edson*, 39 Mich. 113. This and the next two sections, authorizing the several parties to be sued together and judgment against any one or more, does not contemplate severance in case of persons purporting to be joint makers and sued as such. *Reading v. Beardsley*, 41 Mich. 123. Assessment of damages against defaulting party and joint judgment against all upon verdict. *Storey v. Bird*, 8 Mich. 316; See also *Maynard v. Penniman*, 10 Mich. 153; *Atwood v. Bearss*, 47 Mich. 72; *Phelps v. Church*, 63 Mich. 231. As complainant was not a "holder," he could not sue all of the defendants as makers and endorsers in one suit at law, and equity would take jurisdiction to avoid a multiplicity of suits and adjust the rights of the parties. *Comstock v. Potter*, 191 Mich. 629; 23 D. L. N. 416; 158 N. W. 102.

### (12367). Rights of Party to Note or Bill.

**SEC. 16.** The rights and responsibilities of the several parties to any bill or note, as between each other, shall remain the same as they now are by law; saving only the rights of the plaintiff, so far as they shall be determined by the judgment.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 99, being C. L. '57, (4165); C. L. '71, (5781); How. 7350; C. L. '97, (10060), omitting, however, the word "such" referring to bill or note. Changed.

See notes to preceding section.

### (12368). Indians.

**SEC. 17.** All Indians shall be capable of suing and being sued, in any of the courts of this state in like manner and with the same effect, as other inhabitants thereof, and shall be entitled to the same judicial rights and privileges.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 97, being C. L. '57, (4126); C. L. '71, (5741); How. 7309; C. L. '97, (10003), unchanged.

**(12369). Foreign Corporations.**

**Sec. 18.** A foreign corporation created by the laws of any other state or country, may prosecute in the courts of this state, in the same manner as corporations created under the laws of this state, upon giving security for the payment of the costs of suit, in the same manner that non-residents are required by law to do.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 116, being C. L. '57, (4834); C. L. '71, (6543); How. 8136; C. L. '97, (10467), unchanged.

**CONSTRUED:** This section, instead of rejecting or modifying the rule of comity, expressly adopts the substance of that rule, so far as the enactment extends. *Thompson v. Waters*, 25 Mich. 235. See *Seamans v. Temple Co.*, 105 Mich. 403.

This act must be construed in connection with Compilers' Section 11328 and Compilers' Section (Act 206 of '01, p. 316, Sections 1-6) (9063)-(9064)-(9065)-(9066)-(9067)-(9068). *Hastings Industrial Co. v. Moran*, 143 Mich. 679. A foreign corporation not authorized to do business in Michigan cannot maintain an action in the courts of this state unless the matter in controversy arises out of interstate commerce. *Imperial Curtain Co. v. Jacob*, 163 Mich. 72; *Fifth Avenue Library Society v. Hastie*, 155 Mich. 56; *Power Specialty Co. v. Michigan Power Co.*, March, 1916, 190 Mich. 699. See also *Standard Fashion Co. v. Cummins*, 187 Mich. 196. Foreign corporations may sue each other. *Talcott & Co. v. Harvesting Machine Co.*, 51 Mich. 5; *National Coal Co. v. Gas Coke Co.*, 168 Mich. 195. Enforcement of contracts by foreign building and loan associations, see *Hoskins v. Rochester Loan Ass'n*, 133 Mich. 506; *Building & Loan Ass'n v. Burch*, 124 Mich. 57. See also notes to next section. As to actions against corporations not organized under the laws of this state, see notes to Compilers' Section (12340), subdivision 5. The statute puts foreign corporations, complying with its provisions and thereby acquiring authority to transact business in this state, upon the same footing as domestic corporations, with the same right to prosecute and defend actions in the courts of this state and to enforce their contracts, and use the remedies authorized by law as are possessed by such domestic corporations. *Stack v. Detour Lumber & Cedar Co.*, 151 Mich. 29; *Isle Royale Land Corp. v. Osmun*, 76 Mich. 162.

See *Swing v. Cameron*, 145 Mich. 175; *Swing v. Western Lumber Co.*, 140 Mich. 344.

**(12370). Forbidden Acts by State.**

**Sec. 19.** But when, by the laws of this state, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 116, being C. L. '57, (4834); C. L. '71, (6543); How. 8136; C. L. '97, (10467), unchanged.

**CONSTRUED:** This section applies only to acts which, by the laws of this state, are forbidden to be done "by any corporation or association of individuals without express authority of law;" it does not apply to cases where only some particular corporation, or class of corporations, is forbidden, but only to cases where the prohibition is general.—*Thompson v. Waters*, 25 Mich. 235-6;—*Seamans v. Temple Co.*, 105 Mich. 403; *Hoskins v. Loan Ass'n*, 133 Mich. 508; *Hastings Industrial Co. v. Moran*, 143 Mich. 682. Under this section a foreign mutual benefit society which, by reason of non-compliance with law, is not authorized to do business in this state, cannot maintain an action to recover from an agent moneys collected by him, under an arrangement with its officers, on assessments made upon Michigan members.—*Mut. Ben. Society v. Lester*, 105 Mich. 716.

A foreign insurance company which insures property in this state without having obtained authority to do so pursuant to Compilers' Section 9211, cannot sue in this state to collect an assessment due on a policy.—*Swing v. Cameron*, 145 Mich. 175; *Swing v. Western Lumber Co.*, 140 Mich. 344. And it makes no difference that the policy was valid in the domicile of the company where the contract was made. *Swing v. Cameron*, 145 Mich. 175. This section, instead of rejecting or modifying the rule of comity, expressly adopts the substance of that rule, so far as the enactment extends. It applies only to acts which, by the laws of this state, are forbidden to be done "by any corporation or association of individuals, without express authority of law. It does not apply at all to cases where only some particular corporation, or even a particular class of corporations, is forbidden by the laws of this state to do certain things, but only to cases where such prohibition is general, applying to all corporations and all associations of individuals in this state.

**PLEADING:** See *Prussian Nat. Ins. Co. v. Eisenhardt*, 153 Mich. 199.

As to Suits in Chancery Against Unknown Defendants, Etc.

(12371). **Unknown Persons to be Made Defendants.**

**SEC. 20.** In all suits and proceedings in chancery, if there be any person interested in the same or in the subject matter involved therein, or whose name appears in the records of any public office as having at any time claimed any right, title, interest or estate in the subject matter of the suit or any portion thereof or any lien or charge therein without having conveyed or released the same, or who might at any time under the provisions or legal effect of any instrument of record claim or be entitled to claim any benefits thereunder, and it is not known whether such person is living or dead, or where he may reside if living, or whether the title, interest, claim, lien or possible right has been by him assigned to any person or persons, or if dead whether he has personal representatives or heirs liv-

ing or where they or some of them may reside, or whether such title, interest, claim, lien or possible right has been disposed of by will, it shall be lawful to make such person and every one claiming under him defendants in such suit or proceeding by naming such person and adding the words "or his unknown heirs, devisees, legatees and assigns," which shall include and be construed to include all persons claiming in any manner under the persons named as originally interested in such subject matter. If the subject matter be real estate such addition shall include and be construed to include all persons who might claim under the person named any dower or homestead right, whether the same shall be vested or inchoate at the time of beginning such suit or proceeding. In all suits and proceedings in chancery, if there be persons interested in the same, as heirs of some person or persons deceased, whose names are unknown, it shall be lawful to make such unknown heirs parties defendant to such suit or proceeding by the name and description of unknown heirs of such deceased person.

**HISTORY:** Re-enacts Sec. 1 of Act 123 of '09, adding thereto, however, a clause taken from Sec. 1 of Act 185 of '79, being C. L. '97, (10446,) which taken together supersedes said Sec. 1 of Act 185 of '79; As Am. '81, p. 234, Act 197, Eff. Sept. 10; being How. 6744; C. L. '97, (10446), and How. 6745; C. L. '97, (10447) and Sec. 3; As Am. '81, p. 234, Act 197, Eff. Sept. 10, being How. 6746; C. L. '97, (10448), changed.

**PROCEEDINGS AGAINST UNKNOWN DEFENDANTS:** The provisions of Act 123 of the Public Acts of '09 relating to suits against certain classes of unknown or unascertained defendants have been retained. To section one of the Act has been added a part of Section 10446 of the C. L. of '97. The purpose of this was to make one procedure which would include all classes of unknown, or unascertained defendants and by reason of which sections 10446, 10447 of the C. L. of '97, are superseded and have been repealed. Beyond this, there is no material change in the procedure, except that the time for the appearance of such defendants is made uniform with the new provisions relating to substituted service in chancery cases and appearance is required within three months from the date of the order of publication.

**CITED; FORMER LAW:** Walker v. Schultz, 175 Mich. 286.

### 12372). Proceedings to be Begun by Whom.

**SEC. 21.** Proceedings hereunder may be begun by any person, corporation or partnership association claiming any vested or contingent interest, or any estate in possession, expectancy, reversion, or remainder, in the subject matter of the

suit or any undivided part thereof or any estate for years therein, or who has conveyed any interest therein with covenants of title or warranty; and may be brought against all persons, corporations or partnership associations who may be in possession of the subject matter or who appear in any public record or in the record of any corporation to have or claim, or to have had or claimed, any title or interest in or lien upon such subject matter without having conveyed or released the same, including the makers of any conveyance or release which is uncertain or ambiguous in its terms, or contains any misdescription of the premises, or which is executed in such a manner as to make its validity doubtful or uncertain; also against all persons, corporations or partnership associations who, by reason of any provision, limitation, restriction, stipulation, charge, agreement or uncertainty contained in any deed, plat, will or other instrument of record, whether void upon its face or not and whether seemingly extinguished or made void by some other title or by some statutory provision or not, might be entitled in any contingency to enforce the same or make any claim thereunder. If there is any class of persons in whose favor any such provision, limitation, restriction, stipulation, charge, agreement or uncertainty might be enforced, and such persons are unascertained or not in being, they may be made defendants in any suit or proceeding hereunder, and bound by any decree made therein, by being designated as all persons who are or may become entitled to claim under the particular provision, limitation, restriction, stipulation, charge, agreement or uncertainty set forth in the bill of complaint or petition, which shall also be set forth at length in connection with every publication of every order by which notice is given to defendants in such class of the pendency of the suit or proceeding. The court may require the moving party by amendment to describe any defendant or defendants more particularly if in the opinion of the court that should be done.

**HISTORY:** Re-enacts Sec. 2 of Act 123 of '09 making, however, one slight change in phraseology, modified.

See note to Section 20 under black letter title.

### (12373). Suits to Quiet Title.

**SEC. 22.** Whenever suit is brought under the provisions of sections twenty to twenty-seven inclusive of this chapter to quiet the title to real estate, no one whose actual or possible title, claim or lien is sought to be removed or construed, and

whose name appears of record in some public office in connection therewith, may be made defendant in accordance with the preceding sections, except under his proper name or the name appearing in such record, nor shall his unknown heirs, devisees, legatees and assigns be included as defendants therein, unless fifteen years have elapsed since the recording of such title, claim or lien. When any one against whom proceedings under sections twenty to twenty-seven inclusive of this chapter might otherwise be brought is known to be dead, and some of the persons who might claim under him and their places of residence are known, such of them as are known shall be named as defendants and brought before the court in the manner provided by law, and all others who might claim under such deceased person may be included as unknown defendants.

**HISTORY:** Re-enacts with out material change Sec. 3 of Act 123 of 1909, unchanged.

See note to Section 20 under black letter title.

**(12374). Corporations or Partnership Associations as Defendants.**

**SEC. 23.** Any corporation or partnership association, the existence of which has terminated from any cause or which has no officer or agent in this state upon whom process may be served at the time when any suit is commenced under said sections twenty to twenty-seven, may be made a defendant in such suit and notified under the name by which it was formerly known in law, and in and by the order of publication herein provided for, to appear and defend such suit, and all persons who were or are stockholders or creditors of such corporation or partnership association may appear and defend such suit in conformity with the provisions of law as in other causes in chancery.

**HISTORY:** Re-enacts without material change Sec. 4 of Act 123 of '09 and also supersedes Sec. 1 of Act 113 of '91 being C. L. '97, (11009)-(11010); in so far as that relates to suits to quiet title, and also renders unnecessary Act 193 of '91, being C. L. '97, (8580)-(8581)-(8582), modified.

See note to Section 20 under black letter title.

**(12375). Bill to be Sworn to.**

**SEC. 24.** Whenever defendants are named in any suit or proceeding as the unknown heirs, devisees, legatees and assigns of any person, or are included in any class of unnamed persons, the bill of complaint or petition shall be sworn to by the moving party, his agent or attorney, and shall state that the affiant does not know and has been unable after diligent

search and inquiry to ascertain the names of the persons who are included as defendants therein without being named. Upon the filing of such pleading an order shall be entered by the circuit judge of the county in which such proceeding is pending or by a circuit/court commissioner of such county, for the appearance of every defendant in such suit or proceeding who cannot, by reason of being unnamed or otherwise, be personally served with process within three months from its date. If the suit is concerning lands every publication of such order shall be followed by a description of such lands as described in the bill of complaint, and a statement that the suit involves the title to such lands or is brought to quiet the title thereto.

**HISTORY:** Re-enacts Sec. 5 of Act 123 of '09, with some slight changes in phraseology, and also reduces the time for appearance to three months instead of four, modified.

See note to Section 20 under black letter title.

**(12376). Subsequent Proceedings.**

**SEC. 25.** All subsequent proceedings including publication of said order shall be taken in the same manner and with like effect as though all defendants were named therein by their proper names, and as to unnamed defendants and such as are not known to be living shall be in conformity with the statutes relating to defendants who reside in another state: *Provided*, That a guardian or guardians ad litem shall be appointed in accordance with the rules and practice of the court in the case of incompetent persons, to represent all unknown or unascertained defendants, and all known defendants who are infants or incompetent: *Provided further*, That the court before which said cause is heard, on a proper showing by affidavit that one or more of the defendants did not have actual notice of said suit in time to appear and defend the same, may in its discretion, at any time not later than three years after the entry of the final decree, reopen said case and order a rehearing as to the rights of such defendant or defendants who shall serve a copy of such affidavit and order and notice of all subsequent proceedings in the case on the plaintiff or his attorney and on all defendants who appear on the original hearing, or their attorneys.

**HISTORY:** Re-enacts Sec. 6 of Act 123 of '09, with two slight changes in phraseology, modified.

See note to Section 20 under black letter title.

**(12377). Appearance of Party Interested.**

**SEC. 26.** Any person interested in his own right, or as a

stockholder or creditor of any defunct corporation or partnership association, or as an heir, devisee, legated or assignee of some other person, or otherwise, in the subject matter of such suit or proceeding, and who desires to appear in such suit or proceeding, may, upon filing an affidavit in the office of the clerk in chancery of the county where such suit or proceeding is pending showing his interest in such suit or proceeding, enter an order of course therein that the same shall, as far as he is concerned, proceed against him in his proper name as a co-defendant with the other persons defendant therein as herein provided, and upon service of a copy of said affidavit and order and notice of the filing and entry thereof upon the plaintiff or his attorney, together with notice of entry of the usual order of appearance, said cause shall from that time proceed as in all other causes in chancery, but the right and interest of such person so appearing shall be open to question upon the hearing of such cause or proceeding and in any other manner now provided by law.

**HISTORY:** Re-enacts Sec. 7 of Act 123, of '09, with a few slight changes in phraseology. modified.

See note to Section 20 under black letter title.

**(12378). Decree.**

**SEC. 27.** On the hearing of any such suit or proceeding, if the allegations of the bill or petition are proven to the satisfaction of the court, and if it shall appear that the claims or possible rights of the defendants in the subject matter of the suit are of no validity and ought to be barred, the court shall decree accordingly; or if there are valid liens existing, or possible, uncertain or doubtful conditions to be construed, it shall make a decree determining their nature, validity or extent which shall determine the rights of all parties plaintiff or defendant, and shall be effectual to exclude all parties to such suit contrary to such determination, and shall have the same effect as a release by the holder thereof of every actual or possible claim which such decree shall find to be without validity, and if the effect of such decree is to quiet the title to lands, or if it in any way concerns the title to real estate, a certified copy thereof may be recorded in the office of the register of deeds of any county where said lands or any part of the same are situated. The court may award costs in its discretion.

**HISTORY:** Re-enacts Sec. 8 of Act 123 of '09, making however, a few slight changes in the phraseology modified.

See note to Section 20 under black letter title.



**Suits by and Against Infants and Persons Under Disability.****(12379). Persons Who are Incompetent May Sue.**

**SEC. 28.** Whenever an infant, or a person who is insane or otherwise mentally incompetent, shall have a right of action, he shall be entitled to maintain a suit thereon, but before the declaration or bill of complaint is filed or any process issued in the name of such person who is sole plaintiff, the circuit judge or circuit court commissioner of the same county shall appoint a competent and responsible person to appear as next friend for such plaintiff, who shall be responsible for the costs of suit, and the order for such appointment shall be forthwith filed in the office of the clerk of the court in which said action is to be begun. But in case such plaintiff has a guardian of his estate, it shall be competent for such guardian to bring such action.

**HISTORY:** This section re-enacts in part and supersedes Secs. 1, 2, 3 and 7, R. S. '46, Ch. 115, being C. L. '57, (4821)-(4822)-(4823); (As Am. '58, p. 9, Act 4, Eff. May 6) 7; C. L. '71, (6530)-(6531)-(6532)-(6536); How. (8123)-(8124)-(8125)-(8129); C. L. '97, (10454)-(10455)-(10456)-(10460); making the same however broader by including persons who are "insane or otherwise mentally incompetent," modified.

**SUITS BY AND AGAINST INFANTS AND PERSONS UNDER DISABILITY:** Considerable change has been made in the statutory provisions with reference to the prosecution and defense of suits by infants and persons mentally incompetent. A uniform procedure is provided, covering all cases of this character. Such a person may prosecute by his general guardian or by next friend. If he has a general guardian, he must defend by him; if not, he may defend by guardian *ad litem*. Heretofore an infant could not prosecute or defend by his general guardian. The statute also provided in the past that the next friend or guardian *ad litem* should be appointed upon the petition of the infant, but it did not provide a method for making the appointment, in case the infant was too young to be capable of making the petition. The new provisions are that, if the infant be over the age of fourteen years, the appointment shall be made upon the petition of the infant. If not over fourteen, the appointment shall be made upon the petition of the next of kin or other relative or friend whom the officer to whom such petition shall be presented shall deem a proper person to make such petition. It is believed that these provisions cover all possible cases that may arise.

It is also provided that similar proceedings may be had in case a party to an action shall become insane during the progress of the suit.

**INFANT PARTIES IN SUITS BEFORE CIRCUIT COURT COMMISSIONERS:** Heretofore no express authority has existed for the appointment of guardians *ad litem* or next friends for infants or other persons under disability in suits or proceedings before circuit court commissioners. By Section 19, Chapter II, the general provisions

contained in Chapter XII of the act are made applicable to such cases. Under the act such a person may sue or defend by general guardian as well as, by next friend or guardian *ad litem*.

**NEXT FRIEND AND GUARDIAN AD-LITEM:** Necessity of appointment and proper practice. *Haines v. Oatman*, 2 Doug. 430; *Sick v. Aid Ass'n*, 49 Mich. 50. General guardian not authorized to act as such next friend. *Kinney v. Harrett*, 46 Mich. 87; *Sheahan v. Judge*, 42 Mich. 70. An infant cannot empower an agent or attorney to act for him. *Armitage v. Widoe*, 36 Mich. 124. A next friend need not be appointed by the court; it is only necessary that the court should recognize his representative capacity and not dissent. And any proper person may present himself and be accepted as next friend, if there is nothing against it. *Sick v. Aid Ass'n* 49 Mich. 52. But an infant's co-defendant is not a proper guardian *ad litem*; nor any one having interests adverse to the infant's. *Damouth v. Klock*, 29 Mich. 289. The failure to appoint a guardian *ad litem* for infant legatees making application to appeal is an irregularity that may be cured by appointment in the circuit court. In *re Sanborn's Estate*, 109 Mich. 191. It is not necessary that the party appointed be responsible financially, but that he shall be answerable for, or liable to respond for costs, the same as if he were the party in interest. *Rabidon v. Judge*, 110 Mich. 297. As to waiver of irregularity of appearance by next friend. *Kearney v. Doyle*, 22 Mich. 294. Guardians *ad litem* cannot bind infants except in strict accordance with the rules for their protection. *Sheahan v. Judge*, 42 Mich. 69. See *Wood v. Truax*, 39 Mich. 628. Under the former practice a general guardian was not authorized to act as next friend. *Kinney v. Harrett*, 46 Mich. 87; *Sheahan v. Judge*, 42 Mich. 70.

### (12380). Appointment of Next Friend.

Sec. 29. If the plaintiff shall be an infant over the age of fourteen years, such appointment shall be made upon the petition of such infant, and in all other cases such appointment shall be made upon the petition of the next of kin of such plaintiff, or other relative or friend whom the officer to whom such petition shall be presented shall deem a proper person to make such petition, and upon the written consent of the person proposed to be the next friend to such plaintiff, duly acknowledged before any officer authorized by law to take acknowledgment of deeds: *Provided*, That before such next friend shall be appointed in any suit to recover any debt or damages, he shall, if required by the officer to whom application for such appointment is made, execute a bond to such plaintiff, in the penalty at least double the amount claimed in said suit, with such sureties as shall be approved by such officer, conditioned that such next friend shall duly account to such plaintiff for all moneys that may be recovered in such suit, which bond shall be delivered to the officer making the appointment, and shall be by him filed in the office of the judge of probate of the county where the infant resides.

**HISTORY:** This section re-enacts in part and supersedes Secs. 4, 5 and 6, R. S. '46, Ch. 115, being C. L. '57, (4824)-(4825)-(4826); C. L. '71, (6533)-(6534)-(6535); How. (8126)-(8127)-(8128); C. L. '97, (10457)-(10458)-(10459), modified.

**CONSTRUED:** Security for protection of infant's interests. *Westbrook v. Comstock*, Walk. 314; *Sheahan v. Judge*, 42 Mich. 69. The next friend of an infant has authority to receive payment and satisfy a judgment recovered by him in the name of the infant. *Baker v. Railroad Co.*, 142 Mich. 497.

**(12381). Appointment of Guardian Ad Litem for Incompetent Persons.**

**SEC. 30.** After the service of process or declaration, if the suit be commenced by declaration, against a defendant who is an infant, or who is insane or otherwise mentally incompetent, said suit shall be defended by the guardian of the estate of such defendant, if there be one; otherwise such suit shall not be further prosecuted until a guardian ad litem for such person shall be appointed in the manner following: If the defendant be an infant more than fourteen years of age, he may nominate such guardian ad litem; in all other cases the nomination may be made by the next of kin of said defendant, or any other relative or friend, whom said judge or commissioner may deem a proper person to make such nomination, and if said judge or commissioner approve the nomination so made, upon the filing of the written consent of the person proposed as guardian ad litem, he shall make such appointment. If such officer shall not approve of such nomination, he shall appoint some other suitable person as such guardian ad litem. The person so appointed shall not be liable for the costs of such suit, unless specifically charged by order of the court for some personal misconduct in such cause. If no such nomination is made within twenty days after the service of process or declaration, if the suit be commenced by declaration, the plaintiff may obtain an order from the court in which the proceedings are pending, appointing some suitable person to act as guardian ad litem for such person.

**HISTORY:** This section re-enacts in part and supersedes Secs. 8, 9, 10, 11 and 12, R. S. '46, Ch. 115, being C. L. '57, (4828)-(4829), (As Am. '58, p. 9, Act 4, Eff. May 6) (30)-(31)-(32); C. L. '71, (6537)-(6538)-(6539)-(6540)-(6541); How. (8130)-(8131)-(8132)-(8133)-(8134); C. L. '97, (10461)-(10462)-(10463)-(10464)-(10465), modified.

See note to Section 28 under black letter title.

**CONSTRUED:** A judgment against an infant defendant is not void because no guardian ad litem was appointed to represent him, but is voidable merely. *Schmiff v. Judge*, 129, Mich. 103.

Appointment of guardian ad litem by probate judge, upon his own motion, upon a hearing on an administrator's account. *Walker v.*

Hull, 35 Mich. 488. Appointment of a new guardian on appeal. *Id.* Practice. Peck v. Judge, 98 Mich. 639.

The answer of an infant, put in by his guardian ad litem, is regarded as a pleading merely and cannot be used as evidence for or against the infant against whom the complainant must prove his case. And no decree will be entered against an infant on a bill taken against him as confessed. Thayer v. Lane, Walk. 202; Chandler v. McKinney, 6 Mich. 219; Ballentine v. Clark, 38 Mich. 395. A chancery order granted on an infant's admissions is erroneous. Smith v. Smith, 13 Mich. 258. A guardian ad litem cannot bind his ward by admissions. Cooper v. Mayhew, 40 Mich. 528. An infant is not bound by any attempted relinquishment of his rights by his next friend. Burt v. McBain, 29 Mich. 260.

CITED: Peck v. Judge, 98 Mich. 643; Stoner v. Riggs, 128 Mich. 132. See also Erwin v. Fay, 165 Mich. 504.

### (12382). Action Prosecuted or Defended by Guardian.

SEC. 31. If, during the pendency of any action, either party shall become insane, the action may be prosecuted or defended by his guardian, in like manner as if it had been commenced after the appointment of the guardian, or the court may appoint a next friend or guardian to prosecute or defend the suit as the case may require.

HISTORY: Re-enacts Sec. 21, R. S. '46, Ch. 101, being C. L. '57, (4224); C. L. '71, (5844); How. 7413; C. L. '97, (10133), making one slight change in phraseology, modified.

See note to Section 28 under black letter title.

### Survival of Actions.

### (12383). Actions Which Survive.

SEC. 32. In addition to the actions which survive by the common law the following shall also survive, that is to say, actions of replevin, actions for the conversion of property, for deceit, for assault and battery, for false imprisonment, for negligent injuries to persons, for damages done to real and personal estate, and actions to recover real estate, or any interest therein, where persons have been induced to part with the same through fraudulent representations and deceit.

HISTORY: Re-enacts and supersedes Sec. 5, R. S. '46, Ch. 101, being C. L. '57, (4208); C. L. '71, (5828); How. (7397); As Am. '85, p. 117, Act 113, Imd. Eff. May 26; As Am. '97, p. 181, Act 148, Eff. Aug. 30; C. L. '97, (10117); and Sec. 2 of Act 195 of '97, being C. L. '97, 10422, unchanged.

CONSTRUED: The right of action given by Compilers' Sections (5496)-(5501), does not change or repeal this statute or prevent recovery thereunder for the negligent killing of a servant. *Habitz v. Wabash R. R. Co.*, 170 Mich. 71, and such right of action survives under this section. *Fernette v. P. M. R. R. Co.*, 175 Mich. 672. See also *Jorgensen v. G. R. & I. Ry. Co.*, Dec. 1915, 189 Mich. 537. A widow can recover

for probable contributions of husband killed negligently, even though she never has received anything from him. *Ingersoll v. D. & M. Ry. Co.*, 163 Mich. 268. Where the plaintiff in a personal injury suit dies, the action begun by him may be continued by his personal representative. *Rouse v. M. U. R.*, 164 Mich. 477. And the death act has no application to the manner in which it shall be pursued. Id. Administrator cannot recover for services of wife where recovery in a previous action by husband showed that he had not emancipated her. *Walker v. L. & S. T. Co.*, 156 Mich. 514. The right of action for injuries to the person arising from negligence, which survives under this section, is a separate and distinct cause of action from that given by the death act to the personal representative for the pecuniary injury resulting from his negligent killing. *Hurst v. Detroit, Etc., Ry.*, 84 Mich. 539. Where death results to a minor from injury after several hours, action is under this section, and this act applies to causes of action as well as to actions. *Love v. D. J. & E. Ry.*, 170 Mich. 1. Where death results from negligent injury, if the death be not instantaneous, the administrator recovers under this act the full measure of damages for the benefit of the next of kin. If it be instantaneous, he recovers under the Death Act for the same persons a limited amount of damages. *Dolson v. L. S. & M. S. Ry. Co.*, 128 Mich. 444; *Sweetland v. C. & G. T. Ry.* 117 Mich. 329; *Jones v. McMillan*, 129 Mich. 86; *Storrie v. Elevator Co.*, 134 Mich. 304. Where there is a continuing injury resulting in death within a few moments, it is "instantaneous" within the meaning of the death act, and the action does not survive. *West v. Railway*, 159 Mich. 269. This section creates no new liability, but prevents the lapsing by death of an old one, while the death act creates a new liability not known to the common law. *Lincoln v. Detroit, Etc., R. Co.*, 179 Mich. 196. This section was intended to include only those cases where injury is occasioned to property by the direct, wrongful act of a party upon the property. *Stebbins v. Dean*, 82 Mich. 385. A statutory provision that a cause of action shall survive is equivalent to saying that an executor may sue on it. *Rogers v. Windoes*, 48 Mich. 628;

**ACTIONS THAT SURVIVE:** The right of action for injuries sustained from defective highways, etc., survives. *Racho v. Detroit*, 90 Mich. 92; *Roberts v. Detroit*, 102 Mich. 67. An executor may bring an action for the conversion of property, where the conversion occurred, but was not sued on, in his testator's lifetime. *Rogers v. Windoes*, 48 Mich. 628. An action against a physician for negligent malpractice survives against his executors. *Norris v. Judge*, 100 Mich. 256. The right of action for personal injuries not resulting in the death of the injured. *Rouse v. M. U. R.*, 164 Mich. 477; See further, *Hicks v. Steel*, 142 Mich. 292.

**ACTIONS THAT DO NOT SURVIVE:** Bastardy proceeding do not survive either at the common law or under the statute. *People v. Kemppainer*, 163 Mich. 186. A right of action based wholly upon the destruction by a widow of unrecorded deeds of lands to her husband, the title to which she afterwards secures herself, in fraud of the heirs, does not survive at common law or under this statute. *Stebbins v. Dean*, 82 Mich. 385.

**NO SURVIVAL UNDER FORMER LAWS:** In the case of *Frohlick v. Deacon*, 181 Mich. 255, the supreme court was equally divided as

to the holding of the trial court that an action of conspiracy in restraint of trade did not survive. Where the bailee of property died and another wrongfully took possession of the property, the owner of the property alone could replevin. The administrator of the bailee could not. *Salter v. Sutherland*, 123 Mich. 225.

**DAMAGES:** This section does not fix the measure of damages but leaves the same according to the rules of the common law. *Norblad v. Railroad*, 156 Mich. 700. The rule for damages stated under this act is in *Kyes v. Valley Telephone Co.*, 132 Mich. 281. Cases under this act for Negligent Injury: *Olivier v. Houghton County Street Ry.*, 134 Mich. 367; *Id.* 138 Mich. 242; *Storrie v. G. T. Elevator Co.*, 134 Mich. 297; *Ely v. D. U. R.*, 162 Mich. 287; *Love v. D. J. & C. R. R.*, 170 Mich. 1. Mortality tables are not admissible for child under ten years. *Morse v. D. G. & M. Ry. Co.*, 168 Mich. 99. For method of proving expectancy of child, See *Love v. Railroad*, 170 Mich. 1.

**PLEADINGS:** A declaration drawn under this section cannot be amended to come under the Death Act, as it would be stating another action. *Hurst Administrator v. Detroit City Railway*, 84 Mich. 539. See also *Walker v. L. & S. T. Co.*, 144 Mich. 686. Counts under this act and the Death Act may be joined and no election can be compelled. *Carbary v. D. U. R.*, 157 Mich. 683; *Ely v. D. U. R.*, 162 Mich. 287. A right of action for the maintenance of an illegitimate child would not survive at the common law, unless the injury on which the cause of action was based affected property rights. Where the action affected the person alone it abated, otherwise it survived. *People v. Kemppainen*, 163 Mich. 186.

**FORMER LAW CITED:** *Blick v. Olds Motor Works*, 175 Mich. 641; *Sonsmith v. Railroad*, 173 Mich. 71; *Williams v. Verona Mining Co.*, 149 Mich. 46; *Bigelow v. Kalamazoo*, 97 Mich. 125; *Brunt v. Railroad Co.*, 78 Mich. 539; *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 692. See also *Gates v. Beebe*, 170 Mich. 109; *Ingersoll v. D. & M. Ry. Co.*, 163 Mich. 269; *Davis v. Railroad*, 147 Mich. 484; *Hunter v. Village of Ithaca*, 135 Mich. 281, (sidewalk injury). *Hewitt v. East Jordan Lumber Co.* 136 Mich. 140.

**DEATH ACT:** See Compilers' Sections (14577)-(14578), commonly referred to as the "death act." See also note to Compilers' Section (8318), see *Beach v. City of St. Joseph*, 192 Mich. 302.

**ACTION TO RECOVER REAL ESTATE:** Action for the recovery of real estate after abatement by death of plaintiff. See Compilers' Section (12320).

### (12384). Abatement of Cause.

**SEC. 33.** In all actions at law or in equity, where the cause of action does not survive, if one or more of the plaintiffs or defendants shall die, the suit shall abate only as to the person or persons so dying, and the surviving parties may proceed without reviving the suit.

**HISTORY:** Re-enacts Sec. 65, R. S. '46, Ch. 90, being C. L. '57, (3519); C. L. '71, (5101); How. 6655; C. L. '97, (470), changing the phraseology so that the rule applies both to actions at law and suits in equity. Modified.

**UNDER FORMER LAWS:** As to the rule in ejectment, see *Hoffman v. Judge*, 40 Mich. 351.

**(12385). Causes Not Permitted to Abate.**

**SEC. 34.** Where the cause of action at law or in equity survives, if a sole plaintiff or defendant dies, the action shall not abate, but upon a proper suggestion of the death of such party upon the record the executor or administrator of such deceased plaintiff or defendant, shall be admitted to prosecute or defend said action.

**HISTORY:** Re-enacts and merges Secs. 1 and 2, R. S. '46, Ch. 101, being C. L. '57, (4204)-(4205); C. L. '71, (5824)-(5825); How. 7393-4; C. L. '97, (10113)-(10114), unchanged.

**SUGGESTION OF DEATH:** The proceeding on suggesting the death of a plaintiff is entirely ex parte and there is no provision of statute by which notice of it is to be given to the defendant. If he is present he has no right to intervene. *Vickery v. Beir*, 16 Mich. 54. There should be proof presented to the court in all cases where death is suggested. *Id.* The suggestion cannot be the subject of an issue. *Larned v. Wilson*, 4 Mich. 333. The declaration need not be amended, but the later proceedings must be properly entitled. *Stimpson v. Judge*, 41 Mich. 3. Where a complainant in chancery dies, the suit is revived by an order substituting his representative as complainant and no actual amendment of the bill is necessary. *Webster v. Hitchcock*, 11 Mich. 56; *Webster v. Bailey*, 31 Mich. 36. The statute suggestion of the death of a party answers the purpose of the bill of revivor, and the rules controlling the action of the court are not different in the cases where revival of a suit is by suggestion or by revivor. *Haines v. Judge*, 155 Mich. 419. Under this section parties cannot be brought into the suit who do not claim by operation of law as a consequence of the death of the original party. *Id.* See also *Bigelow v. Kalamazoo*, 97 Mich. 124; *Hoffman v. Judge*, 40 Mich. 351.

**PLEADINGS:** Under this section the court has the same power of amendment in causes revived in the name of an administrator that it has in other cases. *Jones v. Pendleton*, 151 Mich. 443. See *Young v. Blanchard*, 165 Mich. 340; *People v. Kemppainen*, 163 Mich. 186; *Sweetland v. Chicago, etc., R. Co.*, 117 Mich. 329.

**(12386). Personal Representations May Prosecute or Defend.**

**SEC. 35.** When there are several plaintiffs or defendants in any action, the cause of which survives, and any of them shall die before final judgment or decree, the executor or administrator of such deceased plaintiff or defendant, shall be admitted to prosecute or defend, together with the surviving plaintiff, or defendant, as the case may be.

**HISTORY:** This section re-enacts and merges Sec. 9, R. S. '46, Ch. 101, being C. L. '57, (4212); C. L. '71, (5832); How. 7401; C. L. '97, (10121); and Sec. 64, R. S. '46, Ch. 90, being C. L. '57, (3518); C. L. '71, (5100); How. 6654; C. L. '97, (469), unchanged.

**PROCEDURE AFTER THE DEATH OF A PARTY:** Heretofore in actions, the cause of which survives, where there were two or more plaintiffs or defendants, in the case of the death of one of them, the action has been prosecuted or defended by the survivor or survivors and in case of the death of all the plaintiffs or defendants, the action has been prosecuted or defended by the executor or administrator of the last survivor. If the deceased was a plaintiff, this procedure deprived his representatives, to whom his interest in the cause of action passed, of any right to participate in the management of the suit. If the deceased party was a defendant, it deprived the plaintiff of the right to pursue his remedy in one suit against both the survivor and the estate of the deceased. The new practice provides that upon the decease of either a plaintiff or defendant in such a case, the executor or administrator shall be admitted to prosecute or defend together with the survivor and that in the case of the death of all the plaintiffs or defendants, the action shall be prosecuted or defended jointly by the executors or administrators of all the plaintiffs or defendants. If, however, the action is brought to recover upon a several or joint and several liability, and one of the defendants dies, the plaintiff may, at his option, proceed against the survivor without bringing in the executor or administrator of the deceased.

**FORMER LAWS CONSTRUED:** The following cases give the rule as applied under former laws.

Where, after the trial of a suit against the principal and sureties in a bond, the principal dies, the suit should proceed against the surviving defendants. *Healy v. Newton*, 96 Mich. 228. Where, after commencement of suit against two partners, one dies, the suit is properly revived and prosecuted to judgment against the surviving partner, the administrator of the other not being a necessary party. *Van Kleeck v. McCabe*, 87 Mich. 599. In real actions. *Hoffman v. Judge of St. Clair Circuit*, 40 Mich. 351.

See also *Haines v. Judge*, 155 Mich. 417, 419. Where the exclusive object of the suit against the petitioner was to sever the bond of marriage, the death of the husband, the complainant, brought the suit to an end, for there remained no longer in the case a party complainant to contend nor any subject-matter of contention. An abatement in the sense of equity may be defined as a state of suspension with a capacity for revival. *Zoellner v. Zoellner*, 46 Mich. 513. When a complainant in chancery dies, the suit is revived by an order substituting his representative as complainant and no actual amendment of the bill is required to give the order that effect. *Webster v. Hitchcock*, 11 Mich. 56; *Webster v. Bailey*, 31 Mich. 36.

But such an amendment, substituting the administrator as complainant, would not prejudice defendant and may be disregarded as surplusage. *Id.*

**ASSIGNMENT BY COMPLAINANT:** When the subject matter of the suit is assigned by the complainant, the suit can no longer be prosecuted in his name after the assignment is brought to the notice of the court, and the only mode in which the assignee can revive, or get the benefit of the original suit, is by filing an original suit in the nature of a bill of revivor and supplement. *Wallace v. Dunning*, Walk. 416; *Griggs v. D. & M. Ry. Co.*, 10 Mich. 117; *Webster v. Hitchcock*, 11 Mich. 56; *Cooper v. Bigley*, 13 Mich. 478; *Perkins v. Perkins*,



16 Mich. 162; *Brewer v. Dodge*, 28 Mich. 359. See *Widner v. Lane*, 14 Mich. 124, as to the effect of an assignment by one defendant to complainant. See *Barnett v. Powers*, 40 Mich. 317, as to bills of revivor.

CITED: Former law on same subject. *Newberry v. Trowbridge*, 13 Mich. 275; *Seymour v. Bruske*, 140 Mich. 253.

**(12387). Cause Jointly Prosecuted or Defended by Personal Representatives.**

SEC. 36. If all the plaintiffs or all the defendants shall die before final judgment or decree, such action shall be prosecuted or defended jointly by the executors, or administrators of such deceased plaintiffs or defendants.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 101, being C. L. '57, (4213); C. L. '71, (5833); How. 7402; C. L. '97, (10122), modifying the same slightly.

CITED: *Newberry v. Trowbridge*, 13 Mich. 275.

**(12388). Order May be Had if Personal Representative Does Not Appear.**

SEC. 37. If the executor or administrator does not voluntarily appear on or before the first day of the next term, after the death of such party, the opposite party to said suit, or any co-plaintiff or co-defendant of said deceased party may have an order of course that the executor or administrator appear and take upon himself the prosecution or defense of the suit within thirty days after service of notice of such order.

HISTORY: Re-enacts Sec. 3, R. S. '46, Ch. 101, being C. L. '57, (4206); C. L. '71, (5826); How. 7395; C. L. '97, (10115), excepting the old section read "the surviving party may have an order, etc," instead of the way it appears above. Modified.

PROCEDURE TO BRING IN REPRESENTATIVES: The executor or administrator has until the first day of the next term of court in which voluntarily to appear. If the representatives do not appear on or before the first day of the next term, either the opposite party or any co-plaintiff or co-defendant may have an order of course that the executor or administrator appear and take upon himself the prosecution or defense of the suit within thirty days after service of notice of such order. A copy of such order is to be served on the representative if resident within the state. If not resident within the state, an order of publication of notice may be had in the same manner and published with the same effect, as in relation to absent, concealed or non-resident defendants in chancery cases. In the case of personal service, thirty days are allowed in which to appear and answer. In default of appearance within the time limited, the default of the personal representative shall be entered and judgment rendered against him in his representative capacity. If no administrator or executor is otherwise appointed, any party entitled to have the executor or ad-

ministrator of the deceased party brought into the action as a party thereto, may petition for the appointment of an administrator in like manner as creditors are authorized to do.

**(12389). Service of Order.**

**SEC. 38.** A copy of such order shall be served on the representative or other person or persons interested, as aforesaid, against whom the revivor is ordered if residents of the state; but if not residents of this state, then an order of publication of notice may be had from the proper court or officer, to revive in the same manner, and be published with the same effect, as is now provided in relation to absent, concealed or non-resident defendants in original bills; in the case of personal service of such order, the person so served shall be allowed thirty days after such service, to appear, answer, or disclaim.

**HISTORY:** Re-enacts Sec. 67, R. S. '46, Ch. 90, being C. L. '57, (3521); As Am. '61, p. 296, Act 182, Imd. Eff. Mar. 15; C. L. '71, (5103); How. 6657; C. L. '97, (472), making a slight change in the phraseology and changing the time in which to appear from sixty to thirty days. Modified.

See note to Section 37 under black letter title.

**PUBLICATION:** Brown v. Thompson, 29 Mich. 76.

**(12390). Entry of Appearance.**

**SEC. 39.** If they shall not, in the case of personal service, within that time, or in case of publication, within the time prescribed by the order of publication, appear and answer, or disclaim, the court, upon due proof of the service of such order or publication of notice of the same, may cause their appearance to be entered; and in such case the answer of the deceased party shall be deemed the answer of such representatives, or other person or persons as aforesaid; and after such order of appearance, the same proceedings may be had and with the like effect as to absent or non-resident representatives, and other person or persons aforesaid, so brought in on publication of notice, as is now provided as to representatives of a deceased party brought in on personal service of an order of revivor.

**HISTORY:** Re-enacts Sec. 68, R. S. '46, Ch. 90, being C. L. '57, (3522); As Am. '61, p. 296, Act 182, Imd. Eff. Mar. 15; C. L. '71, (5104); How. 6658; C. L. '97, (473), unchanged.

**(12391). Entry of Default.**

**SEC. 40.** If the executor or administrator shall not appear within the time limited by such order, his default shall be entered, and such judgment or decree shall be rendered against

him in his representative capacity, as may be proper in the case.

**HISTORY:** Re-enacts in part Sec. 4, R. S. '46, Ch. 101, being C. L. '57, (4207); C. L. '71, (5827); How. 7396; C. L. '97, (10116), modified.

See note to Section 37 under black letter title.

**CITED:** Sheldon v. Warner's Estate, 59 Mich. 450.

**(12392). Procedure Against Survivor.**

**SEC. 41.** In cases where the action is brought to recover upon a several, or joint and several liability, and one of the parties so liable dies, the action may proceed at the option of the plaintiff against the surviving party, or parties, without bringing in the executor or administrator of the deceased.

**HISTORY:** New Section.

**(12393). Appearance of Heir of Plaintiff.**

**SEC. 42.** In all real and mixed actions, if the plaintiff shall die before final judgment, his heir, within such time as the court shall allow, may appear and prosecute the suit, in the same manner as if the action had been originally commenced by him, or the action may be prosecuted by the executor or administrator for the benefit of the heir, or, of the creditors of the deceased.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 101, being C. L. '57, (4214); C. L. '71, (5834); How. 7403; C. L. '97, (10123), changing "demandant" to "plaintiff," changed.

**(12394). Death of One of Plaintiffs.**

**SEC. 43.** If there are several plaintiffs in such action, and any of them shall die before final judgment, the heir, executor or administrator of the deceased party may be admitted on motion, to prosecute the suit, jointly with the survivors, in the same manner as if he had joined with them in commencing the suit.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 101, being C. L. '57, (4215); C. L. '71, (5835); How. 7404; C. L. '97, (10124), making the same change in phraseology as in the preceding section, changed.

**(12395). Surviving Parties May Prosecute.**

**SEC. 44.** If the interest of the deceased party passes to the surviving plaintiffs, or if there be no motion for the admission of another person as heir, executor or administrator, within the time allowed by the court for that purpose, the surviving plaintiffs may prosecute the suit for so much of the premises in question as may be claimed by them.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 101, being C. L. '57, (4218); C. L. '71, (5836); How. 7405; C. L. '97, (10125), making the same change in phraseology mentioned in the two preceding sections, changed.

**(12396). Prosecution Against Surviving Defendants.**

**SEC. 45.** When there are several defendants in any real or mixed action, and any of them shall die before final judgment, the action may be prosecuted against the surviving defendants, for so much of the premises as they shall hold or claim.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 101, being C. L. '57, (4217); C. L. '71, (5837); How. 7406; C. L. '97, (10126). Unchanged.

**(12397). Partition of Lands.**

**SEC. 46.** The same proceedings as are prescribed in the preceding sections, in relation to real and mixed actions, shall be had in all petitions and actions for partition of lands, in case of the death of any of the parties, except as is provided in the two following sections.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 101, being C. L. '57, (4218); C. L. '71, (5838); How. 7407; C. L. '97, (10127). Unchanged.

**SUBSTITUTED SERVICE:** Important changes are made with reference to substituted service upon absent, concealed or non-resident defendants. An order of publication may be made upon proof by affidavit of any fact heretofore allowed as a basis for an order, but the order must in all cases require the appearance of the defendant within three months from the date of the order. The order may be published or personally served as heretofore.

It is further required that in all cases a copy of such order shall be mailed to the defendant at his last known postoffice address by registered mail and a return receipt demanded, and that proof by affidavit shall be required of such mailing and whether or not a return receipt was received, and, if one was received, it shall be attached to said affidavit. It should be noted that the statute fails to make an exception as to mailing a copy, even if personal service of the order is made and, since strict compliance with the law is required in cases of substituted service, it will be wise to mail the copy as required, even if personal service is had.

**(12398). Death of One of Several Plaintiffs.**

**SEC. 47.** If upon the death of either of several plaintiffs in a suit for partition, the interest of the deceased party shall pass to the surviving plaintiffs, or to any person who shall be admitted to join them in the suit, it shall be prosecuted accordingly, in the manner before provided respecting real actions, but if the interest of the deceased party shall pass to

any person who is not so admitted as a plaintiff, such person may, by order of the court, be made a defendant, and the same proceedings may be had against him, as would have been necessary to make him an original defendant.

**HISTORY:** Re-enacts without material change Sec. 16, R. S. '46, Ch. 101, being C. L. '57, (4219); C. L. '71, (5839); How. 7408; C. L. '97, (10128). Unchanged.

See note to Section 46 under black letter title.

**(12399). Death of One of Several Defendants.**

**SEC. 48.** If upon the death of either of the several defendants, the interest of the deceased party shall pass to the surviving defendants, the suit may proceed against them without any new process, but if the interest of the deceased party shall pass to any other person, such person may be made a defendant, by order of the court, in the manner prescribed in the preceding section.

**HISTORY:** Re-enacts without material change Sec. 17, R. S. '46, Ch. 101, being C. L. '57, (4220); C. L. '71, (5840); How. 7409; C. L. '97, (10129), unchanged.

See note to Section 46 under black letter title.

**(12400). Appointment of Administrator.**

**SEC. 49.** In all cases where the opposite party, or a co-plaintiff or co-defendant of the deceased party is entitled to have the executor or administrator of the deceased party brought into the action as a party thereto, if an executor or administrator is not otherwise appointed, such party may petition for the appointment of an administrator in like manner as creditors are entitled to do.

**HISTORY:** New Section.

See note to Section 46 under black letter title.

**(12401). Death of Plaintiff in Cause Not Surviving.**

**SEC. 50.** When the plaintiff in any cause at law or in equity shall die, and the cause of action as stated in the pleadings shall not survive, his representatives may, by filing an affidavit showing such death, and showing that the pleadings on file do not correctly set forth plaintiff's real cause of action, on motion in open court, accompanied by an amended declaration or bill of complaint, showing a cause of action which

did survive, be made plaintiffs in the suit, and the same shall stand revived as in other cases.

**HISTORY:** Re-enacts along much broader lines however, Sec's 72 and 73, R. S. '46, Ch. 90, being C. L. '57, (3526)-(3527); C. L. '71, (5108)-(5109); How. 6662-3; C. L. '97, (477)-(478); changed.

**(12402). Death of Defendant in Cause Not Surviving.**

**SEC. 51.** If a defendant shall die, and the cause of action as stated in the pleadings shall not survive, and the plaintiff shall neglect or refuse to procure an order for the revival of the suit, upon a like showing as required in the preceding section, the court may order the suit to stand revived, upon motion of a surviving defendant, against the representatives of the deceased defendant.

**HISTORY:** New section.

**(12403). Death of Sole Plaintiff in Replevin or Attachment.**

**SEC. 52.** In all actions of replevin, or in attachment, when the sole plaintiff shall die during the pendency of the suit, it shall be sufficient for the defendant or defendants, as the case may be, to notify the surety or sureties in the replevin or attachment bond, to appear and prosecute the suit, and if he or they shall fail so to do within such time as the court shall direct, then his or their appearance may be entered by the defendant or defendants, and thereupon the cause shall proceed to judgment and execution, in like manner, and with like effect, as though the same had been originally commenced in the name of such surety or sureties.

**HISTORY:** Re-enacts without material change Sec. 22, R. S. '46, Ch. 101, being C. L. '57, (4225); C. L. '71, (5845); How. 7414; C. L. '97, (10134), unchanged.

## CHAPTER XIII.

### COMMENCEMENT OF SUITS AND SERVICE OF PROCESS.

#### (12404). Commencement of Suits and Service of Process.

SECTION 1. It shall not be necessary to file any warrant of attorney to authorize any attorney to appear in any court, for either party to an action brought therein, except in cases where it shall be especially required by law; nor shall any entry of any warrant of attorney in any record or other proceeding be necessary; but the plaintiff in his declaration, and the defendant in his plea, shall state the name of the attorney or attorneys by whom they respectively appear.

HISTORY: Re-enacts Sec. 25, R. S. '46, Ch. 97, being C. L. '57, (4131); C. L. '71, (5746); How. 7314; C. L. '97, (10008), unchanged.

#### (12405). Style of Process.

SEC. 2. The style of all process from courts of record at law

HISTORY: Re-enacts with some changes in phraseology Sec. 1, R. S. '46, Ch. 97, being C. L. '57, (4107); As Am. '69, p. 4, Act 3, Imd. Eff. Jan. 23; C. L. '71, (5722); How. 7290; C. L. '97, (9984); and supersedes sections 40 and 41 of R. S. '46, Ch. 90, (The former as Am. '47, p. 169, Act 105, Eff. May 16) being C. L. '57, (3494)-(3495); C. L. '71, (5076)-(5077); How. 6630, (As Am. '85, p. 92, Act 89, Eff. Sept. 19), 1; C. L. '97, (452)-(453), changed.

**PROCESS:** "In the name of the people, etc." *Tweed v. Metcalf*, 4 Mich. 579; *Wisner v. Davenport*, 5 Mich. 501; *Forbes v. Darling*, 94 Mich. 626; *Atty. Gen. v. Jochim*, 99 Mich. 358; *Johnson v. Ins. Co.*, 12 Mich. 216. Does not apply where suit commenced by declaration and rule to plead, as this provision has reference only to process issued by the court. *Penfold v. Slyfield*, 110 Mich. 343. In reference to a chancery subpoena, held, that the object of the provision is to make this style the distinguished feature of all process. The requirement is constitutional and the defect jurisdictional. *Forbes v. Darling*, 94 Mich. 627. The constitutional provision (Art. VII, 22,) applies to the judicial department only. *Atty. Gen. v. Jochim*, 99 Mich. 358. **Testing.** *Johnson v. Ins. Co.*, 12 Mich. 224; *Howerter v. Kelly*, 23 Mich. 337. **Indorsement by attorney.** *Parks v. Goodwin*, 1 Doug. 57. Seems inteded merely as a matter of convenience; no provision of law has annexed to it any legal liability. *Preston v. Preston*, 1 Doug. 293. Name of attorney indorsed on cover inclosing affidavit, writ of attachment and return sufficient. *VanSlyck v. Arseneau*, 140 Mich. 155. As to the signing of process in chancery proceedings under former laws, see *Towrans v. Hicks*, 32 Mich. 307; *Creveling v. Moore*, 39 Mich. 563. May be indorsed nunc pro tunc. *Parks v. Goodwin*, 1 Doug. 57. There is no reason why the mere filling out of a summons by an attorney after the signature and sealing of the clerk, where no abuse is shown should vitiate the writ. *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 60. A deputy county clerk may sign process in his own name. *Calander v. Olcott*, 1 Mich. 345.

### (12406). Commencement of Personal Actions by Summons or Capias.

**SEC. 3.** All original writs in personal actions shall be a summons or a capias ad respondendum according to such form as shall be fixed by the general rule of court. Said writs may be issued in vacation or term time and shall be made returnable according to the general rule of court.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 97, being C. L. '57, (4111); C. L. '71, (5727); How. 7295; As Am. '85, p. 13, Act 17, Eff. Sept. 19; As Am. '97, p. 211, Act 164, Eff. Aug. 30; C. L. '97, (9989), unchanged.

**RULES OF COURT:** Under this section the supreme court is empowered to fix a time in which a defendant can enter his appearance and perfect special bail. *Wright v. Wayne Circuit Judge*, 119 Mich. 501. And Circuit Court Rule 18, (Former Rule 1) made under the authority of this section prevails over Compilers' Section (12418). *Id.* See also *Vohlers v. Manufacturing Co.*, 171 Mich. 8. When date of return day falls on Sunday. *Id.*

**RETURNABLE:** Prior to the amendment of '85 a capias could be made returnable only on the first day of term. *People v. Kent County Judge*, 38 Mich. 308. Effect of misstatement of date of return. *Wonderly v. Kent Circuit Judge* 41 Mich. 722. Since amendment, *Burt v. Wayne Circuit Judge*, 82 Mich. 253.

**CITED:** *Kirby v. Soule*, 178 Mich. 414.



**Action—How Commenced.****(12407). Commencement of Action.**

**SEC. 4.** All actions at law in any court of record, except mandamus, quo warranto, and certiorari, may be commenced either,

1. By original writ; or

2. By filing in the office of one of the clerks of the court, a declaration upon which is indorsed a notice in substantially the following form:

To ..... defendant:

You are hereby notified that a suit has been commenced against you as defendant by ....., as plaintiff, and that the within is a true copy of plaintiff's declaration in said cause, and that if you desire to defend the same, you are required to plead thereto within fifteen days after service upon you of a copy of said declaration.

Dated .....

.....

Attorney for plaintiff. .

And either of said methods may be used in any case, notwithstanding the provisions of any general, local or special act, or city or village charter to the contrary. If such action shall be commenced by original writ, plaintiff shall file his declaration in the office of the clerk within fifteen days after issuance of such writ.

**HISTORY:** Re-enacts and supersedes Sec. 2, R. S. '46. Ch. 97, being C. L. '57, (4108); C. L. '71, (5723); How. 7291; C. L. '97, (9985); As Am. '99, p. 247, Act 168, Imd. Eff. June 23; As Am. '05, p. 103, Act 76. Eff. Sept. 16; and also Sec. 2 of Ch. 7 of Act 164 of '81, being How. 5108; C. L. '97, (4722); As Am. '01, p. 228, Act 165, Eff. Sept. 1, '02, unchanged.

**COMMENCEMENT OF SUITS:** Heretofore the provisions for commencing suits, by declaration and by summons, have not been uniformly applicable. An ejectment suit could only be begun by declaration. A school district could only be sued by summons. It is now provided that both of these methods of bringing suit may be employed in any action at law, excepting, of course, mandamus, quo warranto, and certiorari. The rule to plead and notice thereof have been done away with and a simple notice to be endorsed on the declaration has been provided, the form of which is fixed by the statute.

**ORIGINAL WRIT:** See preceding section. Where process may be served, see Compiler's Section (12430)-(12531). Former rule as to

service of process, see *McEwan v. Zimmer*, 38 Mich. 765. *Galloway v. Holmes*, 1 Doug.

**BY FILING DECLARATION:** The filing and serving of the declaration is in the nature of process to bring defendant into court. *Menominee v. Judge*, 81 Mich. 577; *Begole v. Stimson*, 39 Mich. 298; *Ellis v. Fletcher*, 40 Mich. 321. By filing a declaration plaintiff submits himself to the jurisdiction of the court as a party to the record. (*People v. McCaffrey*, 75 Mich. 115) as does the defendant by appearing and pleading. *Cofrode v. Judge*, 79 Mich. 338-9. Suits may be commenced by declaration against municipal corporations. *Menominee v. Judge*, 81 Mich. 577.

**ENTERING RULE:** Former Law. Prior to this act plaintiff had to enter a rule to plead in the minutes kept by the clerk. The following cases construe the provision relative thereto. *Campbell v. Judge*, 111 Mich. 250; *Griffin v. McGavin*, 117 Mich. 372; *Howe v. Maltz*, 35 Mich. 500; *Ralston v. Chapin*, 49 Mich. 274; *Granger v. Judge*, 44 Mich. 384; *Corning v. Burton*, 102 Mich. 93; *Blanck v. Judge*, 44 Mich. 98.

**SERVICE OF DECLARATION:** See Compilers' Section (12423). Service of the declaration before filing is void and cannot be amended. *Ellis v. Fletcher*, 40 Mich. 321; *South Bend Plow Co. v. Manahan*, 62 Mich. 143, and cases, cited; *Marshall v. Calkins*, 114 Mich. 697. Former rule as to place of service. *Turrill v. Walker*, 4 Mich. 177. Proof of service must show that a copy of the declaration was served, before judgment by default can be taken. *Campbell v. Donovan*, 111 Mich. 247 and cases cited. And such proof must be filed. *Anderson v. Cole*, 114 Mich. 637.

The omission of the name of the county in the copy of the declaration served is not material. *Allen v. Hazen*, 26 Mich. 142. A defendant against whom a judgment by default has been taken may contradict the return of personal service on him by a private person. *Campbell v. Donovan*, 111 Mich. 247. See *Griffin v. McGavin*, 117 Mich. 372. A signed agreement to waive service, even if made outside the jurisdiction, is valid. *Allured v. Voller*, 107 Mich. 476. Indorsement of filing by clerk not necessary on copy of declaration served. *Mich. Buggy Co. v. Smallegan*, 138 Mich. 80.

**SUIT COMMENCED:** Suits by declaration are not begun until the declaration is filed. *Ellis v. Fletcher*, 40 Mich. 321; *Wetherbee v. Kusterer*, 41 Mich. 361. The suit cannot be considered as duly commenced until a copy of the declaration with notice of the rule to plead is personally served upon the defendant. *Detroit F. P. Co. v. Bagg*, 78 Mich. 654; *Boyle v. Detroit*, 152 Mich. 250; *Wilton v. Detroit*, 138 Mich. 68.

**PLEADING TO DECLARATION:** In a suit commenced by declaration the defendant may interpose any plea within the time allowed by the statute for pleading in such cases. *Hake v. Judge*, 99 Mich. 216. As to dilatory pleas, see Compilers' Section 12456.

### (12408). Commencement of Chancery Suits.

**SEC. 5.** Suits in chancery shall be commenced by filing bills of complaint in accordance with the rules of court, and upon the filing of such bill the plaintiff shall be entitled to a chan-

cery summons and other process when ordered by competent authority. The designation "chancery subpoena" so far as it applies to process for appearance other than as witnesses, is hereby abolished.

**HISTORY:** New section. Changes designation of "chancery subpoena" to "chancery summons."

**CHANCERY SUBPOENA:** In chancery cases process for appearance of a party is hereafter to be called a "Chancery Summons."

**(12409). Service of Bill or Declaration With Process.**

**SEC. 6.** In all chancery cases, and in suits at law when commenced by original writ, plaintiff may cause to be served with the process, a true copy of the bill of complaint or declaration in said cause and the defendant therein shall be required to plead or answer within fifteen days after such service. If the plaintiff shall not serve a copy of his bill of complaint or declaration with the process, the defendant shall appear within fifteen days after service of process, after which, copy of the bill of complaint or declaration shall be served upon defendant, or his attorney, within fifteen days: *Provided*, That where service of process against corporations is made upon the commissioner of insurance or secretary of state, the defendant shall not be required to plead or answer thereto until thirty days after the mailing of the copy of such process to such defendant by said commissioner of insurance or secretary of state.

**HISTORY:** Supersedes part of Sec's. 22, 23 and 24. R. S. '46, Ch. 97, being C. L. '57, (4128)-(4129)-(4130); C. L. '71, (5743)-(5744)-(5745); How. 7311-12-13; C. L. '97, (10005)-(10006), (As Am. '99, p. 248, Act 168, Imd. Eff. June 23),-7, changed.

**DECLARATION OR BILL OF COMPLAINT MAY BE SERVED WITH PROCESS:** For the purpose of enabling the plaintiff to expedite proceedings, it is provided that he may cause to be served with his summons a copy of the declaration, or bill of complaint in which event the defendant shall appear and plead or answer within fifteen days after such service. It is optional with the plaintiff to do this or to proceed according to the old practice.

**APPEARANCE:** A general appearance waives defects and gives jurisdiction over the person. *Graham v. Judge*, 108 Mich. 425. A defendant who is not served with process but appears is entitled to notice of trial, and in an action in which only a joint judgment is permissible, the same cannot be rendered without his appearance. *Penfold v. Slyfield*, 110 Mich. 343. Prior to Act 168, '99, where a suit was commenced by *capias* the plaintiff had until the end of the next term after the return of the writ to file declaration. *Reid, Murdock & Co. v. Judge*, 115 Mich. 418. The statute and not the

rules of court controlling in such cases. *Id.* Former rule as to when plaintiff should declare, see *Bender v. Judge*, 181 Mich. 52. Same rule prior to '99, see *Fish v. Barbour*, 43 Mich. 22; *DeMyer v. McGonegal*, 32 Mich. 126. Effect of failure of sheriff to make return see notes to Compilers' Section 12424.

The time for filing the declaration in the cause applies to actions commenced by *capias* only, not to suits begun by the issuance of a summons. *Bender v. Wayne Circuit Judge*, 181 Mich., 50; 21 D. L. N., 573; 147 N. W., 571.

**(12410). Actions of Ejectment, Replevin, Attachment and Special Proceedings.**

**SEC. 7.** Actions of ejectment, and replevin, actions begun by attachment and all special actions and proceedings, shall

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declaration or bill of complaint, unless such motion is based on a change in plaintiff's financial condition since the commencement of suit: *Provided further*, That in case any plaintiff except a non-resident of the state, shall show the court that he is unable to comply with such order, if the court shall be satisfied that the declaration in said cause states a meritorious cause of action, and that the suit is prosecuted in good faith, the plaintiff shall be allowed to proceed in such action without giving security for costs.

**HISTORY:** New section which supersedes Sec's. 7, 8, and 9,

cery summons and other process when ordered by competent authority. The designation "chancery subpoena" so far as it applies to process for appearance other than as witnesses, is hereby abolished.

**HISTORY:** New section. Changes designation of "chancery subpoena" to "chancery summons."

**CHANCERY SUBPOENA:** In chancery cases process for appearance of a party is hereafter to be called a "Chancery Summons."

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**HISTORY:** Amendment by P. A. '23, Act No. 167. Approved May 10, 1923.

with his summons a copy of the declaration, or bill of complaint in which event the defendant shall appear and plead or answer within fifteen days after such service. It is optional with the plaintiff to do this or to proceed according to the old practice.

**APPEARANCE:** A general appearance waives defects and gives jurisdiction over the person. *Graham v. Judge*, 108 Mich. 425. A defendant who is not served with process but appears is entitled to notice of trial, and in an action in which only a joint judgment is permissible, the same cannot be rendered without his appearance. *Penfold v. Slyfield*, 110 Mich. 343. Prior to Act 168, '99, where a suit was commenced by *capias* the plaintiff had until the end of the next term after the return of the writ to file declaration. *Reid, Murdock & Co. v. Judge*, 115 Mich. 418. The statute and not the

rules of court controlling in such cases. *Id.* Former rule as to when plaintiff should declare, see *Bender v. Judge*, 181 Mich. 52. Same rule prior to '99, see *Fish v. Barbour*, 43 Mich. 22; *DeMyer v. McGonegal*, 32 Mich. 126. Effect of failure of sheriff to make return see notes to Compilers' Section 12424.

The time for filing the declaration in the cause applies to actions commenced by *capias* only, not to suits begun by the issuance of a summons. *Bender v. Wayne Circuit Judge*, 181 Mich., 50; 21 D. L. N., 573; 147 N. W., 571.

**(12410). Actions of Ejectment, Replevin, Attachment and Special Proceedings.**

SEC. 7. Actions of ejectment, and replevin, actions begun by attachment, and all special actions and proceedings, shall be commenced, and process therein be served, and pleadings and other proceedings had as hereinafter provided in the chapters relating to such actions and proceedings. Except as provided in such chapters, the general provisions in this act contained shall, so far as applicable, apply to such actions and proceedings.

HISTORY: New section.

**(12411). Security of Costs by Whom Given.**

SEC. 8. On motion of the defendant, all plaintiffs who are non-residents of the state of Michigan, shall be, and all other plaintiffs, when it shall appear reasonable and proper to the court, may be required to furnish sufficient surety or sureties, to be approved by the clerk of the court, and who shall justify in double the amount of security ordered, for all such costs as may be awarded to the defendant, and such sureties shall be liable for all costs awarded either in the court of original jurisdiction, or in any appellate court: *Provided*, All such motions shall be made within fifteen days after service of the declaration or bill of complaint, unless such motion is based on a change in plaintiff's financial condition since the commencement of suit: *Provided further*, That in case any plaintiff except a non-resident of the state, shall show the court that he is unable to comply with such order, if the court shall be satisfied that the declaration in said cause states a meritorious cause of action, and that the suit is prosecuted in good faith, the plaintiff shall be allowed to proceed in such action without giving security for costs.

HISTORY: New section which supersedes Sec's. 7, 8, and 9,

R. S. '46, Ch. 97, being C. L. '57, (4113)-(4114)-(4115); C. L. '71, (5728)-(5729)-(5730); How. 7296-7-8; C. L. '97, (9990)-(9991)-(9992).

**SECURITY FOR COSTS:** The requirement that non-resident plaintiffs should give security for costs before beginning suit has been eliminated and it is now provided that on motion of the defendant all non-resident plaintiffs shall be and all other plaintiffs in the discretion of the court may be, required to furnish security for costs. It is provided that all such motions shall be made within fifteen days after service of the declaration or bill of complaint unless such motion is based on a change in plaintiff's financial condition since the commencement of the suit. A copy of the bond or other undertaking by which security is given must be forthwith served upon the defendant or his attorney.

**DISCRETION OF COURT:** Gifford v. Roberts, 125 Mich. 408; Smith v. Judge, 139 Mich. 463; Goodenough v. Burton, 146 Mich. 51; Clark v. Judge, 154 Mich. 483.

**INDORSEMENT UNDER FORMER RULE:** Brown v. Mining Co., 105 Mich. 656; Parks v. Goodwin, 1 Doug. 57; Preston v. Preston, 1 Doug. 293.

**SECURITY FOR COSTS:** The requirement that non-resident filing security for costs depends, as a prerequisite on his declaration stating a meritorious cause of action. And where the trial court, without directly passing on the question, denied plaintiff's motion to vacate an order requiring such security, it was equivalent to saying, that the plaintiff had not stated a meritorious cause of action. Jensen v. Ottawa Circuit Judge, 194 Mich. 405.

#### (12412). Service of Copy of Bond.

**SEC. 9.** A copy of the bond or other undertaking, by which such security is given, shall be forthwith served upon the defendant or his attorney.

**HISTORY:** New section.

See note to Section 8 under black letter title.

#### (12413). Requirement of New Security.

**SEC. 10.** If any plaintiff, or any surety for costs, shall remove out of the state, or if any such surety be deemed by the court insufficient, such court may require the plaintiff to give new or additional security to the satisfaction of the court; and every person becoming such additional surety, shall be liable for all costs from the commencement of suit, in like manner as if he had been the original surety.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 97, being C. L. 57, (4116); C. L. '71, (5731); How. 7299; C. L. '97, (9993), modifying the same slightly.

**Of Capias ad Respondendum.****(12414). Commencement of Personal Action by Capias.**

**SEC. 11.** Personal actions arising upon contracts, express or implied, may be commenced by capias ad respondendum, only to recover damages for any breach of promise to marry where fraud is alleged, or for moneys collected by any public officer, or for any misconduct, or neglect in office, or in any professional employment, or in case of fraud or breach of trust, when the plaintiff shall file a declaration supported by the affidavit of himself, or any other person having knowledge of the facts, stating that the plaintiff has a claim for damages against the defendant for the cause of action stated in such declaration and upon which he believes that the plaintiff is entitled to recover a certain sum, being more than one hundred dollars.

**HISTORY:** This section modifies and re-enacts Sec. 13, R. S. '46, Ch. 97, being C. L. '57, (4119); C. L. '71, (5734); How. 7302; As Am. '97, p. 149, Act 53, Eff. Aug. 30; C. L. '97, (9996), modified.

**CAPIAS AD RESPONDENDUM:** A slight change is made in relation to action commenced by capias in that instead of the writ being issued upon the filing or presentation of an affidavit, the plaintiff must file a declaration, supported by affidavit.

**CONSTITUTIONALITY:** See Const. II, 20; Tyson's Case, 32 Mich. 262; Mintz v. Jacob, 163 Mich. 281; and notes to Compilers' Section 12416.

**AFFIDAVIT:** For the requisites, sufficiency, etc., of the affidavit see notes to Compilers' Sections (12416) and (13633). People v. McAllister, 19 Mich. 217; Johnson v. Maxon, 23 Mich. 136; Stephen-son's Case, 32 Mich. 60; Deitz v. Groesbeck, 32 Mich. 304; Wilcox v. Ismon, 34 Mich. 269; Badger v. Reade, 39 Mich. 771; Watson v. Judge, 40 Mich. 729; Delong v. Briggs, 47 Mich. 624; Meddaugh v. Williams, 48 Mich. 172; Sheridan v. Briggs, 53 Mich. 569; Stensrud v. Delamater, 56 Mich. 144; Johnson v. Morton, 94 Mich. 1; Graham v. Judge, 108 Mich. 425; Shaw v. Ashford, 110 Mich. 534; Clark v. Judge, 125 Mich. 449; Church v. Judge, 129 Mich. 126; Conrad v. Judge, 144 Mich. 492; Benie v. Judge, 154 Mich. 591; Gardiner v. Judge, 155 Mich. 414; Ord v. Judge, 160 Mich. 569; H. J. Cheney Co. v. Allgeo, 165 Mich. 384; Soule v. Judge, 175 Mich. 127. As to the affidavit being the basis for arrest: See Pratt v. Allegan Circuit Judge, 177 Mich. 564; Ord v. Wayne Circuit Judge, 160 Mich. 569; Conrad v. Van Buren Circuit Judge, 144 Mich. 492; Clark v. Kent Circuit Judge, 125 Mich. 449; Graham v. Cass Circuit Judge, 108 Mich. 425; Shaw v. Ashford, 110 Mich. 534; Paulus v. Grobben, 104 Mich. 42; Johnson v. Morton, 94 Mich. 1; Pease v. Pendell, 57 Mich. 315; Stensrud v. Delamater, 56 Mich. 144; Sheridan v. Brakes, 53 Mich. 569; Maxwell v. Dean, 46 Mich. 37; Meddaugh v. Williams, 48 Mich. 172; Delong v. Briggs, 47 Mich. 624; Park v. T. C. S. & D.



R. R. Co., 41 Mich. 352; *Watson v. Judge of the Superior Court*, 40 Mich. 729; *Hackett v. Judge of Wayne Circuit Court*, 36 Mich. 324; *Wilcox v. Ismon*, 34 Mich. 268; *Deltz v. Groesbeck*, 32 Mich. 303; *Stevenson's Case*, 32 Mich. 60; *Sheahan's Case*, 25 Mich. 145; *Johnson v. Maxon*, 23 Mich. 136; *Brown v. Kelley*, 20 Mich. 33; *People v. McAllister*, 90 Mich. 217; *Proctor v. Prout*, 17 Mich. 473.

**CAPIAS:** A suit by capias is a civil remedy. *Pennock v. Fuller*, 41 Mich. 155. When an application is made to a judge to hold to bail, it is his duty to hear and investigate; and if the affidavit sets up facts and circumstances tending to show fraud or breach of trust, thus bringing the case within the exceptions of the constitution, authority to act depends upon the facts, and the determination of the judge must be held to have all the qualities of a judicial decision, and as such protects the judge, the officer and the party. *Johnston v. Morton*, 94 Mich. 6. In this state the proceedings by capias are governed by the statute. *Reid, Murdock & Co. v. Judge*, 115 Mich. 418. Suit brought by assignee, see *Park v. Railroad*, 41 Mich. 353. As to when entitled to a ca. sa. even though suit is commenced by summons. *Forsythe v. Judge*, 180 Mich. 637.

**CONTRACT:** A capias issuing in an action on a contract is irregular, unless it appears from the affidavit that the case is one of those enumerated in this section. *People v. McAllister*, 19 Mich. 215. If an agent, in violation of his contract of agency fails to pay over moneys due, it is cause for action on contract, but does not fall within the provisions of this section. *Id.*; *Stephenson's Case*, 32 Mich. 60.

In actions falling under this section assumpsit will lie, *Mintz v. Jacob*, 163 Mich. 282.

**BREACH OF PROMISE TO MARRY:** A cause of action based simply upon a breach of promise to marry in which there is no charge of fraud, is within the constitutional inhibition against imprisonment for debt. *Tyson's Case*, 32 Mich. 262. But where the affidavit avers the promise to marry and that thereby the defendant seduced the plaintiff, it is to be regarded a case of fraud and excepted from the constitutional provision. *Sheahan's Case*, 25 Mich. 145; *Badger v. Reade*, 39 Mich. 775-6.

**PROFESSIONAL EMPLOYMENT:** Professional employment can relate only to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. *Pennock v. Fuller*, 41 Mich. 155. The failure of an agent to pay over money he was employed to collect, he not being an attorney at law, is not "misconduct or neglect in professional employment." *Brownson v. Newberry*, 2 Doug. 38.

**FORMER LAW CITED:** *Clark v. Judge*, 151 Mich. 117. See also *Case v. Ranney*, 174 Mich. 679; *Pratt v. Judge*, 177 Mich. 564; *Muir v. Judge*, 151 Mich. 117.

## (12415). Claims for Damages.

SEC. 12. Personal actions may be commenced by capias ad respondendum in cases of claims for damages, other than those arising upon contract, express or implied, in like manner as stated in the preceding section, where an order for bail

shall be endorsed on the writ, by a judge of the court from which the writ issues, or a circuit court commissioner, directing the amount in which bail is to be taken. The court may increase or diminish the amount of bail upon proper showing.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 97, being C. L. '57, (4121); C. L. '71, (5736); How. 7304; C. L. '97, (9998); modifying the same slightly.

See note to Section 11 under black letter title.

**FORM OF WRIT:** See Circuit Court Rule 18, Section 6 (1916).

**CONSTRUED:** The fact that a bailable action is commenced by summons does not deprive plaintiff of the right to ca. sa. Forsythe v. Judge, 180 Mich. 633. When plaintiff waives tort and sues in assumpsit, he is estopped from discontinuing and instituting a tort action. Mintz v. Jacob, 163 Mich. 281. In general, see Pease v. Pendell, 57 Mich. 316; Fish v. Barbour, 43 Mich. 22; People v. Gebhardt, 154 Mich. 506; Benie v. Judge, 154 Mich. 591-2; Clark v. Kent Circuit Judge, 125 Mich. 454.

**ARREST AND HOLDING TO BAIL:** The arrest of a person privileged from arrest by reason of his being on the way to or from court is not void, but voidable. Watson v. Superior Court Judge, 40 Mich. 729; Brower v. Tatro, 115 Mich. 368. A party who has given bail to a criminal warrant, cannot, pending his release, be arrested on a civil capias for the same matter at the suit of the same complainant. Baldwin v. Branch Circuit Judge, 48 Mich. 525. This and the next section confer upon the judge or commissioner authority to act and power to determine whether the case made comes within the exceptions named in the constitution and whether it will warrant the indorsement and issuance of the writ. Johnson v. Morton, 94 Mich. 4. A juror is privileged from arrest on civil process. Bower v. Tatro, 115 Mich. 368.

### (12416). Order for Bail.

**SEC. 13.** Such order shall be made only upon the presentation of a declaration supported by the affidavit of the plaintiff, or some other person having knowledge of the facts, and which declaration with the supporting affidavits, shall be filed, and copies thereof served with the writ.

**HISTORY:** This section re-enacts, in part and supersedes Sec. 16, R. S. '46, Ch. 97, being C. L. '57, (4122); C. L. '71, (5737); How. 7305; C. L. '97, (9999), changed.

See note to Section 11 under black letter title.

**CONSTITUTIONALITY:** See Const. II, Sections 10 and 20. The affidavit must state clearly the facts, and they must be within the knowledge of affiant, in order to comply with the inhibitions of the constitution against warrants not based upon probable cause. Brown v. Kelley, 20 Mich. 33; Conrad v. Judge, 144 Mich. 495.

**AFFIDAVIT:** The affidavit must set forth the facts and circumstances in detail, and not conclusions or inferences from facts, and must be facts within the personal knowledge of the deponent. Sheridan v. Briggs 53 Mich. 571; Watson v. Judge, 40 Mich. 729; Delong v. Briggs, 47 Mich. 624; Johnson v. Morton, 94 Mich. 1; Graham v.

Judge, 108 Mich. 426; Conrad v. Judge, 144 Mich. 497; Gardiner v. Judge, 155 Mich. 414; Martin v. Judge, 173 Mich. 22; Soule v. Judge, 175 Mich. 129; Rice v. Judge, 176 Mich. 324; Badger v. Reade, 39 Mich. 774; Marble v. Curran, 63 Mich. 228. Sufficiency where knowledge of expert is necessary. McCrea v. Judge, 100 Mich. 78; Church v. Judge, 129 Mich. 126. When affidavit held sufficient. Peace v. Pendell, 57 Mich. 316; Paulus v. Grobben, 104 Mich. 44; Wright v. Judge, 119 Mich. 500; Robinson v. Judge, 142 Mich. 71; Muir v. Judge, 151 Mich. 118; Ord v. Judge, 160 Mich. 569; Pratt v. Judge, 177 Mich. 599. Must present such facts that the officer fixing bail can exercise some judgment. Hackett v. Judge, 36 Mich. 334. The grounds of arrest by *capias* and the proceedings to hold to bail must conform strictly to the statute; special bail is not held on a case not made by the affidavit. Fish v. Barbour, 43 Mich. 19, 22, 25. The facts and circumstances should be stated in detail. Hackett v. Judge, 36 Mich. 335. Cannot be upon information and belief. *Id.* Or upon hearsay. Proctor v. Prout, 17 Mich. 475. Must set forth in detail the facts and circumstances which are the basis of conclusions. Shaw v. Ashford, 110 Mich. 535. The provisions of Compilers' Section (12414) requiring affiant to declare he believes plaintiff entitled to more than one hundred dollars, do not apply to actions brought under Compilers' Sections (12415)-(12416). Benie v. Judge, 154 Mich. 592. If plaintiff is not personally cognizant of the facts relied upon, he must procure the affidavit of some one who is. Proctor v. Prout, 17 Mich. 475; Gardiner v. Judge, 155 Mich. 416. When affidavit made by agent. Shaw v. Ashford, 110 Mich. 534; Park v. Railroad, 41 Mich. 353. Not error to sign affidavit on day before writ issued. Clark v. Judge, 125 Mich. 449; People v. Gebhardt, 154 Mich. 506. The sufficiency of the affidavit cannot be raised after giving special bail, pleading or going to trial. Stewart v. Hill, 1 Mich. 265; Maxwell v. Deens, 46 Mich. 37; West v. Luyendyke 73 Mich. 663; Reed v. McCready, 170 Mich. 60. But if the affidavit shows that the court has no jurisdiction there is no waiver. Stephenson's Case, 32 Mich. 60; Graham v. Judge, 108 Mich. 425. When defendant is released because of insufficiency of the affidavit plaintiff can proceed on the summons clause of the writ. Cheney Co. v. Allgeo, 165 Mich. 388.

Sufficiency of affidavit; where an affidavit in a conversion action, set forth that the defendant rented a horse for a certain purpose and did not return the animal as agreed, nor upon request, it was held that the affidavit sufficiently stated a *prima case* in trover Timm v. Cass Circuit Judge, 192 Mich. 508. And it was held in an action brought for false imprisonment, where the affidavit on which the *capias* issued, was technically defective, that the writ was a good defense, the affiant showing that he had personal knowledge of the facts, etc. Thomas v. Rosecrantz, 193 Mich. 357.

#### (12417). Service of *Capias* by Whom.

SEC. 14. Writs of *capias ad respondendum* shall be served by the sheriff, or other officer, by arresting the defendant, and keeping him in his custody until discharged according to law, and serving a copy of the writ and the declaration and sup-

porting affidavits upon which said writ is founded, upon the defendant.

**HISTORY:** Re-enacts without material change Sec. 12, R. S. '46, Ch. 97, being C. L. '57 (4118); C. L. '71, (5733); How. 7301; C. L. '97, (9995); As Am. '99, p. 247, Act 168, Imd. Eff. June 23, unchanged.

**CITED:** *People v. Gebhardt*, 154 Mich. 507; See also *Graham v. Judge*, 108 Mich. 425.

**(12418). Discharge from Arrest.**

**Sec. 15.** Every defendant arrested upon a *capias ad respondendum* shall be entitled to be discharged from such arrest upon executing to the officer making the same, with the addition of his name of office, a bond, in a penalty equal to the amount specified in the order for bail, or in double the amount specified in the affidavit attached to the writ, as the case may be, with two sufficient sureties, conditioned that such defendant will appear in the action commenced by such writ, by putting in special bail within fifteen days after service of said writ upon him, and by perfecting such bail, if required, according to the rules and practice of the court.

**HISTORY:** This section re-enacts Sec. 17, R. S. '46, Ch. 97, being C. L. '57, (4123); C. L. '71, 5738; How. 7306; C. L. '97, (10000); As Am. 1899, p. 247, Act 168, Imd. Eff. June 23, unchanged.

**WHAT CONSTITUTES ARREST:** *Josselyn v. McAllister*, 25 Mich. 48; *Page v. Mitchell*, 13 Mich. 68; *People v. Gebhardt*, 154 Mich. 507.

**BAIL BOND TO OFFICER:** A bail bond running to the under sheriff, when he makes the arrest, is not invalid. *Wilcox v. Ismon*, 34 Mich. 268. See *Pease v. Pendell*, 57 Mich. 316; *Prichard v. Sharp*, 51 Mich. 432. As to giving special bail, see next chapter. Bail to the sheriff was originally designed temporarily to liberate the defendant from close custody and to place means in the sheriff's hands to insure defendant's appearance to answer at the return of the writ. *De Myer v. McGonegal*, 32 Mich. 124.

As to actions brought by plaintiff on bail bond, see *Compilers' Section* (12984), (12999), and notes.

**CITED:** *Ludwick v. Kent Circuit Judge*, 138 Mich. 107. See *DeMyer v. McGonegal*, 32 Mich. 125; *Breckon v. Judge*, 109 Mich. 615; *Wright v. Wayne Circuit Judge*, 119 Mich. 500. See also *Compilers' Section* (12406) and notes.

**(12419). Bail Piece.**

**Sec. 16.** The officer taking such bail, shall give to the sureties a bail piece in substance as follows:

..... county, ss. On this ..... day of .....  
one thousand nine hundred and ..... A. B. is bailed by  
C. D. and E. F. of the county of ..... upon a *capias*

ad respondendum, returnable in the ..... court, on the ..... day of ..... at the suit of ..... in a plea of ..... (as the case may be); which bail-piece shall be signed by such officer.

**HISTORY:** Re-enacts without material change Sec. 18, R. S. '46, Ch. '97, being C. L. '57, (4124); C. L. '71, (5739); How. 7307; C. L. '97, (10001), unchanged.

**BAIL PIECE:** Waived unless demanded by the sureties and the bond is valid without giving them. *Wikox v. Ismon*, 34 Mich. 268; *DeMyer v. McGonegal*, 32 Mich. 125.

**(12420). Fictitious Names.**

**SEC. 17.** When the name of any defendant shall not be known to the plaintiff the writ may be issued against him by a fictitious name, and if duly served, it shall not be abated for that cause, but may be amended on such terms as the court shall think reasonable.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 97, being C. L. '57, (4125); C. L. '71, (5740); How. 7308; C. L. '97, (10002), unchanged.

**(12421). Return for Imprisonment of Defendant.**

**SEC. 18.** If a defendant arrested on process on which he is required to be held to bail, shall be committed to prison for the want of such bail, the sheriff or other officer making the arrest shall specially return upon such process, the fact that the defendant is imprisoned for want of bail.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. '97, being C. L. '57, (4127); C. L. '71, (5742); How. 7310; C. L. '97, (10004), unchanged.

**CITED:** *De Myer v. McGonegal*, 32 Mich. 125; *Bender v. Judge*, 181 Mich. 52.

**(12422). Service of Defendant in Custody.**

**SEC. 19.** If the defendant in any action commenced by *capias ad respondendum*, shall be in custody, such writ may be served upon him in like manner, and with the same effect, as if he were at large.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 97, being C. L. '57, (4120); C. L. '71, (5735); How. 7306; C. L. '97, (9997), unchanged.

See *Benie v. Wayne Circuit Judge*, 154 Mich. 591.

**(12423). "Process" Includes Declarations.**

**SEC. 20.** In this act wherever the term "process" is used,

it shall be deemed to include declarations, in suits commenced by declaration, wherever the same would be applicable.

**HISTORY:** New section.

**PROCESS MAY BE SERVED—WHERE:** A decided change has been made in the law with reference to the place where process may be served. In all cases where a suit at law is brought in the county where the defendant or one of the defendants, if there be more than one, resides, the process may be served anywhere in the state as well as in all other cases where such service may have been made heretofore. This applies as well to the service of declarations in suits begun by declaration because of a provision that the word "process" shall be deemed to include declarations where the suit is begun by declaration.

**(12424). Service of Summons.**

**SEC. 21.** Writs of summons at law and in chancery, shall be served by showing the original writ to the defendant, and delivering to him a copy thereof; and on the return of the writ personally served the defendant shall be considered in court, and may be proceeded against accordingly.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 97, being C. L. '57, (4117); C. L. '71, (5732); How. 7300; C. L. '97, (9994), making the same however, applicable to both law and equity, modified.

**CONSTRUED:** See notes to next section. After jurisdiction is acquired over the person of an insane defendant, it is the duty of the court to appoint a guardian ad litem to defend. *Erwin v. Fay*, 165 Mich. 507. The failure of the sheriff to make return as required is purely technical and does not deprive the court of jurisdiction where no prejudice is shown. *Pixley v. Judge*, 121 Mich. 629. Officer's return when prisoner has escaped from custody. *People v. Gebhardt*, 154 Mich. 508. It is a general rule that, if a statute prescribes a method for serving process, the method must be followed, but, in particular cases, clerical errors, not leaving in doubt the command of the writ or its official character, are disregarded or amended. *Lyon v. Baldwin*, 194 Mich. 118; 160 N. W., 428.

**FORMER LAW CITED:** *Thompson v. Thomas*, 11 Mich. 276.

**Who May Serve Process.**

**(12425). Service of Process by Whom.**

**SEC. 22.** All civil process at law, or in equity, issued from any court of record, except process requiring the arrest of any person, or the seizure of property, may be served by any person of suitable age and discretion, and proof of service shall be made by the affidavit of the person making such service, except when such service is made by an officer of the court

authorized to serve process, when his certificate of service shall be sufficient proof thereof.

**HISTORY:** New section. It also supersedes in part Sec. 5, R. S. '46, Ch. 97, being C. L. '57, (4111); As Am. '71, p. 79, Act 64, Eff. July 18; C. L. '71, (5726); How. 7294; C. L. '97, (9988), changed.

**WHO MAY SERVE PROCESS:** Heretofore declarations in suits commenced by declaration and process in chancery could be served by any person of suitable age and discretion, while other process could not. Obviously a uniform rule would be an improvement over this practice and it has been provided that all civil process at law or in equity issued from any court of record, except process requiring the arrest of any person or the seizure of property, may be served by any person of suitable age and discretion.

**SERVICE OF PROCESS:** Service may be made by a private person. *Munn v. Haynes*, 46 Mich. 142; *Norvel v. McHenry*, 1 Mich. 234. Plaintiff, can as an individual serve the declaration by which the suit was commenced in his own case. *Penfold v. Slyfield*, 110 Mich. 343. Service of a declaration before filing it is void and cannot be amended. *Ellis v. Fletcher*, 40 Mich. 321; *Chilled Plow Co. v. Manahan*, 62 Mich. 143. See also *Boyle v. Detroit*, 152 Mich. 250. Merely laying process on the body of a man too sick to understand it is not a valid service. *People v. Judge*, 38 Mich. 310. As to service on insane person, see *Erwin v. Fay*, 165 Mich. 507. Prior to '47 service was restricted to the county. *Turrill v. Walker*, 4 Mich. 180. Service outside the state is irregular. *Pratt v. Bank of Windsor*, Harr. 254. The action of the sheriff in the service of process cannot be controlled by the prosecuting attorney. *Beecher v. Anderson*, 45 Mich. 548.

**PROOF OF SERVICE:** Default can be entered only after due proof of service. *Campbell v. Judge*, 111 Mich. 250; *Denison v. Smith*, 33 Mich. 158; *Johnson v. Delbridge*, 35 Mich. 436; *Alversen v. Dennison*, 40 Mich. 179; *Plow Co. v. Manahan*, 62 Mich. 143; *Marshall v. Calkins*, 114 Mich. 697; *Anderson v. Cole*, 114 Mich. 637. See *Eaton v. Eaton*, 33 Mich. 305. Proof of service may be made by affidavit as well as by the sheriff's return. *Arnold v. Nye*, 23 Mich. 296. The affidavit may be sworn to before a deputy clerk. *Norvell v. McHenry*, 1 Mich. 234. But the affidavit of a private person, of personal service, is open to contradiction by the defendant, who may show that no such service was made. *Detroit F. P. Co. v. Bagg*, 78 Mich. 650; *Campbell v. Wayne Circuit Judge*, 111 Mich. 247. And the affidavit of service must show how the service was made. *People's Mut. Ben. Soc. v. Judge*, 97 Mich. 627.

The certificate of service may be signed by the deputy or under sheriff in his own name. *Calander v. Olcott*, 1 Mich. 344; *Allen v. Hazen*, 26 Mich. 142. Sufficiency of indorsement of acceptance of service. *Allured v. Voller*, 107 Mich. 476. See *Wyandotte Rolling Mills Co. v. Robinson*, 34 Mich. 428; *Granger v. Judge*, 44 Mich. 384; *Griffin v. McGavin*, 117 Mich. 372.

**EXEMPTION FROM SERVICE:** There is no general exemption from service of process while attending court, where no arrest is made. *Case v. Rorabacker*, 15 Mich. 537. But see *Hoffman v. Judge*, 113 Mich. 109. See also *Coatsworth v. Judge*, 117 Mich. 567. As to privilege of juror,

see *Brower v. Tatro*, 115 Mich. 368. Exemption of members of the legislature. See Const. V, 8.

This section is new and supersedes C. L. '97, (9998).

**(12426). Appointment of Person for Service.**

SEC. 23. The judge of any circuit court of this state may in any suit or proceeding at law or in chancery commenced or pending therein, on the application of any party thereto by petition signed by such party or by his attorney or agent, duly verified, showing the facts, appoint some disinterested person to serve any process or other papers, original or final, or to do any act therein which the sheriff by law might do in said cause, in cases where the sheriff and coroners of the county are parties, or interested or incapacitated to act; such appointment shall be made in writing under the hand of the judge, and filed in the cause; and the person so appointed shall have the same power conferred upon him, and proceed in the same manner prescribed for the sheriff in the performance of like duties; the fees payable to such person shall be the same as those payable to sheriffs by virtue of the provisions of law in that behalf for like services. Such judge may, in his discretion, require the person so appointed, before acting under said appointment, to give a bond to the people of this state in such penal sum, and with such surety or sureties as such judge may approve, conditioned for the faithful performance and execution by such person of his duties in such case, without fraud, deceit or oppression, and for the payment of all moneys that may come into his hands by virtue of such appointment.

HISTORY: Re-enacts Sec. 15, R. S. '46, Ch. 106, being C. L. '57, (4453); C. L. '71, (6089); How. 7674; As Am. '87, p. 154, Act 140, Eff. Sept. 28; C. L. '97, (10310), unchanged.

**(12427). Person to be Deemed Coroner.**

SEC. 24. The person so designated and receiving such process or other papers, original or final, shall, in respect to the same, be deemed a coroner of the county, and shall be liable in all respects to all the provisions of law respecting sheriffs, so far as the same may be applicable.

HISTORY: Re-enacts Sec. 16, R. S. '46, Ch. 106, being C. L. '57, (4454); C. L. '71, (6090); How. 7675; As Am. '87, p. 154, Act 140, Eff. Sept. 28; C. L. '97, (10311), unchanged.



**(12428). Service Not to be Made on First Day of Week.**

**SEC. 25.** Except as otherwise provided by law, no person shall serve or execute any civil process, from midnight preceding, to midnight following the first day of the week, nor shall any process be served on any elector entitled to vote at any election during the day on which said election is held.

**HISTORY:** Re-enacts and merges Sec. 94 of Act 175 of '51, being C. L. '57, (118); C. L. '71, (124); How. 227; C. L. '97, (3717); and Sec. 5, R. S. '46, Ch. 43, being C. L. '57, (1578); C. L. '71, (1988); How. 2019; C. L. '97, (5916), omitting however the clause relating to damages, unchanged.

**CONSTRUED:** *Anderson v. Birce*, 3 Mich. 280; *Peck v. Cavell*, 16 Mich. 11; See *Shriver v. Bean*, 112 Mich. 513.

**(12429). Service on Sunday.**

**SEC. 26.** Upon sufficient cause being shown by affidavit, to the satisfaction of a judge of any circuit, such judge may make any restraining order, or authorize the issuance of any writ on Sunday, or any legal holiday, or election day, and may authorize the service or execution thereof on any such day.

**HISTORY:** New section.

**ISSUANCE OF PROCESS ON SUNDAY:** Heretofore no method has been provided by which, in emergency cases, restraining orders or other process could be issued on Sunday, or on holidays, or on election days. It is now provided that upon sufficient cause being shown by affidavit to the satisfaction of a judge in any circuit, he may make any restraining order or authorize the issuance of any writ on Sunday or any legal holiday or election day, and may authorize the service or execution thereof on any such day.

**Where Process May be Served.****(12430). Service Anywhere Within the State.**

**SEC. 27.** All civil process issued from any court of record may be served anywhere within the state where the party upon whom service is to be made may be found, in the following cases:

1. When the process is issued out of a court in chancery;
2. When the process is issued out of a court at law, when the suit is brought in the county where the defendant, or one of the defendants if there be more than one, resides;
3. In ejectment cases and in all other cases where suit is required by law to be brought in the county where the subject matter of the suit is located or where the fact happened out of which the cause of action arose;

4. In any suit brought upon any bond required by law to be filed in any probate court.

When a personal transitory action at law is commenced in the county where the plaintiff resides, against a defendant or defendants residing without the county, service of process must be had in the county where the suit is commenced. If such service is had upon one defendant within such county, the remainder of the defendants may be served anywhere in the state: *Provided*, That nothing in this section contained shall be construed to abrogate or repeal any provisions of section seventeen of act number eighty-two of the Public Acts of eighteen hundred seventy-three, the same being section seven thousand two hundred eighty-two of the Compiled Laws of eighteen hundred ninety-seven, relating to suits by receivers of mutual fire insurance companies for assessments levied by them.

**HISTORY:** This section supersedes Sec. 1 of Act 233 of '61, as Am. '69, p. 101, Act. 54, Eff. July 5; C. L. '71, (5748); As Am. 73, p. 471, Act 187, Imd. Eff. Apr. 29; How. 7316; C. L. '97, (10010); As Am. '01, p. 354, Act 225, Imd. Eff. June 6; As Am. '13, p. 722, Act 377, Eff. Aug. 14, modified.

See note to Section 20 under black letter title.

**CONSTITUTIONALITY:** See *Halladay v. Railway*, 155 Mich. 439.

**NON-RESIDENT DEFENDANT UNDER FORMER LAWS:** When the original summons is returned after being served on a part of the defendants and before the return day a subsequent summons is issued to the sheriff of another county it is valid. *Hakes v. Macklin*, 170 Mich. 231. Suits against foreign insurance companies may be brought in the county where the plaintiff resides and service may be had either upon the commissioner of insurance or the attorney appointed. *People v. Fidelity Co.*, 163 Mich. 101. When one of the defendants is not a resident of the county and a plea in abatement is filed, the burden is on plaintiff to show joint liability in order to retain jurisdiction. *Rosenthal v. Rosenthal*, 151 Mich. 493; *Id.* 154 Mich. 534. When non-resident privileged from arrest by *capias*. *Monroe v. Judge*, 125 Mich. 288.

**RIGHT TO BE SUED AT DOMICILE:** The right of a person to be sued at his own domicile is not a technical one, but one of importance and should not be taken away, except in strict compliance with law. And non-residents as a rule must sue their respondents at home. *Jacobson v. Judge*, 76 Mich. 236.

**UNDER FORMER LAWS:** Under the amendment of '69, of Act 233, '61, it was held that all parties authorized by law to be joined were joint defendants within the meaning of the act. *Hosie v. Judge*, 22 Mich. 493. No service can be made out of the county, until proof has been made of service upon one or more defendants within the county. That is a condition precedent. *Denison v. Smith*, 33 Mich. 158; *Clark v. Lichtenberg*, 33 Mich. 307; *Baxter v. Judge*, 92 Mich. 293; *Allison v. Judge*, 104 Mich. 146. *Engel v. Smith*, 200 Mich. 398; *Boyle v. Waters*, 199 Mich. 485. Any de-

fendant, whether joint or not, may appear and plead without service. *Ralston v. Chapin*, 49 Mich. 274. See also *Church v. Edson*, 39 Mich. 113; *Bank v. Dwight*, 85 Mich. 509; *Allison v. Judge*, 104 Mich. 141; *O'Connell v. Lumber Co.*, 113 Mich. 124; *Brown v. Bennett*, 157 Mich. 658; *Daniels v. Railway*, 163 Mich. 468.

**SCIRE FACIAS:** Under former laws, *Burt v. Judge*, 35 Mich. 228.

**ACTIONS FOR LABOR, ETC.:** Act 246 of '79, p. 249 (How. 7317), in relation to the commencement of actions relating to real estate and for labor or services, and service of process therein, was held unconstitutional in *O'Connell v. Lumber Co.*, 113 Mich. 124, in that it gave special privileges to suitors on specified classes of claims. Prior to this decision, the following rulings had been made: In a suit brought under this section the declaration must show that plaintiffs reside in the county where suit is begun. *Smith v. Bresnahan*, 59 Mich. 346. A justice's summons under this section must be directed to an officer of the county where it is to be served. *Antcliff v. June*, 81 Mich. 480. In *Hakes v. Macklin*, 170 Mich. 231; the Court said: "The important fact and the jurisdictional one is whether service has been had on one or more of the defendants in the county where the suit is commenced. The usual way of making proof of this fact is by the return of the writ with a certificate of service indorsed thereon. The latter part of rule 1 (a) enables plaintiff at his option to have a return made and still keep the writ in the hands of the officer until after the return day, as he might wish to do if he were laying the foundation for substituted service. No question of substituted service is involved here. If it can be said that a premature return of the writ was made under this statute, it would not render void the service upon the defendant Macklin. It would amount to nothing more than an irregularity at which only the plaintiff could complain." In an action of trespass on the case, no jurisdiction is acquired over nonresident who is not jointly liable with the resident defendant. *Brown v. Bennett*, 157 Mich. 654. In *Halladay v. Detroit United Ry*, 155 Mich., the court said: "As affecting the constitutional right of a trial by a jury of the vicinage, however, if that right is infringed by the present statute, it has been during all the history of this legislation. The question, however, of the constitutionality of the statute upon this ground has not, to our knowledge, been previously raised. On the contrary, in the very late case of *Rosenthal v. Rosenthal*, 154 Mich. 533, the amendatory act was treated as valid, no constitutional question being raised. The provision of the Constitution is that the right of trial by jury shall remain. It shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law. To hold that this provision makes it necessary that the parties to a joint action be sued only in the country in which the defendant resides is to compel the bringing of two actions where one has heretofore been permitted." Where the summons was first served on one of the defendants and proof of service filed by the sheriff who returned that he could not find the other two defendants within his bailiwick, but that they resided within the state, and where a summons was then sent to the sheriff at the place where the parties resided, who personally served them on the two defendants, the first defendant pleaded the general issue,

thereby submitting himself to the jurisdiction of the court, and even though the plea in abatement should be sustained as to the two of the defendants, it would not affect the jurisdiction of the court as to the first defendant. *Rosenthal v. Rosenthal*, 151 Mich. 498. Act 246 of P. A. '79 was held unconstitutional. *O'Connell v. Menominee Lumber Co.*, 113 Mich. 124. Under this statute service on a non-resident in another county is not authorized where there is a failure of personal service upon the resident defendant. *Baxter v. Kent Circuit Judge*, 92 Mich. 291. It is said that the right of a person to be sued at his own domicile is not a technical one, but one of importance and should not be taken away, except in strict compliance with law. Nonresidents, as a rule, must sue their respondents at home. *Jacobson v. Judge*, 76 Mich. 236. It is a condition precedent that no service can be made out of the county, until proof has been made of service upon one or more defendants within the county. *Dennison v. Smith*, 33 Mich. 158; *Clark v. Lichtenberg*, 33 Mich. 307; *Baxter v. Judge*, 92 Mich. 293. Under this section, it has been held that an indorser before delivery is liable to a suit as joint maker. *Allison v. Washtenaw Circuit Judge*, 104 Mich. 141. Although never served with process, a joint defendant has the right to appear and plead. *Ralston v. Chapin*, 49 Mich. 274. This statute does not apply to writs scire facias and they cannot be issued to other counties than that in which the court sits. *Burt v. Judge*, 35 Mich. 228.

**(12431). Service Upon Great Lakes.**

SEC. 28. Civil process issued from any of the courts of this state, when the same may be served by law anywhere in the state, may be served upon any of the waters of the great lakes lying within the state. Any civil process which is required by law to be served within the boundaries of any county within this state, may also be served upon any of the waters of such lakes, lying adjoining the county from which such process issued, and within the territory included by an extension of the boundary lines of such county, to the boundary line of the state: *Provided*, That in any county where the boundary lines thereof by reason of irregularity, are not capable of extension, any such process may be served on such waters at any point within ten miles of the shore line of said county.

**HISTORY:** This section supersedes Sec's 7, 9, 11, 13 and 15, R. S. 46, Ch. 13, being C. L. '57, (306)-(308)-(310)-(312)-(314); C. L. '71, (437)-(439)-(441)-(443)-(445); How. 443-5-7-9, (As Am. '85, p. 102. Act 98, Imd. Eff. May 14)-51; C. L. '97, (2445)-(2447)-(2449)-(2451)-(2453), remains unchanged.

These annotations apply to Act No. 232 of P. A., '03, which is merged in above section. This act is sufficiently entitled. *Reuter Hub & Spoke Co. v. Hicks*, 181 Mich. 250; 21 D. L. N., 689; 148 N. W., 339. Sections 12 and 21 of this act do not confer any power to dissolve a corporation. *Simms v. Bialy Hardware & Supply Co.*, 187 Mich., 375; 22 D. L. N., 700; 153 N. W., 821.

### How Service of Process May be Made.

#### (12432). Service Upon Corporation.

SEC. 29. Process issued from any court of record against a corporation, partnership association or unincorporated voluntary association, may be served upon any officer, director, trustee or agent thereof, or by leaving same during regular office hours at the office of such corporation, partnership association or unincorporated voluntary association, with any person in charge thereof. Except as otherwise provided in this act, all general or special laws relating to the service of process upon corporations are hereby repealed.

HISTORY: This section supersedes and merges Act 69 of '97 being C. L. '97, (10023); and Sec. 2 of Act 25 of '97, being C. L. '97, (10026); and Sec. 3, R. S. '46, Ch. 116, being C. L. '57, (4835); C. L. '71, (6544); As Am. '77, p. 112, Act 123, Eff. Aug. 21; How. 8137; as Am. 87, p. 303, Act 242; Eff. Sept. 28; C. L. '97, (10468); and Sec. 10. of Act 191 of '77, being How. 2374; C. L. '97, (6088); As Am. '05, p. 278, Act 188, Imd. Eff. June 7; and Sec. 6 of Act 29 of '65, being C. L. '71, 2623; How. 3658; C. L. '97, (6477); and Sec. 10 of Act 62 of '48, As Am. '48, p. 236, Act 176, Imd. Eff. Apr. 1; being C. L. '57, (1861); C. L. '71, (2541); How. 3575; C. L. '97, (6552); and Sec. 34 of Act 155 of '51, being C. L. '57, (1914); C. L. '71, (2594); How. 3629; C. L. '97, (6604); and Sec. 30 of Act 232 of '03, As Am. '09, p. 768, Act 313, Eff. Sept. 1; and Sec. 16 of Act 16 of '64, being C. L. '71, (2790); How. 3919; C. L. '97, (6538); and Sec. 17 of Act 283 of '05, p. 456, Eff. Sept. 16; and Sec. 48 of Act 205 of '87, being How. 3208e7; C. L. '97, (6137), and Sec. 12 of Act 108 of '89, being How. 3251L; C. L. '97, (6167); and Sec. 12 of Act 83 of '51, being C. L. '57, (1712); C. L. '71, (2656); How. 3671; C. L. '97, 6640; and Sec. 12 of Act 59 of '51, being C. L. '57, (2060); C. L. '71, (2636); How. 3704; C. L. '97, (6678); and Sec. 5 of Act 129 of '83, being How. 3718e; C. L. '97, (6692); and Sec. 28 of Act 149 of '69, being C. L. '71, (2743); How. 3872; C. L. '97, (6748); and Sec. 17 of Act 39 of '83, being How. 3895q; C. L. '97, (6805); and Sec. 17 of Act 202 of '87, being How. 3895z8; C. L. '97, (6822) and Sec. 37 of Act 113 of '77, being How. 4112; C. L. '97, (7027); and Sec. 17 of Act 398 of '13, p. 761, Eff. Aug. 14; and Sec. 7 of Act 288 of '65, being C. L. '71, (2812); How. 3941; C. L. '97, (7471); and Sec. 19 of Act 230 of '97, being C. L. '97, (6736); and Sec. 2 of Act 119 of '87, being How. 3775c; C. L. '97, (10434); and Sec. 6 of Act. 140 of '67, as added '71, p. 65, Act 53, Imd. Eff. May 29; being C. L. '71, (1624); As Am. '81, p. 231, Act 193, Eff. Sept. 10; How. 3723; C. L. '97, (5263); and Sec. 10 of Act 39 of '55, being C. L. '57, (1779; C. L. '71, (3143); How. 4382; C. L. '97, (8149); and Sec. 19 of Act 108 of '93, being C. L. '97, (8444); and Sec. 5 of Act 168 of '03, p. 220, Imd. Eff. June 2, and Sec. 19 of Act 79 of '79, being C. L. '71, (3205); How. 4460; C. L. '97, (8222); and Sec. 1 of Act 256 of '81, being How. 8145; As Am. '95, p.

159 Act 61, Eff. Aug. 30; C. L. '97, (10442); and Sec. 10 of Act 265 of '09, p. 454, Eff. Sept. 1; and Sec. 11 of Act 225 of '99, p. 353, Eff. Sept. 23; and Sec. 8 of Act 35 of '99 p. 52, Imd. Eff. Apr. 12; and Sec. 4 of Act 136 of '71, being C. L. '71, (2900); How. 4064; C. L. '97, (5473); in so far as the above sections relate to the service of process, therefore modified.

**SERVICE OF PROCESS:** Heretofore a multitude of provisions have existed governing the service of process, especially with relation to corporations, municipal and otherwise. These provisions were very similar yet not identical. They have all been repealed and uniform provisions covering all cases provided. They do not differ greatly from certain of the old provisions. It does not seem necessary to enumerate them here. It seems sufficient to cite the sections of the act where they may be found.

**CORPORATIONS:** Service of process against a corporation on an officer whose relation to the plaintiff or the claim in suit is such as to make it to his interest to suppress the fact of service, is unauthorized. *Atwood v. Light Co.*, 148 Mich. 224. A traveling salesman is an agent of a domestic mercantile corporation, upon whom service of process may be had. *Moinet v. Burnham & Co.*, 143 Mich. 492. See also as to service upon agent. *Arnold v. Mfg. Co.*, 166 Mich. 190. Where acts for the incorporation of certain corporations contain specific provisions regulating the bringing of actions, such provisions must be considered exceptions to this section, if inconsistent. *Dewey v. Car & Mfg. Co.*, 42 Mich. 399. See, also, as to service of notice in case of appeal from commissioners, directed by the probate judge. *Simpson v. Railroad Co.*, 38 Mich. 626.

See, also, *Detroit F. & M. Ins. Co. v. Judge*, 23 Mich. 491; *Haywood v. Johnson*, 41 Mich. 601; *American Ex. Co. v. Conant*, 45 Mich. 642; *Gallagher v. Am. Ex. Co.*, 56 Mich. 14; *Dairy Co. v. Runnels*, 96 Mich. 111; *Thomson v. Milling Co.*, 132 Mich. 598; *Goodrich v. Hackley Co.*, 141 Mich. 345; *Showen v. J. L. Owens Co.* 158 Mich. 330; *Sherrill v. Grand Trunk R. Co.*, 161 Mich. 497; *Pollock v. Railway*, 168 Mich. 584.

**PARTNERSHIP ASSOCIATION:** *Manhard Hardware Co. v. Rothschild*, 121 Mich. 662.

**FORMER LAWS:** The following notes and cases construe C. L. '97, (10468), superseded by this section. Prior to the amendment of '87, no substituted service of process could be made upon a domestic corporation in any county other than that in which its home office was located. *Dairy Co. v. Runnels*, 96 Mich. 111. citing *Insurance Co. v. Judge*, 23 Mich. 492. Under this section, suits may be commenced by declaration against corporations *Menominee v. Judge*, 81 Mich. 578. The legislature intended to place corporations upon the same footing as individuals, as respects service of process against them. *Potter v. Manufacturing Co.*, 79 Mich. 209.

Applied only to domestic corporations. *Grand Trunk Ry. Co., v. Judge*, 106 Mich. 249; *Newell v. Railway Co.*, 19 Mich. 335; *Watson v. Judge*, 24 Mich. 38; *Reath v. Telegraph Co.*, 89 Mich. 22; Applied to railroad companies. *Turner v. Tunnel Co.*, 102 Mich. 580.

**FOREIGN CORPORATIONS:** Actions against corporations not organized under the laws of this state. See notes to Compilers'

Section (12340), Subsection 5. Actions by foreign corporations, see Compilers' Section (12363.)

**ATTACHMENT:** See Compilers' Section (13030), as to actions against corporations by attachment where the plaintiff resides outside the county.

This section supersedes C. L. '97 (10023), (10026), (10468), (6088), as amended by P. A. '05, No. 188, Section 10, (6552), (6604), P. A. '03, No. 232, Section 30, as amended by P. A. '09, No. 313, C. L. '97, (6538), P. A. '05, No. 283, Section 17, C. L. '97, (6137), (6167), (6640), (6678), (6692), (6748), (6805), (6822), (7027), P. A. '13, No. 398, Section 17, C. L. '97, (7471), (7636), (10434), (5263), (8149), (8444), P. A. '03, No. 168, Section 5, C. L. '97, (10442), (8222), P. A. '09, No. 265, Section 10, P. A. '99, No. 225, Section 11, P. A. '99, (5473.)

**SERVICE OF PROCESS:** Where the Insurance Commissioner had been duly appointed to receive service of process, the service on the secretary of the Company instead of upon the Insurance Commissioner was void. *Drueke-Lynch Co. v. Mich. Bonding & Surety Co.* 204 Mich. 180. It was held that where a tax notice to redeem was served upon an officer of the company as "President", when the person served was the secretary, although irregular, was not defective, where the notice reaches the party intended to be served and no one misled. The secretary as well as the president is made the proper party upon whom service may be lawfully made under the statute, *P. L. Sherman Co. v. Pearee*, 197 Mich. 557.

#### (12433). Service of Railway Company.

**Sec. 30.** Whenever it shall become necessary to serve any process, notice or writing upon any company or corporation, owning or operating any steam, electric or street railway, in the state of Michigan, it shall be sufficient to serve the same upon any station agent, or ticket agent at any station or depot along the line, or at the end of the road of such company, or upon any conductor in charge of any train or car of such company along the line of, or at the end of the road of such company, and such service shall be deemed as good and effectual as if made on the officers, directors or other agents of such company: *Provided*, That the modes of service herein provided for, shall be in addition to those provided for in the preceding section: *Provided further*, That service shall not be made upon conductors of street cars in cities where the home office of the corporation is located.

**HISTORY:** This section supersedes and merges Sec. 21 of Act 35 of '67, being C. L. '71, (2522); How. 3556; C. L. '97, (6454); and Act 260 of '99, p. 419, Eff. Sept. 23, which repealed Act 156 of '49; being C. L. '57, (4846); C. L. '71, (6559); How. 8147; As Am. '85, p. 285, Act 207, Eff. Sept. 19; C. L. '97, (10022); and Act 208 of '01, p. 319, Eff. Sept. 5, remains unchanged.

See note to Section 29 under black letter title.

**CCNSTRUED:** A railroad corporation is deemed a resident of any

county in which the railroad is operated. *Pollock v. Railroad*, 168 Mich. 581. Unauthorized foreign railway company with agent doing business in Michigan. *Maxwell v. Speed*, 60 Mich. 39; *Daniels v. Railway*, 163 Mich. 469. Service of process on street railway conductor. *Halladay v. Railway*, 155 Mich. 436. This section is supplemental to the last preceding section, and is intended to facilitate service upon corporation. *G. T. Ry. Co. v. Judge*, 106 Mich. 249. See also *Fowler v. D. & M. Ry. Co.*, 7 Mich. 79; *Detroit F. & M. Ins. Co. v. Judge*, 23 Mich. 495; *Simpson v. Railroad Co.*, 38 Mich. 628; *Detroit v. Ry. Co.*, 63 Mich. 714; *Jebb v. C. & G. T. Ry. Co.*, 67 Mich. 162; *Turner v. Tunnel Co.*, 155 Mich. 436.

**(12434). Service Upon Foreign Corporations.**

SEC. 31. In all cases where suit is brought against a foreign corporation, process may be served upon any officer or agent of such corporation within this state, and any person representing such corporation in any capacity, shall be deemed an agent within the meaning of this section. If such corporation has a legally designated agent or attorney in this state, appointed in pursuance of statute for that purpose, service of process may also be made upon such agent or attorney. The provisions of this section shall not apply to the cases enumerated in section thirty-three of this chapter.

HISTORY: New section.

See note to Section 29 under black letter title.

CONSTRUED: Unauthorized foreign railway company with agent doing business in Michigan. *Maxwell v. Speed*, 60 Mich. 39; *Daniels v. Railway*, 163 Mich. 469.

**(12435). Service Upon Secretary of State.**

SEC. 32. In all cases of foreign corporations, which have paid a franchise fee to the secretary of state, and been admitted by him to do business in this state, in addition to the other methods of service of process herein provided, service of process may also be made upon the secretary of state. There shall be paid to the secretary of state at the time of such service a fee of three dollars, which sum may be taxed as costs to the plaintiff, in case he prevails in the proceedings.

HISTORY: Supersedes a part of Sec. 10 of Act 206 of '01, as Added '07, (Ex. Sess.) Act 3, p. 10, Imd. Eff. Oct. 24, changed.

See note to Section 29 under black letter title.

CONSTRUED: *Arnold v. Mfg. Co.*, 166 Mich. 190; *Showen v. J. L. Owens Co.*, 158 Mich. 332.

**(12436). Service Upon Insurance Company.**

SEC. 33. In all cases of domestic or foreign insurance companies, fraternal, co-operative and mutual beneficiary socie-



ties, orders or associations, and in all other cases where it is required by law that any company, society, order or association, shall appoint in writing the commissioner of insurance, the secretary of state, or any other officer of this state, as their agent or attorney, upon whom all legal process in any action or proceeding may be served, if such appointment shall have been made, service of process shall be made upon such officer. In cases against fire and marine insurance companies service of process may be made in the manner herein provided or in any other manner permitted by law.

**HISTORY:** New Section. Supersedes and merges Sec. 1 of Act 155 of '73, being How. 4362; C. L. '97, (10015); and Sec. 27 of Act 77 of '69, As Added in '71, p. 106, Act 80, Imd. Eff. Apr. 5; C. L. '71, (2942); How. 4242; C. L. '97, (7215); and Sec. 17, of Act 269 of '89, being How. 4323h4; C. L. '97, (7391); and Sec. 1 of Act 266 of '95, As Am. '97, p. 116, Act 106, Imd. Eff. Apr. 29; being C. L. '97, (5196), As Am. '07, p. 455, Act 321, Eff. Sept. 28; and Sec. 2 of Act 14 of '01, p. 18, Eff. Sept. 5; and Sec. 2 of Act 178 of '81, being How. 4361; As Am. '83, p. 174, Act 160, Eff. Sept. 8; C. L. '97, (10445); As Am. '01, p. 79, Act 51, Eff. Sept. 5; and Sec. 17 of Act 169 of '13, p. 305, Eff. Aug. 14; and Sec. 2 of Act 174 of '85, being How. 3960b7; As Am. '93, p. 303, Act 188 Eff. Aug. 28; C. L. '97, (10430); and Sec. 3 of Act 174 of '85, being How. 3960b8; As Am. '93, p. 303, Act 188, Eff. Aug. 28; C. L. '97, (10431), in so far as the above sections relate to the appointment of an agent upon whom legal process may be served, changed.

See note to Section 29 under black letter title.

**FOREIGN INSURANCE COMPANIES:** See Compilers' Section (9280.)

See *Drueke-Lynch Co v. Mich Bonding & Surety Co.*, 204 Mich. 182.

#### (12437). Service in Duplicate.

**SEC. 34.** In all cases where process is served upon the commissioner of insurance, secretary of state, or any other state officer as such agent, such service shall be made in duplicate upon such officer, or his deputy, or in their absence, upon the person in charge of his office; and one of the duplicate copies so served shall forthwith be forwarded by registered mail, postage prepaid, and directed to the secretary or corresponding officer of the defendant.

**HISTORY:** New section.

See note to Section 29 under black letter title.

#### (12438). Service Upon Municipal Corporations and Boards.

**SEC. 35.** In suits or proceedings against municipal and public corporations, and certain unincorporated boards, service of process may be made as follows:

1. Against counties, upon the chairman of the board of supervisors or the county clerk;
2. Against the superintendents of the poor of counties, upon any of the said superintendents;
3. Against cities, upon the mayor, city clerk or city attorney;
4. Against villages, on the president or clerk of the village, or in their absence upon any of the trustees thereof;
5. Against townships, upon the supervisor or township clerk;
6. Against school districts, upon the president of the board of education, director, moderator or treasurer of such district;
7. Against any corporate body or unincorporated board, now or hereafter having charge or control of any state institution, where the right to bring such suit or proceeding is conferred by law, upon the president, secretary or any member of the governing body thereof;
8. Notices, writs or other process in judicial proceedings may be served upon any common council, board, commission, or other public body organized or existing under any law of this state, when by statute no other method of service is specially provided, by delivering the same or a certified or verified copy thereof to the president or chairman of such council, board, commission or body, or to the clerk or secretary thereof, and it shall be the duty of the officer upon whom such service shall be made, at its next meeting, to inform such common council, board, commission, or other public body of such service, and it shall not be necessary to serve notices, writs, or other process upon the individual members of such common council, board, commission, or other public body, and such council, board, commission, or other public body may appear and answer or plead in such proceedings in such manner as it may direct.

**HISTORY:** This section supersedes and merges Sec. 28, R. S. '46, Ch. 13, being C. L. '57, (327); C. L. '71, (459); How. 465; C. L. '97, (2467); and Sec. 13 of Ch. 1 of Act 3 of '95, being C. L. '97 (2696); and Sec. 14 of Ch. 14 of Act 3 of '95, being C. L. '97, (2948); and Sec. 8 of Ch. 33 of Act 215 of '95, being C. L. '97, (3365); and Sec. 1 of Act 192 of '48, being C. L. '97, (2336); (Compilers' Section 2115), and Sec. 2 of Ch. 7 of Act 164 of '81, being How. 5108; C. L. '97, (4722); As Am. '01, p. 228, Act 165, Eff. Sept. 1, '02; and Sec. 2 of Act 194 of '89, being How. 4976b; C. L. '97, (1813); (Compiler's Section 1191); and Sec. 1 of Act 22 '97,

being C. L. '97, (10024), in so far as such sections refer to the service of process.

See note to Section 29 under black letter title.

SUBDIVISION 1: *Curtis v. Suprs.*, 154 Mich. 655.

SUBDIVISION 3: Process: The filing and serving of a declaration as commencement of suit is in the nature of process to bring the defendant into court; and suits may be commenced by declaration against municipal corporations. *Menominee v. Judges*, 81 Mich. 577.

SUBDIVISION 4: Former statutes in relation to service of process against municipal corporations, cited in *Menominee v. Judges*, 81 Mich. 580.

#### (12439). Service Upon Corporations Not Doing Business.

SEC. 36. When it may be necessary to institute suits against any corporation, which may have ceased to do business, or to keep up its organization by the appointment of officers or otherwise, or the term of whose existence may have expired by limitation, it shall be competent to serve any writ, declaration or other process in such suit, on either of the persons who may have been the last presiding officer, president, cashier, secretary or treasurer thereof; and such service shall be as effectual to all intents and purposes as if made on such corporation.

HISTORY: This section merges and supersedes Sec. 4 of R. S. '46, Ch. 116, As Am. '49, p. 312, Act 233, Eff. June 1; being C. L. '57, (4836); C. L. '71, (6545); How. 8138; C. L. '97, (10469); and Sec. 2 of Act 193 of '91, being C. L. '97, (8581), in so far as such section relates to service of process, unchanged.

See note to Section 29 under black letter title.

Where jurisdiction is obtained by substituting, in lieu of actual service, the statute must be strictly complied with or the proceedings cannot be sustained. *Merrill v. Montgomery*, 25 Mich. 73.

#### (12440). Service Upon Inmates of Hospitals for Insane.

SEC. 37. Any citation, order or process required by law to be served on an inmate of the hospitals or homes for the insane or feeble-minded, or epileptic, or any other state hospital or asylum, shall be served only by the medical superintendent in charge thereof or by some one designated by him. Return thereof to the court from which the same issued shall be made by the person making such service, and such service and return shall have the same force and effect as if it had been made by the sheriff of the county.

HISTORY: This section re-enacts and merges Sec. 42 of Act 217 of '03, p. 341, Imd. Eff. June 16, and Sec. 31 of Act 101 of '09, p. 203, Imd. Eff. May 18, remains unchanged.

See note to Section 29 under black letter title.

Applies to inmates that were admitted to hospitals before the

passage of the statute. In re Clark's Appeal, 186 Mich., 300; 22 D. L. N., 398; 152 N. W., 920. The legislative intent indicated is to require the physicians and other witnesses called in the case to be sworn. See P. A. '11, Act No. 25, Sec. 15. People v. Hall, 185 Mich. 55; 22 D. L. N., 60; 151 N. W., 687.

**(12441). Return of Process.**

**SEC. 38.** When any process or order, issued by any court of record, or any declaration or other paper, shall be delivered to any sheriff, under-sheriff or deputy to serve, it shall be the duty of such officer to serve the same with all convenient speed, and to return the same with his certificate endorsed thereon, of the time and manner of such service, either to the office of the clerk of the court in which such suit or proceeding may be pending, or to the attorney whose name shall be endorsed on such process, order, declaration or paper; and in any action where an under-sheriff or deputy sheriff is a party, any process may be served on such under-sheriff or deputy sheriff, by the sheriff in person, or by any under-sheriff or deputy sheriff who is not a party to such action. When the sheriff shall be a party or interested in any suit, any coroner within his county, may serve and execute any process, order or decree, or any other paper in said cause, and shall have the same powers, and be subject to the same liabilities as sheriffs in similar cases.

**HISTORY:** This section re-enacts and merges Sec. 4, R. S. '46, Ch. 97, being C. L. '57, (4110); As Am. '71, p. 79, Act 64, Eff. July 18; C. L. '71, (5725); How. 7293; C. L. '97, (9987); and Sec. 76, R. S. '46, Ch. 14, being C. L. '57, (417); C. L. '71, (558); How. 586; As Am. '87, p. 29, Act 30, Eff. Sept. 28; C. L. '97, (2585); and Sec. 88, R. S. '46, Ch. 14, being C. L. '57, (436); C. L. '71, (578); How. 606; C. L. '97, (2609), unchanged.

See note to Section 29 under black letter title.

**SHERIFF:** The action of the sheriff in the service of process placed in his hands cannot in any manner be restrained or controlled by the prosecuting attorney. Beecher v. Anderson, 45 Mich. 548.

**SERVICE OF PROCESS:** See note "Service of Process" to Compilers' Section (12425). As to service upon corporations, see Compilers' Section (12432.)

**MANNER OF SERVICE:** See Compiler's Section (12424.)

**CORONER:** Under the law as it now is, the coroner's right to serve process is limited to those cases where the sheriff is a party, or is directly interested in the case. Hubel v. Rorison, 81 Mich. 42.

**FORMER LAW: SERVICE BY CORONER:** See Fletcher v. Lee 65 Mich. 557; VanDusen v. King. 106 Mich. 133; Edwards v. Aud. Gen., 161 Mich. 644.

**DEPUTY:** The certificate of service may be shown by the deputy

or under-sheriff in his own name. *Calendar v. Olcott*, 1 Mich. 344; *Allen v. Hazen*, 26 Mich. 142.

**RETURN:** Must show that the statute has been complied with as to mode of service. *Norvell v. McHenry*, 1 Mich. 234; See also *Campbell v. Judge*, 111 Mich. 248. The certificate of service may be indorsed upon the original or the copy. *Larned v. Wilcox*, 4 Mich. 333. See note, "Proof of Service," to Compilers' Section (12425). Return of service of declaration under former practice. *Anderson v. Cole*, 114 Mich. 637. See also *Pixley v. Judge*, 121 Mich. 629; *People v. Gebhardt* 154 Mich. 508.

**AMENDMENT OF RETURN:** A party dissatisfied with the sheriff's return should ask for an amendment thereof; he cannot dispute the return. *Flynn v. Judge*, 136 Mich. 23. A sheriff cannot be compelled to amend his return. *Flynn v. Judge*, 138 Mich. 126. As to amending returns and certificates of service, see *Arnold v. Nye*, 23 Mich. 296; *Montgomery v. Merrill*, 36 Mich. 97; *Haynes v. Knowles*, 36 Mich. 407; *Watson v. Toms*, 42 Mich. 561; *Green v. Kindy*, 43 Mich. 279; Though the return is dated Sunday it may be shown by the clerk's entry and the indorsement on the writ that the return was made on Saturday. *Macomber v. Wright* 108 Mich. 109. See also *People v. Judge*, 1 Doug. 417; *Calander v. Olcott*, 1 Mich. 344; *Wilcox v. Sweet*, 24 Mich. 355; *Myers v. Prosser*, 40 Mich. 644; *Kid v. Dougherty*, 59 Mich. 243.

**(12442). Service at Expiration of Term of Office.**

**SEC. 39.** Sheriffs, under-sheriffs and deputy sheriffs, may execute all such original or final process as shall be in their hands at the expiration of the term for which such sheriffs were elected, the execution of which shall have been begun by him, and shall made [make] due returns thereof in their own name; and in case of a vacancy in the office of sheriff, every deputy in office under him, may execute any writ or process in his hands, or in the hands of such sheriff, at the time such vacancy happened, and shall have the same authority, and be under the same obligation to serve and execute and return the same, as if such sheriff had continued in office.

**HISTORY:** This section re-enacts and merges Sec. 77, R. S. '46, Ch. 14, and Sec. 34, R. S. '46 Ch. 147, being C. L. '57, (417)-(431); C. L. '71, (559)-(573); How. 587, 601; C. L. '97, (2586)-(2604), unchanged.

See note to Section 29 under black letter title.

**CONSTRUED:** If the sheriff whose time is about to expire has commenced the service of process the law requires that he should complete such service. This is to prevent a divided responsibility in the execution of process. *Fletcher v. Morrell*, 78 Mich. 176, 180. See *Crane v. Hardy*, 1 Mich. 62.

**CITED:** Former law on the same subject cited in *Vrooman v. Thompson*, 51 Mich. 459; *Blair v. Compton*, 33 Mich. 433; *Fletcher v. Morrell*, 78 Mich. 180.

**(12443). Exemption from Arrest.**

**SEC. 40.** No officer of the senate or house of representatives, while in actual attendance upon the duties of his office, shall be liable to arrest on civil process.

**HISTORY:** Supersedes without change Sec. 1, R. S. '46, Ch. 2, being C. L. '57, (17); C. L. '71, (20); How. 37; C. L. '97, (34), though said section 34, C. L. '97, was not expressly repealed by the Judicature Act, remains unchanged.

See note to Section 29 under black letter title.

See Beecher's Annotated Constitution of Michigan, 1908, Article 5, Sections 1-40.

**(12444). Service Upon Prisoner.**

**SEC. 41.** Process may be served upon any person confined in any jail or prison in this state, whether such confinement be under civil or criminal process, by delivering a true copy of such process to the sheriff, warden or other officer in charge of such jail or prison, who shall forthwith deliver the same to such prisoner.

**HISTORY:** This section supersedes Sec. 18, R. S. '46, Ch. 148, being C. L. '57, (5592); C. L. '71, (7379); How. 8956; C. L. '97, (10549), unchanged.

See note to Section 29 under black letter title.

**(12445). Exemption of Female.**

**SEC. 42.** No female shall be imprisoned on any process in any civil action.

**HISTORY:** Re-enacts in part and supersedes Sec. 45, R. S. '46, Ch. 106, being C. L. '57, (4483); As Am. '73, p. 180, Act 131; Eff. July 31; C. L. '71, (6119); How. 7704; C. L. '97, (10342), changed.

**CONSTRUED:** It is the settled policy of the state not to imprison females on civil process. *Strickland v. Bartow*, 27 Mich. 68. A woman may be imprisoned for failure to comply with the provisions of a decree in equity. *Carnahan v. Carnahan*, 143 Mich. 390-97; *Stewart v. Hart*, 196 Mich. 138.

**Exemptions from Arrest.****(12446). Witnesses Exonerated from Arrest in Civil Suit.**

**SEC. 43.** Any person duly and in good faith subpoenaed as a witness in any suit, or proceeding, and any party thereto, and any attorney engaged therein, shall be exonerated from arrest in any civil suit, while going to the place where he shall be required to attend, while in attendance and while returning therefrom; and in all cases where such attendance is without the county of the residence of such witness,

party or attorney, he shall be exempt from the service of any civil process, in any suit commenced in the county where he is so in attendance. All other officers of the several courts of record shall be liable to arrest, and may be held to bail in the same manner as other persons, except while in attendance upon an actual sitting of the court of which they are officers, or while going to, or returning from such sitting. The court or officer before whom any person shall have been subpoenaed in good faith to attend as a witness, and every justice of the supreme court, circuit judge and circuit court commissioner, shall have authority to discharge any person arrested contrary to the provisions of this section.

**HISTORY:** This section supersedes Sec's. 62, 63, and 64, R. S. '46, Ch. 102, being C. L. '57, (4299)-(4300)-(4301); (As Am. '58, p. 8, Act 4, Eff. May 6); C. L. '71, (5919)-(5920)-(5921); How. 7492-93-94; C. L. '97, (10157)-(10158)-(10159); and Sec. 26, R. S. '46, Ch. 96, being C. L. '57, (4072); C. L. '71, (5685); How. 7253; C. L. '97, (1117), unchanged.

**CONSTRUED:** In *Case v. Rorabacher*, 15 Mich. 538, a party while attending court as a litigant was served with a summons in another action, but was denied the privilege of exemption. In *Mitchell v. Judge*, 53 Mich. 541. A resident of one county went into another county as a witness in his own behalf in an action in which he was defendant and was held to be privileged from the service of civil process, the court distinguishing the case from *Case v. Rohrabacher*, (supra) where the party claiming the privilege was attending court within the jurisdiction of his residence. See also *Letherby v. Shaver*, 73 Mich. 500; *Watson v. Judge*, 40 Mich. 729. A party attending court as a witness is privileged from the service of a summons as well as from arrest on civil process. *Mitchell v. Judge*, 53 Mich. 541.

**PRIVILEGE FROM ARREST:** The privilege of exemption of attorneys from arrest in certain cases given by this section, is not exclusive of the common law privilege from service of process while attending court, or while going thereto, or returning therefrom. *Hoffman v. Judge*, 113 Mich. 109. The provisions of this section do not permit an attorney who is under arrest, at liberty under a jail limits bond from going beyond the limits of the county to attend a session of the supreme court. *Hughes v. Hally*, 137 Mich. 433.

**CITED:** Former law on same subject. *Monroe v. St. Clair Circuit Judge*, 125 Mich. 284. It is not prohibited to surrender to state authority persons brought into state by federal officers to await action of federal grand jury. In *re Little*, 129 Mich. 454.

#### (12447). Arrest Absolutely Void.

**SEC. 44.** Every arrest made contrary to the foregoing provisions, shall be absolutely void, and shall be deemed a contempt of the court issuing the subpoena; and every person making or procuring such arrest, shall be responsible to the

person arrested in double the amount of damages which shall be found by the jury, and shall also be liable to an action at the suit of any injured party for the loss, hindrance and damage sustained by him in consequence of such arrest.

**HISTORY:** Re-enacts in part and supersedes Sec. 65, R. S. '46, Ch. 102, being C. L. '57, (4302); C. L. '71, (5922); How. 7495; C. L. '97, (10160), modified.

**(12448). Affidavit of Person Arrested.**

**SEC. 45.** But no sheriff, or other officer or person shall be so liable, unless the person claiming an exemption from arrest shall, if required by such sheriff or officer, make an affidavit stating:

1. That he has been legally subpoenaed as a witness to attend before some court, officer, auditors, referees, commissioners or notary public, specifying such court, officer, auditors, referees, commissioners, or notary public, the place of attendance and the cause in which he shall have been subpoenaed, and that he has not been subpoenaed by his own procurement with intent to avoid the service of any process; or

2. That he is an attorney in, or party to a suit, the trial of which is then pending, and that he is going to, or in actual attendance upon, or returning from the court in which said trial is then pending, and that his attendance upon said court is necessary to the trial of said cause; or

3. That he is an officer of a court of record, actually and in good faith, going to, attending upon or returning from an actual sitting of the court in which he is such officer.

**HISTORY:** Re-enacts, making the same broader however, to comply with section 43, supra, Sec. 66, R. S. '46, Ch. 102, being C. L. '57, (4303); C. L. '71, (5923); How. 7496; C. L. '97, (10161).

**EXEMPTION FROM ARREST:** Section (10161), C. L. '97, is modified so as to apply to parties and attorneys in a pending trial, and the officers of a court of record attending court during the sitting thereof.

**Of Substituted Service.**

**(12449). Order of Appearance and Affidavit of Facts.**

**SEC. 46.** Upon, or at any time after, the filing of a bill, the circuit judge, or a circuit court commissioner, shall make an order for the appearance of the defendant, within three months from the date of the order, upon proof by affidavit of any of the following facts:



1. That the defendant resides out of the state;
2. That the defendant is a resident of this state, and that process for his appearance has been duly issued, and that the same could not be served by reason of his absence from, or concealment within this state, or by reason of his continued absence from his place of residence; or
3. That it cannot be ascertained in what state or country the defendant resides.

**HISTORY:** This section re-enacts and supersedes Secs. 80 and 81, R. S. '46, Ch. 90; As Am. '47, p. 169, Act 105, Eff. May 16, being C. L. '57, (3534); As Am. '58, p. 6, Act 4, Eff. May 6; C. L. '71, (5116)-(5117); (As Am. '81, p. 47, Act 54, Eff. Sept. 10); How. 6670-71; As Am. '85, p. 123-4. Act 125, Eff. Sept. 19; C. L. '97, (485)-(486).

**SUBSTITUTED SERVICE:** Important changes are made with reference to substituted service upon absent, concealed or non-resident defendants. An order of publication may be made upon proof by affidavit of any fact heretofore allowed as a basis for an order, but the order must in all cases require the appearance of the defendant within three months from the date of the order. The order may be published or personally served as heretofore.

It is further required that in all cases a copy of such order shall be mailed to the defendant at his last known Postoffice address by registered mail and a return receipt demanded, and that proof by affidavit shall be required by such mailing and whether or not a return receipt was received, and, if one was received, it shall be attached to said affidavit. It should be noted that the statute fails to make an exception as to mailing a copy, even if personal service of the order is made and, since strict compliance with the law is required in cases of substituted service, it will be wise to mail the copy as required, even if personal service is had.

**CONSTRUED:** *Lawrence v. Fellows*, Walk. 468; *Freeman v. Freeman*, 1 Mich. 480.

**PROCEEDINGS:** This statute, to bring in absent, etc., defendants must be strictly construed and fully complied with, the rule being well established both in equity and at law that all exceptional methods of service and obtaining jurisdiction over persons must be confined to the cases prescribed and be exercised in the precise manner provided by the statute. *Platt v. Stewart*, 10 Mich. 260; *King v. Harrington*, 14 Mich. 532; *Detroit F. & M. Ins. Co. v. Saginaw Circuit Judge*, 23 Mich. 492; *Merrill v. Montgomery*, 25 Mich. 73; *People v. Dawell*, 25 Mich. 269; *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 443; *Denison v. Smith*, 33 Mich. 155; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Montgomery v. Merrill*, 36 Mich. 101; *Dewey v. Cent. Car and Mfg. Co.*, 42 Mich. 403; *Colton v. Rupert*, 60 Mich. 318; *Morrison v. Morrison*, 64 Mich. 53; *Adams v. Judge*, 98 Mich. 52; *Campau v. Charmeneau*, 105 Mich. 424; *Mercantile Co. v. Mosser*, 105 Mich. 18. The statute is very clear that the cause for issuing the order of publication must be made out by proof and this must come from some one who testifies on his own responsibility; and the process must be issued and diligent efforts made to serve it during the entire time

allowed for its service, and there must be a responsible showing why it was not served. It is not due diligence to make no effort to serve a writ so long as service can be lawfully made. *Soule v. Hough*, 45 Mich. 420-21.

**AFFIDAVIT:** As to clerical error in affidavit, see *Torrans v. Hicks*, 32 Mich. 309. As to the affidavit, see *King v. Harrington*, 14 Mich. 532; *Brown v. Phillips*, 40 Mich. 264; *Pettiford v. Zoellner*, 45 Mich. 358; *Adams v. Judge*, 98 Mich. 53. Affidavits must be entitled with the names of all the parties to the suit. *Arnold v. Nye*, 11 Mich. 456. The affidavit can be made in the cause as soon as the bill is filed. *Gordon v. Tyler*, 53 Mich. 631. The affidavit must state the facts of inquiry on which it bases the conclusion therein expressed that defendant is absent from the state or concealed within it. *Thompson v. Judge*, 54 Mich. 236. An affidavit of non-residence made five days before the making of an order for the appearance of an absent defendant will not authorize the making of the order. Such an order must be based upon facts existing at the time it is made. *N. Y. Bapt. Union, etc., v. Atwell*, 95 Mich. 239; *Adams v. Judge*, 98 Mich. 53.

See also as to affidavit made by solicitor for complainant, *Powell v. Pierce*, 168 Mich. 427; *Erwin v. Fay*, 165 Mich. 503, 506.

**ORDER:** The order is the result of an adjudication that the statutory cause exists. The affidavit must make a *prima facie* case, without which the order is invalid, but the degree of proof requisite is not subject to review, if it can be said that there is a *prima facie* case. *Adams v. Judge*, 98 Mich. 53.

As to a delay in issuing the order of publication, see *People v. Booth*, 121 Mich. 131, 133.

**CONSTRUED:** See *Freeman v. Freeman*, 1 Mich. 480; *Colton v. Rupert*, 60 Mich. 318. It is unnecessary that the order of publication should fix a specific date for the appearance. *Lewis v. Weidenfeld*, 114 Mich. 581.

**FORMER LAW CITED:** *Erwin v. Fay*, 165 Mich. 506.

In *Platt v. Stewart*, 10 Mich. 264, the court said: "Under this statute the rights of parties residing out of the state may be affected, and their title to real estate to any amount may be divested, without any actual notice that a suit has ever been instituted. The power thus to affect their rights depends entirely upon the statute. The statute can not therefore be enlarged by any equity construction as against them, but upon every principle should be strictly construed; it must be held to prohibit the exercise of the jurisdiction until the preliminary steps required by the statute have been taken: *Gallatin v. Cunningham*, 8 Cow. 370, per Woodworth J. Courts are bound by the dictates of natural justice carefully to scrutinize every step of the proceedings, to enforce a strict compliance with all the statute requirements, that absent parties may not be deprived of those safeguards which the statute has provided for the protection of their rights. Without this vigilance on the part of the courts, the statute which was intended for the advancement of justice, may be made a most efficient instrument of fraud." It has been said that the rule of law is well settled, that all exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in a way precisely indicated by statute. *Hartford Fire Insurance Co. v. Owen*, 30 Mich. 443.

In *Soule v. Hough*, the court said: "The proof by the affidavit of the complainant that the subpoena could not be served on defendants by reason of their absence from the state, is full and complete, and is made after the return-day of process was passed. As the averment is made in positive terms, we must take it as made on personal knowledge of the facts. We have no right to infer that the affiant did not know the facts as fully as the officer; but even if we could, it would be unimportant, for it was for the court which acted upon the proof and made the order for publication, to decide upon its sufficiency; no one can deny that the affidavit was "proof," so that a case was made calling for judicial action. If so, the order of publication cannot be held void without disregarding the authorities. *Brittain v. Kinnyard*, 1 B. & B. 432; *Basten v. Carew*, 3 B. & C. 649; *Sheldon v. Wright*, 5 N. Y. 497; *Porter v. Purdy*, 29 N. Y. 106; *Sotzman v. Pacquette*, 13 Wis. 291; *Florentine v. Burton*, 2 Wall. 211."

In a suit where complainant filed an affidavit of non-residence sworn to the day preceding the filing of the bill of complaint, it was held, that the court could not properly decline to issue an order for appearance for that reason, but that the order must not be made until after the suit is commenced. *Clarke v. Wayne Circuit Judge*, 193 Mich. 33.

#### (12450). Publication of Order for Appearance.

Sec. 47. Such order shall be published within *forty* days after it shall have been made in some newspaper printed in the county *where such case is pending*, or in such other newspaper as the court may direct, once in each week, for six weeks in succession; *Provided, Such publication shall not be necessary in any case in which a copy of said order shall have been served upon such absent, concealed or non-resident defendant, personally at least twenty days before the time prescribed for the appearance of such defendant: Provided further, That such publication shall not be necessary in any case in which a copy of said order shall have been served upon such absent, concealed or non-resident defendant by registered mail and an official return receipt received therefor as hereinafter provided at least twenty days before the time prescribed for the appearance of such defendant. Due proof of such publication or of the personal service or of the delivery by registered mail of such copy of said order shall be made and filed in such case or proceeding.*

**HISTORY:** Re-enacts Sec. 82, R. S. '46, Ch. 90, being C. L. '57, (3535); C. L. '71, (5118); How. 6672; C. L. '97, (487), adding thereto the last clause as above relative to proof of publication, as amended by P. A. '19, Act No. 234.

**PUBLICATION:** Where there is no personal service the publication

of notice is necessary to enable the court to obtain jurisdiction, and no judgment is valid without it. The publication stands in lieu of personal summons. *King v. Harrington*, 14 Mich. 541; *Thompson v. Thomas*, 11 Mich. 274. In a newspaper printed in the county. *Dexter v. Cranston*, 41 Mich. 448. When time begins to run. *Dexter v. Cranston*, 41 Mich. 448. The publication of an order for appearance is rendered unnecessary by defendant's appearance by solicitor. *Long v. Long*, 59 Mich. 296.

The publication of the notice in a comparatively obscure paper and without giving actual notice to defendant, although address known, were not fraudulent, but such conduct will be taken into consideration in a proceeding to reopen the case. *Payton v. Payton*, 194 Mich. 504.

FORMER LAW CITED: *Erwin v. Fay*, 165 Mich. 506.

#### (12451). Extension of Time for Appearance.

SEC. 48. The court may, if necessary, by further order, extend the time for the appearance of such defendant; and in that case, shall direct the publication of such further order for so long a time as it shall think proper.

HISTORY: Re-enacts Sec. 83, R. S. '46, Ch. 190, being C. L. '57, (3536); C. L. '71, (5119); How. 6673; C. L. '97, (488), remains unchanged.

FORMER LAW CITED: *Stevens v. Wayne Circuit Judge*, 161 Mich. 130.

#### (12452). Copy of Order to be Mailed.

SEC. 49. In all cases *except where personal service of such order shall have been had as hereinbefore provided, and excepting further in case of unknown heirs or other unknown defendants*, a copy of such order shall be mailed to *such absent, concealed or non-resident* defendant at his last known post office address by registered mail, and a return receipt demanded therefor. Proof by affidavit shall be required of such mailing and the official return receipt therefor shall be attached to said affidavit if one shall have been received, which receipt shall be deemed sufficient proof of the service upon said defendant of such copy of said order. If such return receipt shall not be received then said order shall be published as hereinbefore provided.

HISTORY: New section.

Sec. 49 of Chap. 13 of Act No. 314 of P. A. '15, Compilers' Section (12452), as Am. by Act No. 234, P. A. '19.

## CHAPTER XIV.

### OF PLEADINGS AT LAW AND IN EQUITY.

#### (12453). Place of Filing.

SECTION 1. All pleadings and proceedings in actions at law or in chancery, shall be filed in the office of the clerk of the court in which the cause is pending, unless otherwise directed by rule or order of the court, and within such time, and under such regulation as shall be by statute or general rule directed.

HISTORY: This section supersedes Sec. 45, R. S. '46, Ch. 90, being C. L. '57, (3499); C. L. '71, (5081); How. 6635; C. L. '97, (457), modified.

#### (12454). Forms of Declaration.

SEC. 2. In the actions which are in this act retained, the forms of declaration now in common use may be employed; but no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend.

HISTORY: New section.

DECLARATIONS: While the new statute permits the use of the forms of declarations heretofore used, it is further provided that no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend. Under this statute it would seem that no case should fail because of any technical defect in the declaration and the way is made clear for the development of a simplified system of pleading.

DECLARATION; SUFFICIENCY OF: In an action against a railroad company for damages by a fire alleged to have been caused by an engine, where no demurrer was interposed or motion made, in view of the present, liberal rule, relating to pleadings under this section and Circuit Court Rule No. 22, this court cannot say that the declaration was insufficient although the time of day when the fire occurred is not alleged. *Sayre v. Detroit, Grand Haven & Milwaukee Railway Co.*, 205 Mich. 294; 171 N. W. 502.

CONSTRUING THE DECLARATION: See *Kemper-Thomas Co. v. Deitz*, 204 Mich. 89; *Douglas v. Temple Man'g. Co.*, 197 Mich. 138.

DILATORY PLEAS ABOLISHED: The Judicature Act having abolished demurrers, pleas in abatement and to the jurisdiction, re-

quires all such matters to be raised either, by motion to dismiss or in a notice attached to a plea. And certiorari will not lie to review the action of the trial court in overruling a motion to dismiss for reasons stated in the notice attached to the general issue. *Thomas Canning Co. v. Cannery Exchange Subscribers*, 202 Mich. 64.

**(12455). Entitling.**

**SEC. 3.** It shall not be necessary to entitle any declaration or other pleading, of any term of the court, or of any day in term or vacation, nor shall it be necessary to mention the name of the state, in the statement of the venue in any case.

**HISTORY:** Re-enacts Sec. 48, R. S. '46, Ch. 107, being C. L. '57, (4549); C. L. '71, (6193); How. 7777; C. L. '97, (10416), remains unchanged.

**CONSTRUED:** Omission of venue not a demurrable defect. *Danaher v. Hitchcock*, 34 Mich. 516; *People v. Miller*, 15 Mich. 359.

**Demurrers, Etc., Abolished.**

**(12456). Motion to Dismiss Substituted for Pleas and Demurrers.**

**SEC. 4.** Demurrers, pleas in abatement, and pleas to the jurisdiction, are abolished. All questions heretofore raised by such plea or demurrer, shall hereafter be raised by motion to dismiss, or in the answer or notice attached to the plea; and in case such questions are raised by answer, or by notice attached to the plea, the same may be brought up for determination by the court, in advance of the trial of said cause, upon four days' notice by either party. The plaintiff shall at any time, either before or after the hearing of the questions so raised, be entitled to amend his pleadings, so as to meet the objections raised thereto, upon such terms as the court may deem proper.

**HISTORY:** This section supersedes a part of Sec's. 22, 23, and 24, R. S. '46, Ch. 108, being C. L. '57, (4575)-(4576)-(4577); C. L. '71, (6224)-(6225)-(6226); How. 7808-9-10; C. L. '97, (10967)-(10968)-(10969); and Sec. 21, R. S. 46, Ch. 99, being C. L. '57, (4175); C. L. '71, (5791); How. 7360; C. L. '97, (10070); and Sec. 14, R. S. '46, Ch. 99, being C. L. '57, (4168); C. L. '71, (5784); How. 7353; C. L. '97, (10063); following substantially Fed. Equity Rule No. 29 making the same applicable to both law and equity, changed.

**DILATORY PLEADINGS:** Conforming to the new federal equity rule but applicable to both law and equity, provisions have been made abolishing all dilatory pleadings. All questions heretofore raised by such pleadings are now to be raised either by motion to dismiss or in the answer or notice attached to the plea. If raised in the answer or notice, either party may bring the same on for hearing in advance of the trial upon four days notice.

**QUESTION OF FACT INVOLVED:** Examination of witnesses. See Compilers' Section (12580).

**DILATORY PLEAS: FORMER RULE:** The following notes give the rule as applied before the enactment of this section.

Pleas in abatement are not to be favored and certainty to every intent is required. *Wales v. Jones*, 1 Mich. 256; *Pew v. Yoare*, 12 Mich. 21; *Belden v. Laing*, 8 Mich. 500; *Heyman v. Covell*, 36 Mich. 159. Must be so complete and certain that the court can see that no answer can be made to its allegations but a denial of their truth or sufficiency. But pleas involving the abuse of the process of the court are not regarded with the same strictness as pleas setting up a mere failure of process or the jurisdiction of the court. They are not treated as captious or dilatory pleas but as meritorious. The highest degree of certainty is required only in such pleas as are odious or unfavorably regarded in law. Dilatory pleas are so regarded because the object is to defeat suits upon grounds unconnected with the merits. *Campbell v. Hudson*, 106 Mich. 526. While strictness is required, still, where no reasonable doubt exists the plea must be held good. *O'Brien v. Alpena Circuit Judge*, 106 Mich. 45.

See *Snyder v. Hemmingway*, 47 Mich. 549; *Jenney v. Potts*, 41 Mich. 52; *Ryder v. Flanders*, 30 Mich. 336. The common law rule which excludes all defenses in ejectment, which are not legal, has been advocated in many parts of the union, but the courts of the United States, however, still adhere to it and it also remains in force in this state. *Harrett v. Kinney*, 44 Mich. 460; *Jeffrey v. Hursh*, 42 Mich. 563; *Conrad v. Long*, 33 Mich. 78; *Ryder v. Flanders*, 30 Mich. 336; *Whiting v. Butler*, 29 Mich. 122; *Buell v. Irwin*, 24 Mich. 145.

In ejectment, where a homestead right is set up in defense to a mortgage foreclosure title, evidence of the conveyance of the property by the defendant to a third person after the time when they claim their homestead right attached, is admissible; and conveyance had a direct and very substantial bearing upon the question of the homestead right, and where the claim of homestead is set up in defense to an action of ejectment in a case where the plaintiff's right of recovery is clear aside from the question of the homestead, the burden of proving the facts necessary to establish the homestead right is upon the defendant. *Amphlett v. Hibbard*, 29 Mich. 298. *Bertram v. Cook*, 44 Mich. 396; *Sparrow v. Hovey*, 44 Mich. 62; *Cook v. Knowles*, 38 Mich. 316; *Lee v. Clary*, 38 Mich. 233; *Stambaugh v. Snoblin*, 32 Mich. 296; *Smith v. Hamilton*, 20 Mich. 432; *Cook v. Bell*, 18 Mich. 387.

**MOTION TO DISMISS, NOT PROPER:** Unless the matters set up in the motion to dismiss are matters which might have been raised by demurrer, plea in abatement, or plea to the jurisdiction under the former practice, they cannot be made the basis of a motion to dismiss. *Lewis J Selznick Enterprises v. Harry I. Garson Productions* 202 Mich. 106; *Pogenkoff v. Patrons Mutual Fire Ins. Co.*, 197 Mich. 166; *Sayre v. Detroit, G. H. & M. R. R. Co.*, 199 Mich. 420; *Johnson v. Harrison*, 199 Mich. 221; *Freeman v. Mitchell*, 198 Mich. 208; *Harrington v. Sheldon*, 196 Mich. 388 and where a defendant set up the defense that plaintiffs, a foreign corporation, have not complied with Act No. 206 of P. A. '01, as amended, have no legal right to do business in Michigan; this defense is not available on a motion to dismiss, but must be

raised by plea in bar to the action, *Lewis J. Selznick v. Harry I. Garson*, 202 Mich. 111.

**MOTION TO DISMISS, WHEN PROPER:** A bill was filed to foreclose a land contract, the defendants appeared and made a motion to dismiss, for the reason that the bill did not allege the payment of the mortgage tax as required by section 4268, C. L. '15, and the copy of the land contract annexed to the bill and made a part of it, not having the certificate of the county treasurer attached showing said tax to have been paid, the court held that the motion should have been granted, or an alternative order have been entered dismissing the bill, unless the tax was paid within a stipulated time. *Nelson v. Breitenwischer*, 194 Mich. 31.

**DISMISSAL AFTER ISSUE JOINED:** A motion to dismiss a bill after joining issue is properly denied where the question of jurisdiction is not involved, *Horner v. Knights of Columbus Building Co.*, 197 Mich. 530. See also *Grund v. First Nat. Bank of Petoskey*, 194 Mich. 300.

**CERTIORARI:** It will not lie to review the action of the trial judge, in overruling a motion to dismiss, for the reasons stated in the notice attached to the plea of the general issue. *Thomas Canning Co. v. Canners' Exch. Subscribers*, 202 Mich. 64.

### (12457). Service of Copies of Pleadings.

**SEC. 5.** When the defendant shall have appeared, and notice thereof shall have been given, as provided in this act, it shall be the duty of the plaintiff or defendant to serve upon the opposite party, or his attorney, copies of the pleadings and proceedings at any time thereafter filed in the cause.

**HISTORY:** Re-enacts and supersedes Sec's. 46, 47, and 48, R. S. '46, Ch. 90, being C. L. '57, (3500)-(3501)-(3502); C. L. '71, (5082)-(5083)-(5084); How. 6636-7-8; C. L. '97, (458)-(459)-(460), unchanged.

**APPEARANCE: NOTICE OF PROCEEDINGS:** Irregularities in the proceedings to bring him in are waived by defendant's voluntary appearance. *Stone v. Welling*, 14 Mich. 514. But not when he appears for a special purpose. *Whipple v. Stewart*, Walk. 357; *Woodruff v. Young*, 43 Mich. 548. After appearance defendant is entitled to notice of all subsequent proceedings. *Jenny v. O'Flynn*, 5 Mich. 215; *Kellogg v. Putnam*, 11 Mich. 344; *Detroit F. & M. Ins. Co. v. Renz*, 33 Mich. 298. Even after the bill is subsequently taken as confessed against him. *Martin v. McReynolds*, 6 Mich. 70. And after a plea withdrawn. *Watson v. Hinchman*, 41 Mich. 716. Notice of hearing must name day, when it is for any time after the opening of the term. *Munch v. Shabel*, 37 Mich. 167. When notice of proceedings is not necessary. *Kellogg v. Putnam*, 11 Mich. 344; *Mich. Ins. Co. v. Whittemore*, 12 Mich. 427, 430. The decree will not be reversed for want of notice when no injury is done. *Kellogg v. Putnam*, 11 Mich. 344; *Munch v. Shabel*, 37 Mich. 166. A defendant who does not appear after personal service is not entitled to notice. *Warner v. Juif*, 38 Mich. 665. Irregularities as to service are waived when the party appears voluntarily. *Greacen v. Buckley, etc., Co.*, 167 Mich. 539; *Thompson v.*



Benefit Assoc., 52 Mich. 522. A notice of a proceeding in a suit in chancery, not signed by the solicitor, nor by his authority, nor emanating from his office, may be disregarded; and testimony taken under such notice may be properly suppressed. *McClintock v. Laing*, 22 Mich. 212.

(12458). Waiver of Answer on Oath.

SEC. 6. When a bill shall be filed in chancery, other than for discovery only, the plaintiff may waive the answer being made on the oath of the defendant, and in such cases the answer may be made without oath, and shall have no other or greater force as evidence than the bill.

HISTORY: Re-enacts Sec. 31, R. S. '46, Ch. 90, being C. L. '57, (3485); C. L. '71, (5067); How. 6621; C. L. '97, (443), changing "complainant" to "plaintiff," remains unchanged.

OATH WAIVED: Although answer on oath is waived, it must, notwithstanding, be signed by defendant. *Kimball v. Ward*, Walk. 439. When oath is waived, the answer, although sworn to, has no greater force than it would have without oath. *Van Dyke v. Davis*, 2 Mich. 151; *Van Inwagen v. Van Inwagen*, 86 Mich. 341. When oath is waived, the bill and answer are of equal validity and neither outweighs the other. *Mandeville v. Comstock*, 9 Mich. 540. An answer, without oath, is but a pleading and is of no effect as mere evidence. *Morris v. Hoyt*, 11 Mich. 17. But admissions expressly made in an answer without oath dispense with the necessity of proof. *Van Dyke v. Davis*, 2 Mich. 151; *Morris v. Morris*, 5 Mich. 179; *Durfee v. McClurg*, 6 Mich. 232; *Morris v. Hoyt*, 11 Mich. 17; *Emerson v. Atwater*, 12 Mich. 314; *Salisbury v. Miller*, 14 Mich. 162-3; *Hardwick v. Basset*, 25 Mich. 151. As to the effect of implied admissions, see *Shook v. Proctor*, 27 Mich. 349, 377. Where an answer is required under oath, the complainant can except for insufficiency, if the answer does not meet every material point, by admission, denial or want of knowledge. But where an answer under oath is waived, no exception can be taken for insufficiency, and complainant must be prepared to support his own case, and to meet any evidence fairly controverting it. *Morris v. Morris*, 5 Mich. 179. When answer under oath is waived, no ground of relief can be set up, which rests merely on the necessity of a discovery. *Torrent v. Rodgers*, 39 Mich. 86; *Wales v. Newbould*, 9 Mich. 87.

See also as to oath waived, *World Mfg. Co. v. Kent Cir. Judge*, 115 Mich. 652. See also Circuit Court Rule 25, Section 1, (1916) which materially alters and improves the practice and renders obsolete numerous decisions as to the effect of a sworn answer. See *Fields v. Highway Com.*, 102 Mich. 450; *Huyck v. Bailey*, 100 Mich. 225; *Ruhlig v. Wiegert*, 49 Mich. 400. Compare with *Newlove v. Callahan*, 86 Mich. 301. This rule must be construed as waiving an answer under oath in all cases except where a sworn bill is filed and a sworn answer demanded. *World Mfg. Co. v. Kent Cir. Judge*, *Supra*; *Maier v. Wayne Circuit Judge*, 112 Mich. 493. Although answer on oath is waived it must, notwithstanding, be signed by defendant, *Kimball v. Ward*, *Walker* 429. When oath is waived, the

answer, although sworn to, has no greater force than it would have without oath. *Van Dyke v. Davis*, 2 Mich. 151; *Van Inwagen v. Van Inwagen*, 86 Mich. 341. When answer under oath is waived no ground of relief can be set up, which rests merely on the necessity of a discovery. *Torrent v. Rodgers*, 39 Mich. 86; *Wales v. Newbould*, 9 Mich. 87. Where an answer is required under oath the complainant can accept for insufficiencies if the answer does not meet every material point, by admission, denial or want of knowledge. But where an answer under oath is waived, no exception can be taken for insufficiency, and complainant must be prepared to support his own case and to meet any evidence fairly controverting it. *Morris v. Morris*, 5 Mich. 179. An answer without oath, is but a pleading and is of no effect as mere evidence. *Morris v. Hoyt*, 11 Mich. 17. But admissions expressly made in an answer without oath dispenses with the necessity of proof. *Hardwig v. Bassett*, 25 Mich. 151; *Salisbury v. Miller*, 14 Mich. 162; *Emerson v. Atwater*, 12 Mich. 314; *Morris v. Hoyt*, 11 Mich. 17; *Durfee v. McClurg*, 6 Mich. 232; *Morris v. Morris*, 5 Mich. 179; *Van Dyke v. Davis*, 2 Mich. 151.

#### (12459). Averment of Incorporation.

SEC. 7. In actions by or against any corporation, foreign or domestic, it shall not be necessary to recite the act or acts of incorporation, or the proceedings by which such corporation was created, or to set forth the substance thereof; but it shall be sufficient to aver that such plaintiff or defendant is a corporation organized and existing under, and by virtue of the laws of the state, or country, naming it, where such plaintiff or defendant was incorporated.

HISTORY: This section supersedes Sec. 7, R. S. '46, Ch. 116, being C. L. '57, (4839); C. L. 71, (6548); How. 8141; C. L. '97, (10472), unchanged.

#### (12460). Existence of Corporations.

SEC. 8. In suits brought by or against any corporation, foreign or domestic, it shall not be necessary to prove on the trial of the cause, the existence of such corporation, unless the defendant shall have denied the same under oath in his plea or answer.

HISTORY: This section supersedes Sec. 6 R. S. '46, Ch. 116, being C. L. '57, (4838); C. L. '71, (6547); How. 8140; C. L. '97, (10471), changed.

CONSTRUED: C. L. '97, (10471), superseded by this section applied only to domestic corporations. In the case of such corporations, corporate existence is admitted by the general issue. *Garton v. Nat'l. Bank*, 34 Mich. 279; *Wilson Sewing Machine Co. v. Spears*, 50 Mich. 534; *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444; *Smith v. Adrian*, 1 Mich. 495. Under the former law a foreign cor-

poration, on a plea of the general issue, was required to prove its corporate existence in the same manner as though n<sup>o</sup>l t<sup>i</sup>al corpora<sup>t</sup>ion were pleaded. *F. & M. Bank v. Troy City Bank*, 1 Doug. 457; *Owen v. Farmers' Bank*, 2 Doug. 134. As to the manner of proving corporate existence, *Canal St. Gravel Road Co. v. Paas*, 95 Mich. 373; *Thatcher v. Nat'l. Bank*, 19 Mich. 196; *Compilers' Section* (12535).

FORMER LAW CITED: *Ludington Water Supply Co. v. Ludington*, 119 Mich. 488; *Manhard Hardware Co. v. Rothschild*, 121 Mich. 662.

**(12461). In Certain Cases Plaintiff May Declare on Money Counts Alone.**

Sec. 9. The plaintiff in all actions on bills of exchange or promissory notes, may declare upon the money counts alone, and any such bill or note may be given in evidence under the money counts, in all cases where a copy of the bill or note shall have been served with the declaration; and the return or proof of service of such copy upon the defendant or defendants, shall be prima facie evidence of such service.

HISTORY: Re-enacts with some changes in phraseology Sec. 7, R. S. '46, Ch. 99, being C. L. '57, (4161); as Am. '59, p. 260, Act 101, Imd. Eff. Feb. 11; C. L. '71, (5777); How. 7346; C. L. '97, (10056), modified.

UPON MONEY COUNTS: Where the promise is to pay money and its non-payment constitutes the sole breach, a recovery may be had under the common counts and the contract is admissible in evidence under such counts. *Conrad Seipp Brewing Co. v. McKittrick*, 86 Mich. 196, citing *Pt. H. & S. W. Ry Co. v. Potter*, 55 Mich. 627; *Miner v. O'Harrow*, 60 Mich. 91; *Phlippen v. Morehouse*, 50 Mich. 537; *Rickey v. Morrison*, 69 Mich. 139; *Thomas v. Caulkett*, 57 Mich. 392. If such declaration omits to allege an express promise, it will be cured by judgment, though bad on special demurrer. *Hoard v. Little*, 7 Mich. 468. Prima facie outlawry of a note does not prevent its introduction in evidence, when the declaration is on the common money counts and a copy of the note has been served with it. *Michael v. Tuttle*, 37 Mich. 502. A certificate of deposit given by a bank, payable on return, is a promissory note within the provisions of this section. *Cate v. Patterson*, 25 Mich. 191. The sheriff's return of service of the declaration implies a service of the copy of the note attached. *Bliss v. Paine*, 11 Mich. 92.

**(12462). No Special Plea in Bar to be Pleaded.**

Sec. 10. No special plea in bar shall be pleaded in any civil action hereafter to be commenced; but all matters of defense to any such action, may be given in evidence under the general issue.

HISTORY: Re-enacts Sec. 22, R. S. '46, Ch. 99, being C. L. '57,

(4176); C. L. '71, (5792); How. 7361; C. L. '97, (10071), remains unchanged.

**CONSTRUED:** This statute abolishing special pleadings does not make them void, when the parties have voluntarily adopted them, joined issue and proceeded to trial and judgment. *Wales v. Lyon*, 2 Mich. 276. See *Thomas Canning Co. v. Cannors' Exch. Subscribers*, 202 Mich. 64.

**FORMER LAW CITED:** *McFarlane v. Ray*, 14 Mich. 468-9; *Porter v. Kimball*, 1 Mich. 241; *Kinnie v. Owen*, 1 Mich. 250.

### (12463). General Issue.

**SEC. 11.** In all civil actions hereafter to be commenced, the general issue shall consist of a demand by the defendant, of a trial of the matters set forth in the plaintiff's declaration.

**HISTORY:** Re-enacts Sec. 23, R. S. '46, Ch. 99, being C. L. '57, (4177); C. L. '71, (5793); How. 7362; C. L. '97, (10072), remains unchanged.

**GENERAL ISSUE:** The statutory general issue is at least as broad as that at the common law. *Osborn v. Lovell*, 36 Mich. 249. It puts in issue everything necessary to be shown by the plaintiff to make out his case. *Id.*; *Kinnie v. Owen*, 1 Mich. 249; *Loomis v. Foster*, 1 Mich. 165; *Young v. Stephens*, 9 Mich. 502; *Taff v. Hosmer*, 14 Mich. 312; *Edwards v. Chandler*, 14 Mich. 471; *Ingalls v. Eaton*, 25 Mich. 34-5; *Wilson v. Wagar*, 26 Mich. 455; *Rawson v. Finlay*, 27 Mich. 270-1; *Snyder v. Willey*, 33 Mich. 483; *Berringer v. L. S. Iron Co.*, 41 Mich. 307; *Estey v. Smith*, 45 Mich. 402; *Singer Mfg. Co. v. Benjamin*, 55 Mich. 332; *Rawlings v. Cole*, 67 Mich. 432. On appeal from the probate of a will the general issue denies the sanity of the testator. *Taff v. Hosmer*, 14 Mich. 309. The general issue is a proper answer to any claim not well founded in fact. *Denver v. Booming Co.*, 51 Mich. 472. Where plaintiff dies after plea of general issue and his administrator is substituted, defendant can show without amendment that administrator had not been properly appointed. *Vickery v. Belr*, 16 Mich. 52. By pleading the general issue defendant submits himself to the jurisdiction of the court. *Grand Rapids, N. & L. S. R. Co. v. Gray*, 38 Mich. 461. The general issue is a demand of a trial in the matters set forth in plaintiff's declaration, and puts in issue every matter except such as, prior to C. L. '97 (10072), were required to be pleaded specially, or of which notice was required to be given. *Ostrom v. Potter*, 104 Mich. 116. A general denial puts the plaintiff to his proof of a contract complying with the law or of a transaction that would render the defendant liable. *Third Nat. Bank v. Steel*, 129 Mich. 439. The scope of the general issue is, as a rule, a denial of every material averment in the declaration. *Sprague v. Hosie*, 155 Mich. 30. See *Green v. Railroad*, 168 Mich. 109.

**DEFENSES UNDER GENERAL ISSUE:** In assumpsit the defense of payment can be made under the general issue. *Olcott v. Hanson*, 12 Mich. 454; *Burt v. Olcott*, 33 Mich. 179; *Huntoon v. Russell*, 41 Mich. 316; *Brennan v. Tietsort*, 49 Mich. 398. Defenses to an action of assumpsit going to the existence of any promise having

legal force. *Snyder v. Willey*, 33 Mich. 483. In an action for the price, defendant may show that the article delivered was not the article purchased. *Grieb v. Cole*, 60 Mich. 402. In an action upon the common counts for use and occupation, defendant can set up a new agreement. *Conkling v. Tuttle*, 12 Mich. 630. In assumpsit for the sale of chattels, defendant may show that they were sold in violation of the United States revenue laws. *Dean v. Chapin*, 22 Mich. 276. That the instrument sued on was never valid. *Myers v. Carr*, 12 Mich. 70; *Hill v. Callaghan*, 31 Mich. 425-6. Where a written contract is sued upon a variance in name may be taken advantage of under the general issue and need not be pleaded in abatement. *Gilbert v. Hanford*, 13 Mich. 40. Non-ownership of a note at the time suit was brought may be shown. *Reynolds v. Kent*, 38 Mich. 247; *Hovey v. Sebring*, 24 Mich. 232. See *Soper v. Peck*, 51 Mich. 563. In an action upon a written contract defendant may show, under the general issue, a non-compliance with any of the conditions of the contract which will defeat recovery. *Morley v. Insurance Co.*, 85 Mich. 217. A rescission of the contract sued upon, for sufficient cause. *Stahelin v. Sowle*, 87 Mich. 134. A defense which is confined to a refutation of the facts stated in the declaration and necessary to be proved in order to enable the plaintiff to recover may be made under the general issue. *Child v. Mfg. Co.*, 72 Mich. 623. In covenant, under the general issue, defendant may show that the deed is not his by proving a lack of power in the agent who executed it in his behalf. *Agent of State Prison v. Lathrop*, 1 Mich. 438. In actions of tort everything which may properly be considered by the jury in mitigation of damages may be given in evidence under the general issue. *Delaven v. Bates*, 1 Mich. 97; *Osborn v. Lovell*, 36 Mich. 246. The nature of a personal injury, in respect to being permanent or temporary, may be shown under the general issue in an action of case therefor. *Goodale v. Portage Lake Bridge Co.*, 55 Mich. 418. In replevin, the defense that the property was taken under legal proceedings against a third person claimed to be the owner thereof. *Snook v. Davis*, 6 Mich. 156; *Craig v. Grant*, 6 Mich. 447. Also anything going to show that plaintiff had no right to possession when he began suit. *Belden v. Laing*, 8 Mich. 500; *Singer Mfg. Co. v. Benjamin*, 55 Mich. 332. Defendant may also show his official character as special administrator and that he claims to hold the property as such. *Singer Mfg. Co. v. Benjamin*, 55 Mich. 332. Under the replevin laws no special plea or notice of lien is necessary. *Lumber Co. v. Lewis*, 66 Mich. 535. In trespass a freehold or mere possessory right may be given in evidence under the general issue. *Rawson v. Finlay*, 27 Mich. 268. In an action for trespass to lands and cutting timber, claiming treble damages, defendant may show that the trespass was involuntary and made under a claim of right. *Osburn v. Lovell*, 36 Mich. 246. See also *Waldo v. Waldo*, 52 Mich. 97; *Walters v. Tefft*, 57 Mich. 390; *Keyser v. Sutherland*, 59 Mich. 455; *Solomon v. Groesbeck*, 65 Mich. 540; *Curtis v. Lesia*, 78 Mich. 480. In trover defendant may show property in a third person, though plaintiff was in possession. *Stephenson v. Little*, 10 Mich. 433. Or that the title was in himself, either absolutely as general owner, or specially as bailee, or by way of lien. *Eureka Iron Works v. Bresnahan*, 66 Mich. 489. See also *McLaughlin*

v. Smith, 45 Mich. 277. In libel. *Edwards v. Chandler*, 14 Mich. 471. In slander. *Hudson v. Dale*, 19 Mich. 17. But see *Thompson v. Bowers*, 1 Mich. 321. In ejectment the defense of title by adverse possession. *Miller v. Beck*, 68 Mich. 76. A defense of partial failure of consideration is inadmissible under a plea of the general issue, without notice. *Library Society v. Hastie*, 155 Mich. 56. The defense of the statute of frauds is available under the general issue. *Third Nat. Bank of N. Y. v. Steel*, 129 Mich. 434; *Sprague v. Hosie*, 155 Mich. 30. Under the general issue a defendant may always show that the agreement sued upon was not made. *Davis v. Kneale*, 97 Mich. 74. In an action by a bailor to recover the value of goods from the bailee upon failure to redeliver, the latter may show that the goods were stolen from him. *Knights v. Piella*, 111 Mich. 9. In an action of seduction the defense of want of chastity of plaintiff can be shown under the general issue. *Greenman v. O'Riley*, 144 Mich. 535. Want of probable cause may be shown as a defense to an action for malicious prosecution. *Birdsall v. Smith*, 158 Mich. 394. But see *White v. McQueen*, 96 Mich. 253. In an action of trover the defendant could show that plaintiff had waived the tort by starting a previous action in assumpsit. *Thomas v. Watt*, 104 Mich. 206. As any matter showing that plaintiff had no title to the property controverted the charge of conversion. *Id.* In assumpsit to recover the amount paid to an officer, the execution may be given in evidence under the general issue. *Miller v. Hahn*, 116 Mich. 607. The statutory general issue affords equal scope with the common law plea of non-assumpsit. *Hall v. Callaghan*, 31 Mich. 425. In general, see *Cleveland v. Rothschild*, 132 Mich. 626. See Circuit Court Rule 23. (1916).

**NOTICE OF DEFENSE:** The purpose of the notice is to apprise the plaintiff of matters to be introduced under the general issue. *Rosenbury v. Angell*, 6 Mich. 515; *McHardy v. Wadsworth*, 8 Mich. 351. The office of a notice is to present tangible issues and not to introduce matters that form no part of the issue. It cannot make them relevant or material. *Proctor v. Houghtaling*, 37 Mich. 41. Not a pleading and no issue of law or fact can be founded upon it. *Rosenbury v. Angell*, 6 Mich. 515; *McHardy v. Wadsworth*, 8 Mich. 351. But see Circuit Court Rule 21, Section 1, (1916.) To the notice there can be no replication and consequently there can be no new assignment, but the plaintiff goes to trial upon the declaration, plea and notice. *McFarlane v. Ray*, 14 Mich. 469. As a general rule, the plaintiff may present by proofs any matter in reply to the notice which might have formerly been replied and proved under a replication. *Id.* In abolishing special pleadings the statute did not design to deprive the parties of substantial rights, but rather to simplify the proceedings and do away with a system which, in the hands of skillful pleaders was sometimes made to defeat justice. *Id.* Special pleas were abolished to avoid technicality and prolixity; but where one is put in it is customary to allow it to stand as a notice of defense. *Benedict v. Smith*, 48 Mich. 594. The requirement in this section of a plea of the general issue in all cases and notice of any special defense is mere matter of form will not invalidate a special defense pleaded alone. *Eddy v. Manshaun*, 42 Mich. 533. See *Cresinger v. Reed*, 25 Mich. 450.

**REQUISITES OF NOTICE:** Formerly the notice was required to

contain all the substantial requisites of a special plea. *Thompson v. Bowers*, 1 Doug. 321. But the revision of 1846 abrogated this rule. As to notice, the present statute makes no distinction between different kinds of action, and it is not requisite now that the notice contain the substance of a special plea. *Cresinger v. Reed*, 25 Mich. 450; *Ins. Co. v. Crampton*, 43 Mich. 422. A notice that apprises the plaintiff with reasonable certainty of the matter of defense so that he may not be taken by surprise on the trial, is sufficient. *Hartford v. Holmes*, 3 Mich. 460; *Porter v. Kimball*, 1 Mich. 239; *Rosenbury v. Angell*, 6 Mich. 508; *McHardy v. Wadsworth*, 8 Mich. 349; *Myers v. Carr*, 12 Mich. 70; *Cresinger v. Reed*, 25 Mich. 450; *Browne v. Moore*, 32 Mich. 254; *Bailey v. Pub. Co.*, 40 Mich. 254; *Eddy v. Manshaun*, 42 Mich. 533; *Ins. Co. v. Crampton*, 43 Mich. 422; *Whittle v. Bailes*, 65 Mich. 542; *Watkins v. Ford*, 69 Mich. 357; *Briesenmeister v. Supreme Lodge K. of P.*, 81 Mich. 533. As to setting forth all the facts constituting the fraud relied upon in defense, see *Wait v. Kellogg*, 63 Mich. 138. A notice that a note "was given for the purchase price of certain intoxicating liquors, contrary to the statute in such case made and provided," is, if necessary, sufficient. *Meyers v. Carr*, 12 Mich. 63.

**AMENDMENT OF NOTICE:** See note, "Amendment to Plea and Notice," to *Compilers' Section* (12478).

**DEFENSES REQUIRING NOTICE:** The statute of limitations. *Shank v. Woodworth*, 111 Mich. 642. *Whitworth v. Pelton*, 81 Mich. 101; citing *Snyder v. Winsor*, 44 Mich. 140; *Ripley v. Davis*, 15 Mich. 75. Discharge in bankruptcy. *Parks v. Goodwin*, 1 Mich. 36. Former judgment, *Briggs v. Milburn*, 40 Mich. 514; *Porter v. Leache*, 56 Mich. 41. The defense of former recovery. *Achey v. Hull*, 7 Mich. 430. *Tabor v. VanVranken*, 39 Mich. 794. Pendency of garnishment proceedings must be pleaded in abatement and cannot be shown under the general issue and notice. *Near v. Mitchell*, 23 Mich. 382. In an action upon an appeal bond the satisfaction of the judgment after joinder of issue must be specially pleaded. *Souvais v. Leavitt*, 53 Mich. 577. In an action on a promissory note against two joint makers the fact that one signed as surety and was released by an unauthorized extension of time to the other, cannot be shown without notice. *Rawlings v. Cole*, 67 Mich. 431. Defenses arising out of fraud or misrepresentations require notice. *Miller v. Finley*, 26 Mich. 249; *Wait v. Kellogg*, 63 Mich. 144. And also proof of the worthlessness of a patent right for which a note was given. *Miller v. Finley*, 26 Mich. 249; See *McCabe v. Caner*, 68 Mich. 182. The defense that plaintiff, as an attorney, bought for prosecution the demand sued on requires notice. See *Compilers' Sections* (12072-5); *Randall v. Baird*, 66 Mich. 312. A defense to an action on a fire insurance policy that the plaintiff set fire to the property must be specially noticed. *Morley v. Ins. Co.*, 92 Mich. 595; *Fire Ins. Co. v. Hannawold*, 37 Mich. 103; *Circuit Court Rule 23, Section 4* (1916). See *Shaw v. Bradley*, 59 Mich. 199, for notice of attachment proceedings under log-lien law. In replevin *Bateman v. Blake*, 81 Mich. 227. In trespass, the defense of license requires notice. *Vanderkarr v. Thompson*, 19 Mich. 82; *Senecal v. Labadie*, 42 Mich. 126; *Waldo v. Waldo*, 52 Mich. 97. And notice under the general issue is the only admissible form of pleading title and license in trespass *quare clausum*. *Durse v. Wheeler*, 22 Mich.

439; *Walters v. Tefft*, 57 Mich. 390. Justification or excuse must be pleaded specially. *Rosenbury v. Angell*, 6 Mich. 513; *Osborn v. Lovell*, 36 Mich. 250; *Waldo v. Waldo*, 52 Mich. 97. In trespass de bonis the defense that the goods were taken under attachment against a third person alleged to be the owner requires notice. *Rosenbury v. Angell*, 6 Mich. 508, 513. In trover, that the goods were taken in attachment. *Fry v. Soper*, 39 Mich. 727; *Frankel v. Coots*, 41 Mich. 75. Libel and slander, see Compilers' Section (12755). In an action for libel notice of justification must be given. *Wheaton v. Beecher*, 79 Mich. 443; *Jastrzembzki v. Marxhausen*, 120 Mich. 677. Omission of a plea of justification admits the falsity of a slander declared upon. *Fowler v. Gilbert*, 38 Mich. 292. See *Thompson v. Bowers*, 1 Doug. 321; *Moyer v. Pine*, 4 Mich. 409; *Farr v. Rasco*, 9 Mich. 353; *Porter v. Henderson*, 11 Mich. 20; *Huson v. Dale*, 19 Mich. 17; *Proctor v. Houghtaling*, 37 Mich. 46. In an action to recover rent, notice of the defense of non-tenantability must be given. *Holmes v. Wood*, 88 Mich. 435. In an action on a bond notice must be given of the defense of failure of consideration. *Boyer v. Sowles*, 109 Mich. 481; *Robson v. Dayton*, 111 Mich. 440. A defendant under a plea of the general issue may not recoup unliquidated damages for delay in delivery and deviation from the contract specifications. *Boiler Co. v. Thompson*, 156 Mich. 365, 368. Where a defendant relies upon an estoppel in pais he should give notice thereof. *Johnson v. Stellwagen*, 67 Mich. 14; *Wessels v. Beeman*, 87 Mich. 485. But see *Rogers v. Robinson*, 104 Mich. 330. In an action for malicious prosecution the defense of good faith and of probable cause for the arrest must be specially and distinctly set forth. *White v. McQueen*, 96 Mich. 253. But see *Birdsall v. Smith*, 158 Mich. 394, where the contrary view is held. Notice of ownership must be given as a defense to an action of trespass quare clausum. *Ostrom v. Potter*, 104 Mich. 115. See also *McFarlane v. Ray*, 14 Mich. 465. Lack of consideration, see *Walbridge v. Tuller*, 125 Mich. 220. Settlement, see *Sunlin v. Skutt*, 133 Mich. 208; Circuit Court Rule 23, (1916). As to the early history of Michigan legislation and rules regarding special pleading, see *Cresinger v. Reed*, 25 Mich. 450.

**GENERAL ISSUE ADMITS:** The jurisdiction of the court over the person of the defendant. *Webb v. Mann*, 3 Mich. 139; *G. R. N. & L. S. R. Co. v. Gray*, 38 Mich. 461; *Gott v. Brigham*, 41 Mich. 227. Where the court has jurisdiction of the subject matter of a suit, it is a general rule that a plea to the merits waives irregularities in obtaining jurisdiction of the person. *Watkins v. Plummer*, 93 Mich. 215. Admits plaintiff's representative character as administrator or executor. *Vickery v. Beir*, 16 Mich. 50; *Bachelder v. Brown*, 47 Mich. 367. That a defendant corporation has been sued in the right name. *L. S. Building Co. v. Thompson*, 32 Mich. 293. Admits the corporate name and existence of plaintiff in case of domestic corporations. *Smith v. Adrian*, 1 Mich. 495; *G. R. & I. R. R. Co. v. Southwick*, 30 Mich. 444; *Garton v. Bank*, 34 Mich. 279; *Wilson S. M. Co. v. Spears*, 50 Mich. 534. In an action for slander it admits the falsity of the words charged. *Fowler v. Gilbert*, 38 Mich. 292.

**GENERAL ISSUE WAIVES:** By appearing generally and pleading to the merits one waives all defects in irregularities in the service and return of process and he cannot thereafter object to the manner



in which he was brought into court. *Crane v. Hardy*, 1 Mich. 56; *Millerd v. Reeves*, 1 Mich. 108; *Campau v. Fairbanks*, 1 Mich. 152; *Stewart v. Hill*, 1 Mich. 265; *Stone v. Welling*, 14 Mich. 514; *Burson v. Huntington*, 21 Mich. 415; *Pardee v. Smith*, 27 Mich. 38; *Hart v. Blake*, 31 Mich. 278; *Miller v. Rosier*, 31 Mich. 477; *Home Ins. Co. v. Curtis*, 32 Mich. 404; *Pierce v. Rehfuß*, 35 Mich. 53; *Manhard v. Schott*, 37 Mich. 234; *Slattery v. Hilliker*, 39 Mich. 573; *Bryant v. Hendee*, 40 Mich. 543; *Gott v. Brigham*, 41 Mich. 227; *Maxwell v. Deens*, 46 Mich. 37; *Clark v. Dunlap*, 50 Mich. 494; *Wasey v. Mohoney*, 55 Mich. 194; *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330; *Taylor v. Adams*, 58 Mich. 187; *Austin v. Burroughs*, 58 Mich. 181; *Dalley v. Kennedy*, 64 Mich. 208; *Gunn Hard. Co. v. Denison*, 83 Mich. 40; *Jacklin v. Soutier*, 82 Mich. 648; *La Barre v. Bent*, 154 Mich. 521. Pleading to the merits waives mere clerical defects in the affidavit. *Baker v. Dubois*, 32 Mich. 92; Formal and technical defects in the declaration are waived. *Hartford v. Holmes*, 3 Mich. 460; *Kean v. Mitchell*, 13 Mich. 207; *Stange v. Clemens*, 17 Mich. 409; *Seiver v. Price*, 26 Mich. 518; *Jennison v. Haire*, 29 Mich. 207; *G. R. & I R. Co. v. Southwick*, 30 Mich. 444; *Hatheway v. Sackett*, 32 Mich. 97; *Stoflet v. Marker*, 34 Mich. 313; *Brown v. McHugh*, 35 Mich. 50; *Aldrich v. Chubb*, 35 Mich. 350; *Jenks v. Brown*, 38 Mich. 651; *Jackson v. Collins*, 39 Mich. 557; *Briggs v. Milburn*, 40 Mich. 512; *Norton v. Colgrove*, 41 Mich. 544; *Burke v. Wilber*, 42 Mich. 327; *Clark v. Field*, 42 Mich. 345; *Wilcox v. T. & A. A. R. Co.*, 43 Mich. 584; *Cook v. Perry*, 43 Mich. 623; *Pettibone v. Maclem*, 45 Mich. 381; *Williams v. Raper*, 67 Mich. 427; *Campbell v. Kalamazoo*, 80 Mich. 655; *Clark v. North Muskegon*, 88 Mich. 308; *Reeder v. Moore*, 95 Mich. 597; Besides many of the cases just cited, the following emphasize the necessity of demurring to a declaration for defects, if defendant desires to take advantage of them. *VanMiddlesworth v. VanMiddlesworth*, 32 Mich. 183; *Bartin v. Gray*, 48 Mich. 164; *Rowland v. Supt. of Poor*, 49 Mich. 553; *Gay v. F. M. Ins. Co.*, 51 Mich. 246; *Sutton v. Van Akin*, 51 Mich. 463; *Bauman v. Beam*, 57 Mich. 1; *Kraatz v. E. L. Co.*, 82 Mich. 457; *Fuller v. Jackson*, 82 Mich. 480; *Gullickson v. Gjorud*, 89 Mich. 8; *Fox v. Spring Lake Iron Co.*, 89 Mich. 387; But pleading to the merits does not waive the essential allegations of a cause of action. *Stoflet v. Marker*, 34 Mich. 313. A plea of the general issue without objecting to the lack of formality of plaintiff's declaration waives the right to assign error on the introduction of evidence under it. *Fowles v. Rupert*, 138 Mich. 150.

**PLEAS PUIS DARREIN CONTINUANCE:** See notes to Compilers' Section (12467). Also Circuit Court Rule 29, (1916).

**EXECUTION OF WRITTEN INSTRUMENT:** See Circuit Court Rule 23, (1916).

**NO CONSIDERATION:** A total failure or want of consideration must be specially pleaded as a defense. *Walbridge v. Tuller*, 125 Mich. 220; Circuit Court Rule 23, Section 2, (1916). Compilers' Sections (14218) and (14267) dispensing with the necessity of pleading want or failure of consideration in certain instances apply only to Justices' courts. See *Hubbard v. Freiburger*, 133 Mich. 142; *Library Ass'n v. Hastie*, 155 Mich. 59.

**NOTE:** It will be observed that many of the foregoing decisions were in cases commenced prior to the adoption of Circuit Court Rule

23, Section 2, Former Rule 7, (b), which modifies somewhat the former practice as to the pleading of special defenses.

In *Ostrom v. Potter*, 104 Mich. 116, the court said: "The general issue is a demand of a trial of the matters set forth in the declaration, and puts in issue every matter except such as, prior to the adoption of section 7362, How. Stat., were required to be pleaded specially, or of which special notice was required to be given under the general issue. How. Stat. Section 7363. As special notice is required to be given only of those matters which had previously been required to be specially pleaded, it follows that the general issue in this state is exactly as broad as the general issue at common law, with the qualification that, as to all such matters as should have been specially, or of which special notice was required to be given under to his plea of the general issue a notice "briefly stating the precise nature of such matter of defense." The general issue denies every material averment in the declaration, whatever the nature or form of the action may be. *Green v. Michigan Cent. R. Co.*, 168 Mich. 104; *Rawson v. Finlay*, 27 Mich. 268; *Kinney v. Owen*, 1 Mich. 249. Thus the defendant is enabled to contest all such allegations and to put the plaintiff to their proof, for it constitutes a complete denial of the cause of action of the plaintiff as well as of every fact necessary to enable the plaintiff to recover. *Kinney v. Owen*, 1 Mich. 249; *Ingalls v. Eaton*, 25 Mich. 34; *Young v. Stephens*, 9 Mich. 502.

#### (12464). Notice of Special Matter of Defense.

SEC. 12. To entitle a defendant to avail himself of any matter of defense, which, according to the practice as it has heretofore existed, was required to be pleaded specially, or of which a special notice was required to be given under the general issue or other general plea, such defendant shall annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 99, being C. L. '57, (4178); C. L. '71, (5794); How. 7363; C. L. '97, (10073), remains unchanged.

**PLEADINGS:** See notes to last section, Circuit Court Rule 23, (1916).

In *Carver v. Bieleke*, 177 Mich. 408, the court said: "This court has repeatedly held that justice court pleadings should be viewed with liberality, technicalities discountenanced, and substance instead of form required. This claim of recoupment, the bill of particulars of which was presented to the justice and used without objection upon the trial by defendant, and upon the testimony which defendant gave under it he was cross-examined by plaintiff, was sufficient, added to the pleadings in the case, to warrant the justice in receiving testimony under it, and also to give notice to the plaintiff of the nature of the claim of defendant with sufficient certainty to prevent surprise as to which he would be called upon to meet with his proofs. Whether the justice marked the paper as filed in the case does not appear. Plaintiff's attorney says he is informed it was not filed. The entire

purpose and sole requirement of pleadings in justice's court is to inform the opposite party what he will be called upon to meet. This knowledge plaintiff had in the justice's court, and accepted without protest or question, as far as the record shows. He made no claim that he was surprised. Counsel for plaintiff, and apparently the court, relied upon the case of *Watkins v. Ford*, 69 Mich. 357, (37 N. W. 300). We think that the cases are distinguishable. In the instant case, by the itemized bill of particulars upon which the defense was based in justice's court, as already stated, plaintiff was informed of defendant's claim, while in the case relied upon and the other cases cited, nothing appears to have been brought to plaintiff's notice but the general statement that defendant 'gave notice of set-off and recoupment.' In view of the liberality with which this court has always viewed pleadings and proceedings in justice's court, where formalities and technicalities have been discountenanced, and that the pleadings are held good if sufficient notice has been given as to what issue is to be met, we are of the opinion that the court should have overruled the objection of plaintiff, and should have received evidence offered by defendant in recoupment. From the record of the trial in the circuit court it is apparent that this claim of recoupment was made in good faith, and that the construction of the lease relative to the repairs upon the roof of the barn is involved." Under the statute a special notice of defense that apprises the plaintiff with reasonable certainty of the matter of defense, so that he may not be taken by surprise on the trial, is sufficient. *Rosenbury v. Angell*, 6 Mich. 508. In this case the court said: "The rule generally laid down as a test of the sufficiency of a notice under the general issue has been, that the notice should contain all that would be necessary to sustain a special plea on general demurrer; and such was the rule laid down by the Supreme Court of this state in *Thompson v. Bowers*, 1 Doug. Mich. 321. But this decision was not made under a statute like that applicable to the present case; and most of the decisions cited by counsel in support of the rule, were under statutes, or rules of practice, differing somewhat from our present statute upon the subject. This statute, after having expressly abolished all special pleas in bar, enacts, that, to entitle a defendant to avail himself of such matter of defense, he "shall annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense."

The objects of a special plea were twofold: 1st. To apprise the plaintiff of the nature of the defense relied upon, so that he might be prepared to meet it, and to avoid surprise on the trial; and, 2d. That an issue of fact might be formed upon it, or growing out of it, if the plaintiff chose to do so; or of law, if he chose to admit its truth by demurrer; and, as judgment on demurrer must be a judgment upon facts admitted on the record, by the parties in their pleadings, it was necessary the matters of fact should be set out with such certainty as to enable the court to decide without the necessity of finding, or supplying by intendment, facts not necessarily included in those thus admitted."

See *Fifth Ave. Library Assoc. v. Hastie*, 155 Mich. 56; *Hubbard v. Frieberger*, 133 Mich. 139; *Keystone Mnfg. Co. v. Forsyth*, 126 Mich. 98; *Ada Dairy Ass'n v. Mears*, 123 Mich. 470; *Robson v. Dayton*, 111

Mich. 440; Boyer v. Sowles, 109 Mich. 481; Morley v. Liverpool & etc. Ins. Co., 92 Mich. 590; Minnock v. Eureka & etc., Ins. Co., 90 Mich. 256; Holmes v. Wood, 88 Mich. 435; Watkins v. Ford, 69 Mich. 257; Whittle v. Bailes, 65 Mich. 640; Farmers Mutual Fire Ins. Co. v. Crampton, 43 Mich. 421; Senecal v. Labadie, 42 Mich. 127; Frankel v. Coats, 41 Mich. 75; Bailey v. Kalamazoo Publishing Co., 40 Mich. 254; Fry v. Soper, 39 Mich. 727; Cressinger v. Reed, 25 Mich. 450; McHardy v. Wadsworth, 8 Mich. 349.

The general issue is not sufficient to justify the admission of testimony to show a limitation of the carrier's liability. Crowley Bros. v. Grand Trunk R. Co. of Canada, 185 Mich., 482; 22 D. L. N., 251; 152 N. W., 215.

#### (12465). Pleading Statutes of Ordinances.

SEC. 13. In any action based upon the provisions of any statute, or city or village ordinance, it shall be sufficient for the plaintiff without setting forth the special matter, to aver that said action arose by virtue of the provisions of such statute or ordinance, by reference to the same.

**HISTORY:** This section supersedes Sec's. 2, 3, and 4, R. S. '46, Ch. 99, being C. L. '57, (4156)-(4157)-(4158); C. L. '71, (5772)-(5773)-(5774); How. 7341-2-3; C. L. '97, (10051)-(10052)-(10053), unchanged.

**CONSTRUED:** C. L. '97, (10051)-(10052)-(10053), superseded by this section, did not include actions for damages under the statute allowing treble damages against trespassers on lands in certain cases. (Compilers' Section 13251.) Howser v. Melcher, 40 Mich. 189. The former statute, however, only embodied actions in certain cases. The above section includes, "any statute." When the form of pleading depends on the common law, the statute must be both pleaded and counted on. Pleading the statute is stating the facts which bring the case within it, and counting on it, in the strict language of pleading, is making express reference to it by apt terms, to show the source of right relied on. Howser v. Melcher, 40 Mich. 189. Where a statute has expressly required the existence of a fact, the pleader must expressly aver it. Beaubien v. Clcotte, 8 Mich. 12.

The declaration should be special and should count upon the statute. McCoy v. Brennan, 61 Mich. 366-7; Declaration in trover under the former statute. Warren v. Dwyer, 91 Mich. 417, and cases cited.

#### (12466). Replications Abolished.

SEC. 14. Replications in equity causes are abolished, and such causes shall be deemed to be at issue, upon the filing of the answer to the bill of complaint, or upon the filing of the answer of the plaintiff to the cross bill of the defendant.

**HISTORY:** New section.

**REPLICATIONS:** Chancery causes are to be deemed at issue upon the filing of the answer to the bill of complaint or, in case an answer

in the nature of a cross bill is filed, upon the filing of the answer to the cross bill.

**(12467). Supplemental Pleadings.**

SEC. 15. Supplemental pleadings, showing matters arising since the original pleadings were filed, may be filed by either party by leave of court.

**HISTORY:** New section.

**PLEAS PUIS DARREIN CONTINUANCE:** This plea operated at common law to destroy the issue previously formed, and required a new one to be formed, by replication or otherwise. The abolishment of special pleas was not designed to deprive the defendant of his right to make special defense of matters arising subsequent to the filing of the plea of the general issue, and does not apply to pleas puis darrien continuance. *Johnson v. Kibbie*, 36 Mich. 269. As to these pleas under the present practice, see *Buel v. Irwin*, 24 Mich. 149; *Jenny v. Potts*, 41 Mich. 52; *Moon v. Harder*, 38 Mich. 566; *Haven v. Beidler Mfg. Co.*, 40 Mich. 286; *Snyder v. Quarton*, 47 Mich. 211; *Souvais v. Leavitt*, 53 Mich. 580. See Circuit Court Rule 29, (1916).

## CHAPTER XV.

### OF SET-OFF AND RECOUPMENT.

#### (12468). What Demands May Be Set off.

SECTION 1. In the following cases and under the following circumstances a defendant may set off demands which he has against the Plaintiff:

1. It must be a demand arising upon judgment or decree, or upon contract express or implied, whether such demand be liquidated or not, and whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other contract having a penalty, the sum equitably due, by virtue of its conditions only, shall be set off;

2. It must be due to him in his own right, either as being the original creditor or payee, or as being the assignee or owner of the demand;

3. It must have existed at the time of the commencement of the suit, and must then have belonged to the defendant;

4. It can be allowed only in actions found upon demands which could themselves be the subject of set-off according to law;

5. If there be several defendants, the demand set-off must be due to all of them jointly, except where other provision is expressly made by law: *Provided*, That in actions upon a note or other contract for the payment of money against several defendants, any one of whom is principal, and the other sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff, or any former holder of the note who transferred the same after due or other contract, may be allowed as a set-off by the principal or any other defendant;

6. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff having no real interest in the contract upon which the suit is founded; in which case no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified;

7. If the action be founded upon a contract other than a

negotiable promissory note, or bill of exchange which has been assigned by the plaintiff, a demand existing against such plaintiff, or any assignee of such contract at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such plaintiff or such assignee while the contract belonged to him;

8. If the action be upon a negotiable promissory note, or bill of exchange, which has been assigned to the plaintiff after it became due, a set-off to the amount of the plaintiff's debt may be made of a demand existing against any person or persons who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor while the note or bill belonged to him;

9. If the plaintiff be a trustee for another, or if the suit be in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 99, being C. L. '57, (4180); C. L. '71, (5796); How. 7365; As Am. '87, p. 377, Act 279, Eff. Sept. 28; C. L. '97, (10075), omitting however, the second sub-division of the old section and inserting in the first sub-division "decree" after "judgment" and after "express or implied" the clause relating to whether or not the demand should be liquidated. Changed.

**SET-OFF:** No change except in phraseology is made in the law relating to the right of set-off, except that the requirement that the demand shall be liquidated is eliminated.

**SET-OFF:** It is optional with defendant whether or not he will apply an independent contract as a set-off. *Paccalona v. Lumber Co.*, 171 Mich. 607. Set-off is a mode of defense. By it the existence of the demand sued upon is, in a certain sense, admitted; but at the same time the defendant sets up a demand against the plaintiff to counter-balance it in whole or in part. *Bank v. Schulenberg*, 54 Mich. 51. Set-off is the compensation of one debt or demand for another, by virtue of which damages are recovered by the party in whose favor a balance shall be found, and the judgment is statutory. *Ward v. Fellers*, 3 Mich. 286. It is in the nature of a cross action and does not deny the validity of any part of the plaintiff's claim, but sets up a separate and independent claim against the plaintiff. *McHardy v. Wadsworth*, 8 Mich. 353. The object of the statute is to save expense of litigation in cross actions. *Gardiner v. Fargo*, 58 Mich. 76. The right of set-off is purely statutory and cannot be extended beyond

the statute. *Woods v. Ayres*, 39 Mich. 348; *Robbins v. Brooks*, 42 Mich. 62; *Bradley v. Thompson Smith's Sons*, 98 Mich. 454. Where a defendant has a claim that is proper subject of set-off, he may use it as such or may sue separately upon it. *McEwen v. Bigelow*, 40 Mich. 215; *Huntoon v. Russell*, 41 Mich. 316; *Morehouse v. Baker*, 48 Mich. 335; *Mitchell v. Wells*, 54 Mich. 130. A set-off is as direct an exercise of affirmative jurisdiction as a suit. *Aud. Gen. v. Treasurer*, 73 Mich. 32. And does not lie against the state. *Id.*; *Aud. Gen. v. Supervisors*, 73 Mich. 183; *Aud. Gen. v. Supervisors*, 76 Mich. 297. But lies against a municipal corporation which brings an action in justices' courts. *Eaton Rapids v. Hought*, 63 Mich. 374. When not allowed. *Backus v. Merrill*, 107 Mich. 466. When suit is brought for overpayment defendant must set off any claim he has under the contract or be precluded from later bringing suit for the same. *Paccalona v. Lumber Co.*, 171 Mich. 606. A defendant is only entitled to judgment by reason of his set-off when the plaintiff's demand is due. *Machine Co. v. Seaver*, 90 Mich. 549. When both plaintiff and defendant base their rights on a Sunday transaction. *Brazee v. Bryant*, 50 Mich. 141. Where set-off has been allowed but judgment reversed as to plaintiff's claim. *Jordan v. Walker*, 154 Mich. 394. See also *Wyckoff, Seamans & Benedict v. Bishop*, 115 Mich. 414; *McGraw v. Union Trust Co.*, 136 Mich. 522; *Benton Fuel Co. v. Shipman*, 136 Mich. 523; *Granger v. Hathaway*, 17 Mich. 500. As to set-off in equity, see *Compilers' Section* (12476).

**AGAINST THE PLAINTIFF:** Joint indebtedness cannot be set off in a suit brought by only one of the debtors. *D., H. & S. W. R. R. Co. v. Smith*, 50 Mich. 112. The claims to be set off against one another must always be such that the debtor on one side is the same as the creditor on the other. *Hendricks v. Toole*, 29, Mich. 343. Claims must be mutual. *Kinney v. Tabor*, 62 Mich. 517, 527. A debt due to a surviving partner may be set off against a demand against him individually. *Newberry v. Trowbridge*, 13 Mich. 275. As to certain claims which may, or may not be set off, see *Powell v. Powell*, 52 Mich. 432; *Stanley v. Nye*, 54 Mich. 277; *Bolt v. Friederick*, 56 Mich. 20; *Dole v. McGraw*, 71 Mich. 106; *Hanselman v. Doyle*, 90 Mich. 142; *Bank v. Wire Works*, 58 Mich. 124; *Howell v. Medler*, 41 Mich. 641; *Brennan v. Tietzort*, 49 Mich. 397; *Stone v. Dodge*, 96 Mich. 514.

**UNLIQUIDATED CLAIM:** Under the former laws an unliquidated claim could not be made the basis of set-off. See the following cases for a construction of the former rule. *Ward v. Fellers*, 3 Mich. 286; *Smith v. Warner*, 14 Mich. 156-7; *Id.*, 16 Mich. 395-6; *Mitchell v. Shuert*, 16 Mich. 446; *Holland v. Rea*, 48 Mich. 225; *Carter v. Joseph*, 48 Mich. 615; *Shaw v. Brady*, 59 Mich. 209; *Shipman v. Coryell*, 105 Mich. 395; *Rawlings v. Fisher*, 110 Mich. 21.

**SUBDIVISION 1:** Must be a demand arising upon judgment or contract. *Woods v. Ayres*, 39 Mich. 348; *Bradley v. Thompson Smith's Sons*, 98 Mich. 455. Money paid without consideration may be set off. *Webber v. Howe*, 36 Mich. 156; *Peterson v. D., S. & Lum. Co.*, 51 Mich. 88. Money had and received. *Wire Co. v. Moore*, 55 Mich. 612; *Hall v. Kimmer*, 61 Mich. 274. Claim for services. *Dustin v. Radford*, 57 Mich. 169; *Eaton Rapids v. Hought*, 63 Mich. 371.

**SUBDIVISION 2:** The party who seeks to obtain the benefit of a set-off must be the real owner and have the control of the counter-



claim. *McGraw v. Pettibone*, 10 Mich. 537; *Dunlap v. J. P. Donaldson Co.*, 74 Mich. 290. An assignment of a claim vests the legal title in the assignee and the assignor cannot, without a reconveyance, avail himself of such claim as a set-off. *Lange v. Perley*, 47 Mich. 357.

SUBDIVISION 3: (This subdivision corresponds to Subdivision 4, C. L. '97, (10075): Must be actually and not colorably owned by defendant. *Smith v. Warner*, 16 Mich. 398. The statute fixes the time when the set-off accrues at the commencement of the suit. *Kinney v. Tabor*, 62 Mich. 527. See also *Godkin v. Weber*, 158 Mich. 517.

SUBDIVISION 4: (Former sub. 5): Allowed only when the claim sued on is itself a proper subject of set-off. *Smith v. Warner*, 14 Mich. 156; *Bradley v. Thompson Smith's Sons*, 98 Mich. 455. Nothing can be set off unless it could be sued upon and any claim that can be sued can be set off. *Wallace v. Finnegan*, 14 Mich. 171; *Gardiner v. Fargo*, 58 Mich. 76. A secured claim may be set off. *Wallace v. Finnegan*, 14 Mich. 170; *Willard v. Fralick*, 31 Mich. 433. In actions of replevin set-offs cannot be allowed. *Boiler Co. v. Thompson*, 156 Mich. 365, 368. See also *Andreas v. School District*, 138 Mich. 54.

SUBDIVISION 5: (Former Sub. 6): A joint and several note may be set off against a demand of one of the makers. *Ferguson v. Milliken*, 42 Mich. 441. A claim against only one of several plaintiffs cannot be set off against a demand due to all. *Fifield v. Edwards*, 39 Mich. 264. Partners may set off a claim jointly but not severally. *Sager v. Tupper*, 38 Mich. 258. See *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183; *Kinney v. Robison*, 52 Mich. 389; *Randall v. Baird*, 66 Mich. 316. The subdivision of the former act corresponding with this subdivision was amended in '87, by adding thereto a proviso identical with subdivision 10 of the law allowing set-off in justice court, (C. L. '97, (776), Sub. 10). By the terms of this proviso a demand of the principal debtor alone may possibly be set off where the other debtor is only a surety. See *Robbins v. Brooks*, 42 Mich. 62. Where there are several defendants, the demand to be set off must be due them jointly, except where other provision is made by law. *Wolf v. Jasper*, 126 Mich. 15. See also *Keystone Mfg. Co. v. Forsyth*, 115 Mich. 51; 126 Mich. 98. *Andreas v. School District*, 138 Mich. 54, 56.

SUBDIVISION 6: (Former Sub. 7): An indebtedness due a corporation cannot be set off in an action against its principal stockholder. *Hapke v. Davidson*, 180 Mich. 138. A claim against one of several plaintiffs cannot be set off against a demand sued on by all. *Fifield v. Edwards*, 39 Mich. 264. Neither can a defendant set off a claim against co-partners in an action by an individual member of the firm. *Stewart v. Terwilliger*, 177 Mich. 313.

SUBDIVISION 7: (Former Sub. 8): In an action by an assignee, charges against the assigner can be set off to the amount of the debt assigned only. *Pabst Brewing Co. v. Lueders*, 107 Mich. 41. The language of this subdivision is a little blind by reason of the use of the word "by" instead of "to" in the second line. *Bradley v. Thompson Smith's Sons*, 98 Mich. 455. Demands are a proper set-off if they belonged to defendant in good faith before notice of assignment. *Smith v. Warner*, 16 Mich. 398. All that is meant by the terms "good

faith" is that the demands shall be actually and not colorably owned by the defendant. And the fact that a demand was purchased at a discount does not prevent its being set off for its full amount. *Id.* An assigned claim cannot be set off by a demand that had not matured at the time the assignment was made. *Kull v. Thompson*, 38 Mich. 685. The assignee of a judgment takes it subject to any set-offs existing in favor of the judgment debtor against the assignor, up to such time as the debtor has notice of the assignment. *Finn v. Corbitt*, 36 Mich. 318. See *Kinney v. Tabor*, 62 Mich. 517.

**PROOF OF SET-OFF:** The burden of establishing set-offs must always be on the defendant, who desires to establish them. *Mitchell v. Wells*, 54 Mich. 130. See *Ludlow v. Pearl's Estate*, 55 Mich. 312.

**RECOURSEMENT:** See *Compilers' Section* (12477) and notes thereto. Section (10075), C. L. '97, set-off of unliquidated demands provided for.

**LIQUIDATED AND UNLIQUIDATED DEMANDS:** The important change in this section is that demands arising upon contract may be set off whether liquidated or not.

A liquidated demand may be defined as one where, from specific data, a specific amount may be calculated and determined by ordinary mathematical process or it is the specific amount arrived at in such a way as to measure the rights of the parties. *Smith v. Warner*, 14 Mich. 152.

An unliquidated demand may be defined as one where the data for calculation depends on values to be established by witnesses. *Smith v. Warner*, 14 Mich. 152.

See *Shipman v. Coryell*, 105 Mich. 295; *Holland v. Kea*, 48 Mich. 118; *Carter v. Joseph*, 48 Mich. 615; *Mitchell v. Shuert*, 16 Mich. 444.

**SET-OFF:** In law, a set-off is affected when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own, to counterbalance that of the plaintiff, either in whole or in part. *Stimson Am. Stat. Law*, §270. Thus a set-off is in the nature of a cross action to the full extent, for it does not deny the validity of any part of the plaintiff's claim or cause of action, but sets up a separate and independent claim against the plaintiff; and the defendant is entitled to judgment upon any surplus of his claim beyond those of the plaintiff. *M'Hardy v. Wadsworth*, 8 Mich. 353. Set-off is a creature of the statute, and it has never been authorized in actions of tort. *Pinch v. Willard*, 108 Mich. 211.

In *Dole v. McGraw*, 71 Mich. 110, the court said: "It will be seen that the only question in this case is, what judgment was the plaintiff entitled to under these findings? The plaintiff claims that it should have been for the value of the property taken as found by the circuit judge, while the defendant's counsel claims that the judgment is correct.

It is true, as claimed by defendant's counsel, that, in assessing damages in actions of trover, it should be done on equitable principles, *Brink v. Freoff*, 40 Mich. 614, 44 Mich. 69, and this may be claimed as well in all other actions; but this does not allow the defendant to make the set-off in his favor. This is not the form of action in which such a counter-claim can be considered. The rule stated only applies to claims for which damages may be assessed.

In a suit in chancery for the purpose of an accounting, in order

that the whole controversy may be settled and adjusted, equity will sometimes permit a judgment, though obtained in an action for a wrong, to be made an item, in favor of the party holding it, in the account to be taken; and it was for this very purpose that this court gave direction, in the other suit, to allow the claim of Dole in this suit to be prosecuted to judgment, that the amount, when judgment was rendered, might be used as an item in his account in the chancery case against the claim of McGraw.

Before this could be done, however, such amount could only be ascertained by trial and judgment; and, the form of the action being trover, only such claim could be litigated therein as the rules governing that form of action would permit.

The position taken by counsel for plaintiff was correct. Judgment should have been taken at the circuit for the full amount he was entitled to recover. This was not done; and it seems very doubtful, at least, if the findings would give the plaintiff the amount of damages to which he is entitled. Under such circumstances, I think the judgment entered should be reversed, and a new trial granted; and that upon such trial the plaintiff, if found entitled to prevail, should be allowed the full value of the property converted, without any deductions, and all the damages to which he is entitled for the wrongful acts complained of, and properly recoverable in this form of action."

However, in *Pierce v. Underwood*, 103 Mich. 64, the court said: "The only other question is whether defendant can be allowed to set off his claim for services, or show the extent of such claim in reduction of plaintiff's damages. We think he can. The money in question came into his hands in the course of his employment. That employment continued for one year, during which time she made no demand for the money. It was not until after the litigation had been disposed of that she applied for the money. In the meantime he had expended, in the course of the litigation, various sums in her behalf, and had performed professional services for her without demand for further payments. It is well settled that an attorney has a lien upon the money of his client, in his possession, to secure payment for his professional services, not only in the suit to which it pertains, but in other suits. *Robinson v. Hawes*, 56 Mich. 135. That was an action of trover, and it was there held that the recovery was subject to the lien. In *Rall v. Cook*, 77 Mich. 681, it was held that a mortgagee who obtained a bill of sale of the mortgaged property by fraud might, in an action of trover brought by the mortgagor, show the extent of his mortgage lien in reduction of damages; citing *Brink v. Freoff*, 40 Mich. 610, 44 Id. 69; *Daggett v. McClintock*, 56 Id. 51.

The action of trover has been termed an equitable action. As is held in *Rall v. Cook*, the damages awarded in such action should only be such as the party is entitled to under the circumstances of the case. If plaintiff is allowed to recover the full amount claimed, defendant may immediately sue her, and recover as damages the amount of his fees and expenditures. There is no valid reason why the whole matter may not be disposed of in the first suit, and circuity of action is thereby avoided."

**RECOUPMENT:** Recoupment may be defined as keeping back something alleged to be due, because there is an equitable reason for withdrawing it. It may be said that recoupment denies the validity of

the plaintiff's cause of action to so large an amount as he claims. *M'Hardy v. Wadsworth*, 8 Mich. 354.

**DISTINCTION BETWEEN SET-OFF AND RECOUPMENT:** Recoupment is not an independent cross claim; like a set-off which may consist of separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of or connected with the contract or transactions which forms the basis of the plaintiff's action. It goes only in abatement or reduction of the plaintiff's claim, and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand. No judgment can be rendered for the defendant for any balance due him. *M'Hardy v. Wadsworth*, 8 Mich. 354.

**LIQUIDATED DEMANDS, SET-OFF, RECOUPMENT:** In *Ward v. Fellers*, 3 Mich. 280, the court said: "At the common law, a defendant was in no instance allowed to recover a judgment for damages for a positive claim against a plaintiff. To obviate the rigor of this rule of law, and as well to avoid a multiplicity of actions as to enable parties where there were mutual cross demands unconnected with each other, and arising upon contract express or implied, which are liquidated or capable of being ascertained by calculation, and not resting in opinion only, to have the whole adjudicated upon in one action, the statutes of set-off were enacted. Hence, set-off is the compensation of one debt or demand for another, by virtue of which damages are recovered by the party in whose favor a balance shall be found, and the judgment is statutory. But at the common law before the adoption of the statutes of set-off, the defendant was entitled to show that the plaintiff had not sustained damages to the extent alleged, and thus to reduce, or altogether defeat, the plaintiff's recovery. This right of the defendant was, however, in the earlier period of the law, of very limited application, and could only be resorted to when the defendant insisted upon a deduction from the plaintiff's demand arising from payment in part or in whole, or former recovery, or some analagous fact. See *Sedg. on Dam's*, 2 ed. ch. 17. It was denominated recoupment, and is defined by *Jacobs*, and by *Cunningham*, (*Law Dic.*, Title *Recoupe*,) to be 'the keeping back and stopping something which is due, and in our law we use it for to defalk or discount, as if a person hath a rent of ten pounds out of certain lands, and he dissesseis the tenant of the land in an assise brought by the disseisee, if he recovers the land and damages, the disseisee shall recoupe the rent due in the damages. So of a rent charge issuing out of lands paid by the said tenant to another, &c., he may recoupe the same. And an inn-keeper may keep back and detain his guest's horse, &c., 'til he pay for his entertainment; but a man that receives another's cattle to pasture, it is said, may not do so, unless it be agreed at the first.' By this definition we can perceive within what very narrow limits this doctrine was originally restricted, and how closely the idea of retention or keeping back was involved in it. 'It is evident,' says Mr. *Sedgwick*, (see *Sedg. on Dam's*, 2 ed. 431), 'that recoupe, or recoupment, in its original sense, was a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were not really as high as alleged.' This was allowed to avoid circuity of action, and was only permissible when the subject matter of reduction sprang immediately from the claim relied upon by the plaintiff."

**STATUTORY CONSTRUCTION:** This provision precludes the interposition of a claim as set-off, when it has arisen after the commencement of the action. *Godkin v. Weber*, 158 Mich. 515. In *Ward et al v. Fellers et al.*, 3 Mich. 285, the court said: "At the common law, a defendant was in no instance allowed to recover a judgment for damages for a positive claim against a plaintiff. To obviate the rigor of this rule of law, and as well to avoid a multiplicity of actions as to enable parties where there were mutual cross demands unconnected with each other, and arising upon contract express or implied, which was liquidated or capable of being ascertained by calculation, and not resting in opinion only, to have the whole adjudicated upon in one action, the statutes of set-off were enacted. Hence, set-off is the compensation of debt or demand for another, by virtue of which damages are recovered by the party in whose favor a balance shall be found, and the judgment is statutory." Again, in *Woods v. Ayres*, 39 Mich. 349, the court said: "The right of set-off at law is given and limited by statute. The common law never recognized it. *Bac. Ab.*, Tit. "Set-off." The provisions concerning set-off must therefore be consulted to see in what cases and in what circumstances the right is admitted. Unless a case is positively embraced by the specifications enacted by the Legislature, the remedy is absolutely denied and the claim will remain to be separately enforced as though there were no such statute.

Now the first pre-requisite under the law allowing set-off is that the demand has arisen "upon judgment, or upon contract express or implied" (Comp. L., §796, subd. 1), and unless it has originated in one of these ways it is incapable of being set off. The demands in question did not rise on judgment or upon express contract. So much may be taken for granted. If then, they were capable of being set off, it must be because they arose on implied contract. Did they originate in that way? The question is not whether they constituted assumpsits in some metaphorical or artificial sense,—whether under the license allowed in modern times in applying forms of action they might not be sued in assumpsit,—but it is whether in the sense of the statute of set-off they were causes of action on true implied contract." The right of set-off is purely a statutory right, and must be strictly pursued. *Bradley v. Thompson Smith's Sons*, 98 Mich. 449; *Robbins v. Brooks*, 42 Mich. 63. In the first case the court said: "The right of set-off has its origin in the injustice of allowing a person to collect a debt when he is at the same time indebted to his debtor in a sum as large or larger than his own claim. And one who buys a claim against another, not negotiable, takes it subject to all rights of set-off due at the time of his purchase. If A. buys a claim due today, B. can set off a debt which is due. If, however, A. has bought the claim half an hour before midnight, the rule is said to be otherwise, though it is difficult to see much difference in defendants' equities in the two cases. Where the defendant, with his plea, gave notice of set-off contending at the trial that a verdict for the sum should be directed in his favor, and the court instructed the jury to allow the sum to defendant in any verdict that they might render with interest at the rate of 5%, the court in reversing the judgment in favor of the defendant. *Jordon v. Walker*, 154 Mich. 398. Under this statute set-offs are only allowed, where there are several defendants, when the demand be to set off is due them all jointly, except where other pro-

vision is expressly made by law. *Wolff v. Jasspon*, 126 Mich. 18. It is no ground for reversal of judgment where the trial court refuses to permit the defendant to amend his notice of set-off during the trial of an action on a promissory note for the purpose of adding a further claim. *Rawlings v. Fisher*, 110 Mich. 19.

Subd. 1.—*Bradley v. Thompson Smith's Sons*, 98 Mich. 449; *Woods v. Ayres*, 39 Mich. 348.

Subd. 2.—See *Peterson v. Door Sash, etc., Co.*, 51 Mich. 86; *Brennan v. Teilsort*, 48 Mich. 397.

Subd. 3.—See *Hendricks v. Toole*, 29 Mich. 340; *Newberry v. Trowbridge*, 13 Mich. 275; *Graw v. Pettibone*, 10 Mich. 537.

Subd. 4.—See *Godkin v. Weber*, 158 Mich. 515, 122 N. W. 1083; *Lange v. Perley*, 47 Mich. 352.

Subd. 5.—See *Willard v. Fralick*, 31 Mich. 431; *Granger v. Hathaway*, 17 Mich. 500; *Wallace v. Finnegan*, 14 Mich. 170; *Smith v. Warner*, 14 Mich. 157.

Subd. 6.—See *Andrias v. School District No. 4*, 138 Mich. 54; *MacGraw v. Union Trust Co.*, 138 Mich. 521; *Wolff v. Jasspon*, 126 Mich. 11; *Robbins v. Brooks*, 42 Mich. 62; *Sager v. Tuper*, 38 Mich. 258; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183.

Subd. 7.—See *Ferguson v. Millikin*, 42 Mich. 441.

Subd. 8.—See *Finn v. Corbitt*, 36 Mich. 318; *Smith v. Warner*, 16 Mich. 390.

#### (12469). Holder Sues all Parties.

SEC. 2. Whenever the holder of any bill of exchange, or promissory note, instead of bringing separate suits against the drawers, makers, guarantors of the payment thereof, indorsers and acceptors of such bill or note, includes all or any of the said parties to the bill, or note, in one action, any person or persons sued, shall be entitled to set-off his or their demand against the plaintiff, and if the whole amount of the demands set-off by any, or all of the defendants, shall be equal to, or shall exceed the amount of the plaintiff's demand, as proved on the trial, judgment shall pass in favor of the defendants generally; but if a balance shall be found in favor of the plaintiff, the verdict or judgment shall show the amount allowed to each defendant as a set-off against the plaintiff's demand.

HISTORY: Re-enacts and merges Sec. 6, R. S. '46, Ch. 99, being C. L. '57, (4160); As Am. '71, p. 36, Act 36, Eff. July 18; C. L. '71, (5776); How. 7345; C. L. '97, (10055); and Sec's. 9 and 10, R. S. '46, Ch. 99, being C. L. '57, (4163)-(4164); C. L. '71, (5779)-(5780); How. 7348-9; C. L. '97, (10058)-(10059), unchanged.

#### (12470). Notice.

SEC. 3. To entitle a defendant to a set-off or recoupment,

he must annex a notice thereof to his plea of the general issue, with a bill of particulars of such set-off or recoupment in all cases where such bill might be demanded.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 99, being C. L. '57, (4181); C. L. '71, (5797); How. 7366; C. L. '97, (10076), inserting "or recoupment" after "set-off" and adding the last clause in relation to the bill of particulars. Modified.

**BILLS OF PARTICULARS OF SET-OFF AND RECOUPMENT:** It is required that in all cases where a bill of particulars would be legally demandable, a defendant claiming a set-off or recoupment shall furnish a bill of particulars of his claim with his plea.

**NOTICE OF SET-OFF:** A notice of set-off in terms as broad as the common money counts in assumpsit will, if no bill of particulars is called for, cover anything that could be proved as a demand under such counts. *Ferguson v. Mullikin*, 42 Mich. 441. An account verified under the statute may operate as notice. *Kinney v. Robison*, 52 Mich. 392. See *McGowan v. Lamb*, 66 Mich. 615. Effect of withdrawal of notice on admission of evidence. *Donovan v. Halsey Fire Engine Co.*, 58 Mich. 38. See *Mead v. Harris*, 101 Mich. 586. The set-off must also be claimed on the trial as well as in the pleadings. *Karwick v. Pickands*, 181 Mich. 170; *Jordan v. Walker*, 154 Mich. 394; *Peterson v. Door, Sash & Lumber Co.*, 51 Mich. 36.

**DISCONTINUANCE OR NON-SUIT:** Plaintiff not allowed after notice of set-off. See Compilers' Section (12475).

#### (12471). Judgment.

**SEC. 4.** If the amount of the set-off duly established, be equal to the plaintiff's debt or demand, judgment shall be entered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 99, being C. L. '57, (4182); C. L. '71, (5798); How. 7367; C. L. '97, (10077), remains unchanged.

**CITED:** *Merchant's Bank v. Schulenberg*, 54 Mich. 52.

#### (12472). Judgment for Defendant.

**SEC. 5.** If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered for the defendant for the amount thereof; but no such judgment shall be rendered against the plaintiff, when the contract, which was the subject of the suit, shall have been assigned before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 99, being C. L. '57,

(4183); C. L. '71, (5799); How. 7368; C. L. '97, (10078), remains unchanged.

CONSTRUED: Merchant's Bank v. Schulenberg, 54 Mich. 52. Wherein an action upon an account by one holding a naked assignment thereof and charges existing against the assignor at the time of the assignment, they are available to the defendant as a set-off and the defendant can not have judgment for more than the amount for which plaintiff sued. Pabst Brewing Co. v. Lueders, 107 Mich. 41; Hall v. Kimmer, 61 Mich. 269.

**(12473). Set-offs in Suits by Executors and Administrators.**

SEC. 6. In suits brought by executors and administrators, demands existing against their testators or interests, and belonging to the defendant at the time of their death, may be set-off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.

HISTORY: Re-enacts Sec. 30, R. S. '46, Ch. 99, being C. L. '57, (4184); C. L. '71, (5800); How. 7369; C. L. '97, (10079), remains unchanged.

NOTE: The word "interests" in the second line of the above section is an error and should be "Intestates."

CONSTRUED: Boltwood v. Miller, 112 Mich. 657.

**(12474). Judgment Against Executors.**

SEC. 7. When a set-off is established in a suit brought by executors or administrators and a balance found due the defendant, the judgment shall be against them in their representative character, and shall be evidence of a debt established, to be paid in the course of administration.

HISTORY: Re-enacts Sec. 31, R. S. '46, Ch. 99, being C. L. '57, (4185); C. L. '71, (5801); How. 7370; C. L. '97, (10080), remains unchanged.

**12475). Plaintiff not to Discontinue.**

SEC. 8. In any action hereafter commenced in this state when the defendant has given notice of a set-off or recoupment, the plaintiff shall not be allowed to discontinue his suit or submit to a non-suit without the consent of the defendant.

HISTORY: Re-enacts Sec. 1 of Act 123 of '85, being How. 7370a; As Am. '97, p. 9, Act 5, Eff. Aug. 30; C. L. '97, (10081), unchanged.

CONSTRUED: See Busch v. Jones, 94 Mich. 223; Port Huron Savings Bank v. St. Clair Circuit Judge, 147 Mich. 553; Former Rule. Merchants' Bank v. Schulenberg, 54 Mich. 49.



**(12476). Set-offs in Equity.**

SEC. 9. In suits in equity for the payment or recovery of money, set-offs shall be allowed in the same manner, and with the like effect, as in actions at law.

HISTORY: Re-enacts Sec. 26, R. S. '46, Ch. 90, being C. L. '57, (3480); C. L. '71, (5062); How. 6616; C. L. '97, (438), with one slight change in phraseology. Modified.

SET-OFFS: Upon ordinary debts the rules of set-offs are alike both at law and in equity. *Hendricks v. Toole*, 29 Mich. 432. But equity will not allow a set-off not allowable in a court of law, unless there are special equities growing out of the transactions itself requiring it. *Lockwood v. Beckwith*, 6 Mich. 175; *Hess v. Final*, 32 Mich. 515. An equitable set-off will not be allowed simply because of the insolvency of the party against whom it is sought to be set up. *Lockwood v. Beckwith*, 6 Mich. 168; *Hale v. Holmes*, 8 Mich. 37. Equity will not compel the vendor of property to allow a set-off against the purchase price, nor compel him to accept his own notes in payment. *Hale v. Holmes*, 8 Mich. 37; *Williams v. Jackson*, 31 Mich. 485. See also *McGraw v. Pettibone*, 10 Mich. 530; *D. & M. R. Co. v. Griggs*, 12 Mich. 45; *Disbrow v. Jones*, Har. 102; *Wolf v. Jasspon*, 126 Mich. 11; *Carpenter v. Hood*, 172 Mich. 533. See also *Banking Com'r. v. State Bank*, 185 Mich. 24. Claim equitable in its nature and unliquidated cannot be set-off. *Critz v. Cropsey*, March, 1916, 190 Mich. 690.

**(12477). Recoupment.**

SEC. 10. In any action, in any court, if the defendant shall claim damages by way of recoupment, by plea or otherwise, in pursuance of the rules and practices of such court, and on the trial of the issue formed, if the court or jury trying the same shall find such defendant entitled to an amount of damages, whether liquidated or not, greater than the amount of the demand of the plaintiff, the court shall give judgment according to the true right thereof for the defendant, for the amount of such excess so found and costs, and issue execution therefor against the plaintiff, as in cases of judgment and execution on plea or notice of off-sets.

HISTORY: Re-enacts Sec. 1 of Act 174 of '61, being C. L. '71, (5802); How. 7371; C. L. '97, (10082), unchanged.

RECOURPMENT: Distinguishable from set-off in these particulars: (1) In being confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought. (2) In having no regard to whether or not such matters be liquidated or unliquidated. (3) The judgment is not the subject of statutory regulation, but controlled by the rule of the common law. *Ward v. Fellers*, 3 Mich. 287. The third distinguishing feature has been changed by this statute; but, prior to its enactment, a defendant could recoup only in abatement of plaintiff's claim. *McHardy v. Wadsworth*, 8 Mich.

354. Only such damages can be recouped as spring out of the contract or transaction sued upon. *Ward v. Willson*, 3 Mich. 1, 11; *Allen v. McKibbin*, 5 Mich. 449; *Thompson v. Richards*, 14 Mich. 172; *Holland v. Rea*, 48 Mich. 218; *Morehouse v. Baker*, 48 Mich. 335. But the right of recoupment is not confined to damages arising before action brought, but may include anything for which a cross-action would lie at the time of pleading. *Platt v. Brand*, 26 Mich. 173. Recoupment is favored as preventing a multiplicity of suits. *Id.*; *Morehouse v. Baker*, 48 Mich. 335; *Allen v. McKibbin*, 5 Mich. 449. And it is as applicable in cases of tort as in cases arising on contract. *Chandler v. Childs*, 42 Mich. 128; *Ward v. Fellers*, 3 Mich. 28.

But in the case of *Dearing Boiler Co. v. Thompson*, 156 Mich. 369, court held that recoupment could not be pleaded in actions of replevin. It is equivalent to a cross-action.—*Allen v. McKibbin*, 5 Mich. 449; *Widrig v. Taggart*, 51 Mich. 103. It cannot be enforced against an infant. *Widrig v. Taggart*, 51 Mich. 103. Nor be based upon a contract void because made on Sunday. *Brazee v. Bryant*, 50 Mich. 136. Or void because made ultra vires. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146. It must be based upon the same contract or transaction upon which suit is brought. *Ward v. Willson*, 3 Mich. 1; *Molby v. Johnson*, 17 Mich. 382; *Holland v. Rea*, 48 Mich. 218; *Morehouse v. Baker*, 48 Mich. 335; *Brazee v. Bryant*, 50 Mich. 136; *Forrest v. Johnson*, 100 Mich. 321; *Helwig v. Lascowski*, 82 Mich. 619; *Haldeman v. Berry*, 74 Mich. 424; *Rens v. Grand Rapids*, 73 Mich. 237. *Sharpless Separator Co. v. Brown*, 174 Mich. 17. Recoupment will not lie for breach of warranty of an executory contract of sale, under which title was not to pass on delivery. *Moneyweight Scale Co. v. David*, 180 Mich. 8. Where defendant's acts amount to an acceptance of goods sold, he cannot recoup for breach of vendor's duty to furnish goods in conformity with the contract specifications. *Paper Co. v. Eichburg*, 184 Mich. 30.

See further, on the principle of recoupment, *Fuller v. Parrish*, 3 Mich. 211; *Bancroft v. Peters*, 4 Mich. 628; *Strong v. G. T. R. R. Co.*, 15 Mich. 206; *M. E. Church v. Ladd*, 22 Mich. 280; *Willey v. Sch. Dist.*, 25 Mich. 419; *Wilson v. Wagar*, 26 Mich. 452; *Begole v. McKenzie*, 26 Mich. 470; *Overpack v. Ruggles*, 27 Mich. 65; *McSloy v. Ryan*, 27 Mich. 110; *Am. Ex. Co. v. Phillips*, 29 Mich. 516; *Chapman v. Dease*, 34 Mich. 375; *Moon v. Harder*, 38 Mich. 566; *Martus v. Houck*, 39 Mich. 431; *Hopkins v. Sanford*, 41 Mich. 244; *Ferguson v. Millikin*, 42 Mich. 441; *Chandler v. Childs*, 42 Mich. 128; *Worth v. McConnell*, 42 Mich. 473; *Baughman v. Gould*, 45 Mich. 481; *Jackson v. Armstrong*, 50 Mich. 65; *Hudnutt v. Comstock*, 50 Mich. 596; *Benjamin v. Richards*, 51 Mich. 110; *Conkling v. Tuttle*, 52 Mich. 630; *Dickinson v. Wright*, 56 Mich. 42; *Gage v. Meyers*, 59 Mich. 300; *Jenkinson v. Monroe*, 61 Mich. 454; *Minnaugh v. Partlin*, 67 Mich. 391; *Wickes v. Elec. Lt. Co.*, 70 Mich. 322; *Roebbling's Sons v. Hematite Co.*, 70 Mich. 346; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147; *McGregor v. Ross' Estate*, 96 Mich. 103; *Telephone Co. v. Noble*, 98 Mich. 68; *Brewing Co. v. Wall*, 98 Mich. 158; *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221; *Delbridge, Brooks & Fisher v. Patterson*, 105 Mich. 413; *Powers v. Daily*, 106 Mich. 61; *Perkins v. The Golden Girl*, 185 Mich. 200; *Manistee*

Navigation Co. v. Filer, 185 Mich. 302; Fay & Eagan Co. v. Cummer Mfg Co., Mar. 1916, 190 Mich. 281.

**NOTICE OF RECOUPMENT:** Is not required to contain all the requisites of a special plea under the former practice, nor is it required to contain the substance of a special plea or be good on general demurrer. Liggett S. & A. Co. v. Buggy Co., 106 Mich. 445, citing Cressinger v. Reed, 25 Mich. 450; Rosenbury v. Angell, 6 Mich. 514; McHardy v. Wadsworth, 8 Mich. 349; Bailey v. Kalamazoo Pub. Co., 40 Mich. 254; Brown v. Moore, 32 Mich. 257; Farmer's Ins. Co. v. Crampton, 45 Mich. 421; Briesenmaster v. Sup. Lodge, Etc., 81 Mich. 525. See, also, Ward v. Willson, 3 Mich. 1; Ferguson v. Milliken, 42 Mich. 441; Roethke v. Brewing Co., 33 Mich. 341; Ritter v. Daniels, 47 Mich. 617; Bolt v. Friederick, 56 Mich. 20; McKeivitte v. Feige, 57 Mich. 374; Watkins v. Ford, 69 Mich. 357; Maltby v. Plummer, 71 Mich. 578; Canal Co. v. Roberts, 72 Mich. 49; Sinker, Davis & Co. v. Diggins, 96 Mich. 557. A defendant is bound by his notice of recoupment and cannot enlarge its scope by claiming damages not specified therein. Taylor v. Salt & Lumber Co., 103 Mich. 1.

Recoupment is distinguishable from set-offs in three particulars: (1). In being confined to matters arising out of, and connected with, the transaction of contract upon which the suit was brought; (2). In having no regard to whether or not such matters be liquidated or unliquidated; (3). The judgment is not the subject of statutory regulations, but controlled by the rule of the common law. Ward v. Fellers, 3 Mich. 287. In this case the court said: "But while it is said that by the application of the doctrine of recoupment, circuity is avoided, and the rights of parties adjusted in one and the same suit, it must be understood that such adjustment is only by way of abatement or reduction, and that no other judgment can be rendered than such as is authorized by the rules of the common law. This necessarily follows from what has already been said, and a reference to a few of the many authorities which might be cited upon this subject will show that such is the universally received doctrine. In Stone v. Yarwood, *ubi supra*, it is said 'the defendant's claim is deducted from that of the plaintiff, and the latter recovers the excess only. The defendant is not allowed to recover any balance. He uses his demand in mitigation of damages only. He may recoupe to the extent of the plaintiff's damages, but he cannot, as in the case of a set-off, recover any excess in his favor.' In Bateman v. Pierce, *ubi supra*, the court say, 'for the purpose of avoiding circuity or multiplication of actions, and doing complete justice to both parties, they are allowed and compelled, if the defendant so elects, to adjust all their claims growing out of the same contract in one action.' And in a subsequent portion of the same opinion, this language is explained and qualified as follows: 'The defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross action; and whatever may be the amount of his damages, he can only set them up by way of abatement, either in whole or in part of the plaintiff's demand. He cannot, as in the case of a set-off, go beyond that, and have a balance certified in his favor.'"

**AS TO RECOUPMENT:** Holser v. Skae, 169 Mich. 484; Powers v. Dally, 106 Mich. 61; Brooks & Fisher v. Patterson, 105 Mich. 413; McKinnon Mngf. Co. v. Alpena Fish Co., 102 Mich. 221; Brewing Co.

v. Wall, 98 Mich. 158; Telephone Co. v. Noble, 98 Mich. 68; McGregor v. Ross' Estate, 96 Mich. 103; Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147; Roebbing's Sons v. Hematite Co., 70 Mich. 346; Wickes v. Elec. Lit. Co., 70 Mich. 322; Minnaugh v. Partlin, 67 Mich. 391; Jenkinson v. Monroe, 61 Mich. 454; Gage v. Meyers, 59 Mich. 390; Dickinson v. Wright, 56 Mich. 42; Conkling v. Tuttle, 52 Mich. 630; Benjamin v. Richards, 51 Mich. 110; Hudnutt v. Comstock, 50 Mich. 596; Jackson v. Armstrong, 50 Mich. 65; Baughman v. Gould, 45 Mich. 481; Woth v. McConnell, 42 Mich. 473; Chandler v. Childs, 42 Mich. 128; Ferguson v. Millikin, 42 Mich. 441; Hopkins v. Sanford, 41 Mich. 244; Martus v. Houck, 39 Mich. 431; Moon v. Harder, 38 Mich. 566; Chapman v. Dease, 34 Mich. 375; Am. Ex. Co. v. Phillips, 29 Mich. 515; McSloy v. Ryan, 27 Mich. 110; Overpack v. Ruggles, 27 Mich. 65; Begole v. McKenzie, 26 Mich. 470; Wilson v. Wagar, 26 Mich. 452; Wildey v. Sch. Dist., 25 Mich. 419; Church v. Ladd, 22 Mich. 280; Strong v. G. T. R. R. Co., 15 Mich. 206; Bancroft v. Peters, 4 Mich. 628; Fuller v. Parrish, 3 Mich. 211.

AS TO NOTICE: Taylor v. Butters, etc., Lumber Co., 103 Mich. 1; Liggett Spring, etc., Co. v. Michigan Buggy Co., 106 Mich. 445; Sinker, etc., Co. v. Diggins, 96 Mich. 357; Delaware, etc., Canal Co. v. Roberts, 72 Mich. 49; Maltby v. Plummer, 71 Mich. 578; Watkins v. Ford, 69 Mich. 357; Roethke v. Best Brewing Co., 32 Mich. 341.

#### (12477a). Action for Recovery of Damages.

SEC. 11. *In any action hereafter brought in any court of the state to recover damages for any injury to person or property, wherein recovery is sought because of the alleged negligence of the defendant, or of his agent, servant, representative or employee, or for the alleged breach of a statutory duty owing thereby, such defendant may, at the time of filing and serving his plea, also file and serve a cross-declaration against the plaintiff setting forth the facts in any cause of action for damages or injury to his person or property because of the alleged negligence of the plaintiff or his agent, servant, representative or employee he may have against said plaintiff arising out of the occurrence, forming the basis of plaintiff's case. Thereupon such plaintiff shall proceed as though an independent action had been started against him by defendant and shall plead to such cross-declaration or take such other step with reference thereto as may be authorized by statute or by rule of court: Provided, That with the permission of the court such cross-declaration may be filed and served subsequently to the filing and service of defendant's plea.*

P. A. '17, Act No. 294, Eff. Aug. 12, '17.

**(12477b). Causes of Action Determined.**

**SEC. 12.** *If a plea of the general issue is interposed to plaintiff's declaration and to defendant's cross-declaration, the alleged causes of action of both plaintiff and defendant shall be determined in the same trial or proceeding. A demand for a trial by jury in one of said causes shall be deemed a demand for both and the same jury shall decide both issues, if submitted thereto by the court, returning a verdict for plaintiff or defendant as the case may be. Each party shall be deemed to have the burden of proof with reference to the cause of action set forth in his declaration, or in his cross-declaration, as the case may be.*

P. A. '17, Act No. 294, Eff. Aug. 12, '17.

## CHAPTER XVI.

### OF THE STATUTE OF AMENDMENTS.

#### (12478). Amendments.

**SECTION 1.** The court in which any action or proceeding shall be pending, shall have power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment or decree rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings, which do not affect the substantial rights of the parties.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 104, being C. L. '57, (4415); C. L. '71, (6047); How. 7631; C. L. '97, (10268), with a slight change in phraseology, and the addition of the last sentence in the above section. This last sentence was taken from U. S. Equity Rules, Rule 19. Modified.

**CONSTRUED:** The statute of amendments is the basis of all the modern relaxation of rules of practice; and the manifest object of that statute is to give parties who are met with such objections on a trial the right of amendment on reasonable terms, and to make a verdict where no point has been previously made at all, valid to rectify all defects that are not so radical as to leave nothing to amend, and to treat the record as if it had been actually amended. (Campbell, J.). *Schindler v. Railway Co.*, 77 Mich. 154.

The circuit court has no authority to grant amendments on special appeal. *E. S. Knowles & Son v. Cavanaugh*, 144 Mich. 265; *Wells v. Fidelity & Guaranty Co.*, 160 Mich. 213. Where a defect in a declaration was such that it could have been amended at the trial, an objection based thereon, raised for the first time on appeal, will not be considered. *Foley v. Dwyer*, 122 Mich. 587.

The statute of amendments cures technical errors in awarding interlocutory judgment, ordering an assessment of damages and giving final judgment, if on the entire record the result should not be disturbed. *Whittemore v. Stephens*, 48 Mich. 572, 579. The provisions of this statute apply to cases in justices' courts as well as to courts of record. *Kidd v. Dougherty*, 59 Mich. 243; *Drew v. Dequindre*, 2 Doug. 93; *Barber v. Smith*, 41 Mich. 144. This statute has always been very liberally construed. *Beecher v. Pudges*, 70 Mich. 363; *Portsmouth Savings Bank v. Judge*, 83 Mich. 651; *Smith v. Pinney*, 86 Mich. 492. This statute applies to attachment cases as well as to others. *Barber v. Smith*, 41 Mich. 144; *Drew v. Dequindre*, 2 Doug. 93.

Where the amendment is not allowed on the erroneous belief that

it sets up a new cause of action, it is reversible error. *Lyle v. Detroit*, 157 Mich. 442. Plaintiff may amend declaration after the jury retires. *Garnsley v. Boyce*, 158 Mich. 9. A garnishee may amend his disclosure at any time before judgment. *Dunn v. Savings Bank*, 118 Mich. 549.

**AMENDMENTS SHOULD BE ALLOWED:** An amendment in furtherance of justice, which neither surprises the opposite party nor deprives him of any essential right, should be allowed. *People v. La Grange Twp. Board*, 2 Mich. 191-2; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 187; *Lyman v. Becannon*, 29 Mich. 466; *Hopkins v. Briggs*, 41 Mich. 175; *Green v. Kindy*, 43 Mich. 281; *Collins v. Beecher*, 45 Mich. 436; *Chapman v. Colby*, 47 Mich. 47; *Cummin v. Wilcox*, 47 Mich. 501; *Sutton v. Van Akin*, 51 Mich. 463; *Frederick v. Judge*, 52 Mich. 534; *Smith v. Sherman*, 52 Mich. 637; *Postsmouth Savings Bank v. Judge*, 83 Mich. 651; *Wood v. Judge*, 84 Mich. 524; *Shearer v. Middleton*, 88 Mich. 621; *Smith v. Pinney*, 86 Mich. 484; *Wood v. Insurance Co.*, 96 Mich. 439; *Tuller v. Ginsburg*, 99 Mich. 137; *Edwards v. Three Rivers*, 102 Mich. 154-5; *Hoban v. Cable*, 102 Mich. 213. Where amendments can be made by the record, they should be allowed with liberality. *Emery v. Whitwell*, 6 Mich. 474. But will not be allowed to prejudice rights of third parties acquired while the proceedings were defective. *Montgomery v. Merrill*, 36 Mich. 97.

**AMENDMENT TO DECLARATION:** An amended declaration cannot introduce a new cause of action. *Angell v. Pruyn*, 126 Mich. 19; *Drew v. Judge*, 1 Doug. 434; *Fire Ins. Co. v. Judge*, 77 Mich. 236. An amendment is allowable which does not change the form of the action, but charges that defendant committed the acts complained of in a different manner or in a different capacity. *Gerkin v. Brown & Sehler Co.*, 177 Mich. 51; *Shearer v. Middleton*, 88 Mich. 624; *Strang v. Judge*, 108 Mich. 229; *Harris v. Thomas*, 140 Mich. 465; *Jones v. Pendleton*, 151 Mich. 444; *Croze v. Land Co.*, 153 Mich. 376. See also *Vreeland v. Loekner*, 99 Mich. 93; *Brassel v. Railway Co.*, 101 Mich. 5; *Edwards v. Three Rivers*, 102 Mich. 154; *Pratt v. Judge*, 105 Mich. 500; *Cleveland v. Rothschild*, 138 Mich. 90; *Garnsley v. Boyce*, 158 Mich. 9; *Knudsen v. Muskegon*, 158 Mich. 185. But it cannot be so amended as to change the form of the action. *Hensler v. Judge*, 13 Mich. 206; *Drew v. Judge*, 1 Doug. 434. A mere change in date does not introduce a new cause of action. *Beneway v. Thorp*, 77 Mich. 184; *Niemarck v. Schwartz*, 51 Mich. 466; *Keating v. Ins. Co.*, 160 Mich. 649; *Hapke v. Davidson*, 180 Mich. 148. Nor a change of the place of injury to a point 500 feet north instead of 500 feet south of a certain point. *Paskan v. Allouez Mining Co.*, 185 Mich. 329. An amendment cannot be allowed which sets up new claims already barred by the statute of limitations. *Nugent v. Judge*, 93 Mich. 462; *M. C. R. Co. v. Judge*, 35 Mich. 227; *Gorman v. Judge*, 27 Mich. 138. The statute of limitations cannot be evaded under the guise of an amendment. *Wingert v. Judge*, 101 Mich. 397. An amendment after the running of the statute of limitations which changes the allegations of negligence, but relates to the same injury, is permissible. *Brown v. Railway*, 179 Mich. 404. In an action against a city, the declaration may be so amended as to show that plaintiff, pursuant to the city charter, gave proper notice to the city, although the amendment was allowed after the time to give such notice had expired. *City of Detroit v. Judge*, 125 Mich. 634. Adding new counts. *Drew v. Judge*, 1 Doug. 434; *Long v. Judge*,

27 Mich. 164; *Chapman v. Colby*, 47 Mich. 52. A count which has been abandoned may be later reinserted. *Merrill v. Leisenring*, 166 Mich. 219. See also *Id.*, 157 Mich. 133. Plaintiff may amend by striking out certain of the charges. *Aronson v. Baldwin*, 178 Mich. 565. Where action was brought by *capias*, an amendment differing from the cause set up in the affidavit was not allowed. *Musselman Grocer Co. v. Casler*, 138 Mich. 24. See also *Priebsch v. Ottenwess*, 176 Mich. 483. A justice of the peace can on an adjourned day allow plaintiff to amend. *Moser v. White*, 171 Mich. 105. A new element of damages can be introduced by amendment. *Gates v. Beebe*, 170 Mich. 109. When the case made by the declaration does not conform to the statute and upon the clause alluding to the statute may be stricken out. *McIntyre v. Murphy*, 153 Mich. 344. The omission to aver assignment of a demand sued upon by the assignee may be cured by amendment. *Kelly v. Waters*, 31 Mich. 404; *Waldron v. Harris*, 28 Mich. 493, 495; *Harris v. Chamberlain*, 126 Mich. 280; *Farnum v. Doyle*, 128 Mich. 697; *Howland v. Caille*, 153 Mich. 349; *Worden Grocer Co. v. Blanding*, 161 Mich. 257; *Miller v. Supply Co.*, 150 Mich. 299. Amendment increasing the *ad damnum* clause when allowable. *Borden v. Clark*, 26 Mich. 410. But in appeal cases it cannot be increased beyond the justice's jurisdiction. *Evers v. Sager*, 28 Mich. 47. Amendment of description of plaintiff's title, in ejectment. *Fisher v. Hallock*, 5 Mich. 463; *Hoban v. Cable*, 102 Mich. 213; *Bringham v. Railroad Co.*, 78 Mich. 570; *Ludeman v. Hirth*, 96 Mich. 17.

If there is a possibility of making such amendments as will present a good case, such amendments will be permitted, when the declaration is objected to, on the most favorable terms. *Schindler v. Railway*, 77 Mich. 154; see also *Conn. F. Ins. Co. v. Judge*, 77 Mich. 231; *F. & P. M. Rd. Co. v. Judge*, 108 Mich. 80; *Rathbun v. Parker*, 113 Mich. 594; *Hohn v. Casualty Co.*, 115 Mich. 79; *Willett v. M. C. R. R.*, 114 Mich. 411; *Hathaway v. Railway*, 124 Mich. 610; *Arnold v. Brechtel*, 174 Mich. 155; *Davis v. Buss Machine Works*, 175 Mich. 72.

**AMENDMENT TO PLEA AND NOTICE:** It is within the discretion of the trial court to allow an amendment to be made to the notice. *Brown v. Moore*, 32 Mich. 254; *Walbridge v. Tuller*, 125 Mich. 221; *Baptist Church v. Insurance Co.*, 119 Mich. 207. And such amendment may be allowed after appeal from justice's court. *Hopkins v. Briggs*, 41 Mich. 175. After plea of the general issue an amendment to interpose the statute of limitations is discretionary. *Ripley v. Davis*, 15 Mich. 75. And such discretion is not reviewable. *Shank v. Woodworth*, 111 Mich. 642. Where defendant on discovering the nature of the contract sued upon amended his notice so as to deny any liability, the plaintiff was not allowed to rely on any claimed admission of liability under the original notice. *Hickey v. Lundy*, 168 Mich. 336. On the subject of such amendments see also *Tupper v. Kilduff*, 26 Mich. 394; *Polhemus v. Bank*, 27 Mich. 44; *Johnson v. Kibbee*, 36 Mich. 269; *Mason v. Peter*, 58 Mich. 554; *Randall v. Baird*, 66 Mich. 312; *Beecher v. Judges*, 70 Mich. 363; *Deline v. Ins. Co.*, 70 Mich. 435; *Minnock v. Ins. Co.*, 90 Mich. 236.

**IN CHANCERY SUITS:** Amendments as to matters germane to the case can be allowed at any time to conform with the proofs, protect the substantial rights of the parties, and secure the ends



of justice. *City Bank & Trust Co. v. Hurd*, 179 Mich. 464. Matter which constitutes a new bill, or is inconsistent or repugnant to the substantive allegations of the original bill, cannot be introduced by amendment. *Ogden v. Moore*, 95 Mich. 294. A bill of complaint may be amended after the proofs are all in. *Hall v. Hall*, 172 Mich. 212. An amendment to the bill of complaint which merely sets up additional reasons for the same cause of action is permissible. *Kunze v. Solomon*, 126 Mich. 292; *Antoszewski v. Plumbing Co.*, 185 Mich. 215. An amended bill is not barred by limitation, if the original bill was filed in time, and the amendment introduces no new cause of action. *Belden v. Blackman*, 124 Mich. 668. Where an order of publication as signed read "four months," instead of five, but was corrected by the solicitor and was published according to requirements, an amendment of the order to comply with the statute was proper. *Jankvitch v. Hosmer Circuit Judge*, Sept., 1915, 188 Mich. 284. Amendment of answer or plea, see *Brown v. King*, 172 Mich. 355; *Pluchak v. Crawford*, 137 Mich. 509; *Detroit, etc., R. Co. v. McCammon*, 108 Mich. 375. Amendment at the trial. *Central Savings Bank v. O'Connor*, 139 Mich. 84; *Heliker v. Heliker*, 184 Mich. 657. After the entry of a decree a party was allowed to file a replication *nunc pro tunc*. *Daly v. Judge*, 102 Mich. 394. The verification to a cross-bill may be amended after the filing of the decree. *Daly v. Judge*, 102 Mich. 394. Amendment after appeal taken, see *In re Choate's Estate*, 163 Mich. 288; *Robson v. Robson*, 161 Mich. 293; *Bennett v. Fleming*, 207 Mich. 278.

**DIVORCE PROCEEDINGS:** A divorce bill cannot be amended by substituting a prayer that the marriage be annulled. *Schafberg v. Schafberg*, 52 Mich. 429. A defendant to a divorce suit cannot after appeal have the answer amended and the cause remanded for further hearing on the ground that his marriage to complainant was not lawful. *Robson v. Robson*, 161 Mich. 293. See *Daly v. Judge*, 102 Mich. 394.

**CHANGING CAPACITY IN WHICH PARTY SUES:** A declaration cannot be amended as to allow plaintiff, suing as an individual, to sue in the capacity of administrator. *Walker v. Lansing, etc., Trac-tion Co.*, 144 Mich. 686. But see *Osborne v. Osborne*, 156 Mich. 414. A declaration that combines a cause of action to an estate with a cause for the loss of services can be corrected by amendment. *Ver-linde v. Railroad*, 165 Mich. 373. Where plaintiff was described as guardian of certain minors, it was proper to treat the case on error as brought by plaintiff in his capacity as guardian, where no plea in abatement was filed. *Newton v. Railway*, 163 Mich. 373. See also *Fournier v. Railway*, 157 Mich. 539; *Hurst v. Railway*, 84 Mich. 539.

**SET-OFF:** The court may allow defendant at the trial to file notice of set-off and a bill of particulars of the same. *Wellman v. O'Connor-Martin Co.*, 178 Mich. 687.

**BILL OF PARTICULARS:** See *City of Battle Creek v. Haak*, 139 Mich. 514; *Hopke v. Davidson*, 180 Mich. 148. A bill of particulars may be amended at the trial. *Cleveland v. Rothschild*, 138 Mich. 92. See also *Wellman v. O'Connor-Martin Co.*, 178 Mich. 687; *Council v. McNett*, 109 Mich. 331; *Holser v. Skae*, 169 Mich. 484. *Bamlet Realty Co. v. Doff*, 183 Mich. 695.

**MOTION FOR NEW TRIAL:** An amendment to a motion for a new

trial not containing grounds or reasons therefor, germane to those which were stated in the original motion, may not be permitted after term following respondent's conviction. *Nichols v. Flannagan* Circuit Judge, 185 Mich. 654.

**MISNOMER:** In cases of undesigned misnomer, where the interests of substantial justice will allow it, without a real change in the identity of the opposing litigants, an amendment will be allowed. *Welch v. Hull*, 73 Mich. 52, citing *Parks v. Barkham*, 1 Mich. 95; *Merrill v. Kalamazoo*, 35 Mich. 211; *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 319; *Final v. Backus*, 18 Mich. 218; *Barber v. Smith*, 41 Mich. 145. See *Wood v. Judge*, 84 Mich. 524, citing *Morford v. Dieffenbacher*, 54 Mich. 593; *Kinney v. Harrett*, 46 Mich. 87. See *Smith v. Pinney*, 86 Mich. 492, citing *Johr v. Supervisors*, 38 Mich. 536; *McLaughlin v. Wilks*, 42 Mich. 553; *Berrien Co. Treasurer v. Bunbury*, 45 Mich. 79; *Cragin v. Gardner*, 64 Mich. 402; also cases in other states. See *Wood v. Insurance Co.*, 96 Mich. 439-40; *Tuller v. Ginsburg*, 99 Mich. 137. See *Bole v. Lumber Co.*, 77 Mich. 241-2. See note to subdivision 9 of Compilers' Section (12482). A corporation that is made a party to an action under a wrong name, process being served on the right agent or person, may be duly made a party by amendment at the trial. *Daly v. Blair*, 183 Mich. 351.

**MISSTATEMENT OR OMISSION:** A misstatement in a pleading may be corrected at the trial. *McTiver v. Twp. of Grant*, 131 Mich. 456; See also *Gensler v. Nicholas*, 151 Mich. 530. The add damnum clause inadvertently left blank as to the amount may be corrected. *Groat v. Railway*, 153 Mich. 165.

**AMENDMENTS TO PROCESS, ETC.:** Affidavit in replevin. *Taylor v. Buck*, 100 Mich. 181, citing *Baker v. Dubois*, 32 Mich. 92. Bond in replevin. *Hopkins & Son v. Green*, 93 Mich. 395. Sheriff's return to capias. *Heymes v. Champlin*, 52 Mich. 25. Return to summons. *Axtell v. Gibbs*, 52 Mich. 639. Return to writ of attachment. *Kidd v. Dougherty*, 59 Mich. 243. The summons may be made to correspond with the ad damnum clause of the declaration. *Groat v. Railway*, 153 Mich. 165; *Peacock v. Detroit, G. H. & Mil. R. R. Co.*, 208 Mich. 410.

**WHEN CAUSE FOR CONTINUANCE:** If the defendant is taken by surprise by an amendment allowed at the trial, he should be allowed a continuance. *Ruscyk v. Railway*, 180 Mich. 399. And in such instance it is error for the court to refuse to do so. *Gerkin v. Brown & Sehler Co.*, 177 Mich. 47; *Jennings v. Sheldon*, 53 Mich. 431. The adverse party cannot complain that he was taken by surprise by an amendment allowed at the trial where no continuance is asked. *Aronson v. Baldwin*, 178 Mich. 565; *Berston v. Gilbert*, 180 Mich. 640; *Wolverine Spice Co. v. Fallas*, 182 Mich. 364; *Antoszewski v. Plumbing Co.*, 185 Mich. 215. Or where no motion is made until plaintiff's proofs are all in and no showing made. *Crane Lumber Co. v. Bellows*, 116 Mich. 305; See also *Arndt v. Bourke*, 120 Mich. 265; *Brown v. Owosso*, 130 Mich. 107; *Groat v. Railway*, 153 Mich. 167; *Paskavan v. Allouez Mining Co.*, 185 Mich. 329.

**AMENDMENT TO BE FILED:** When an order is obtained granting leave to amend a declaration, the amendment to be effective must be actually made. *Ballou v. Hill*, 23 Mich. 61; *Harris v. Thomas*, 140 Mich. 462; *Carroll v. Mfg. Co.*, 181 Mich. 285. The trial judge

should require the amended declaration to be filed either before verdict or within a reasonable time thereafter. *Harris v. Thomas*, 140 Mich. 465. Where the court permitted an amendment to the declaration and stated of what it should consist, it was immaterial that no amendment was in fact made, as it all appeared upon the record. *Johnson v. Ins. Co.*, 106 Mich. 99; *Farnam v. Doyle*, 128 Mich. 697; *Bosek v. Railway*, 175 Mich. 13; See also *Gates v. Beebe*, 170 Mich. 109.

**DISCRETION WILL NOT BE REVIEWED:** The discretion of the court in the allowance of amendments within the statute, will not be reviewed. *Ripley v. Davis*, 15 Mich. 75; *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44; *Browne v. Moore*, 32 Mich. 256; *King v. Wayne Circuit Judge*, 41 Mich. 727; *Beecher v. Judges*, 70 Mich. 363; *Beneway v. Thorp*, 77 Mich. 184; *Portsmouth Savings Bank v. Henry Hart Circuit Judge*, 83 Mich. 651-2; *Edwards v. Three Rivers*, 102 Mich. 155; *Shank v. Woodworth*, 111 Mich. 642; *Hoyt v. Judge*, 117 Mich. 172; *Baker v. Protective Asso.*, 118 Mich. 433; *Baptist Church v. Ins. Co.*, 119 Mich. 204; *O'Toole v. Ins. Co.*, 159 Mich. 188; *Painter v. Land Co.*, 164 Mich. 266. *Heliker v. Heliker*, 184 Mich. 657. But the refusal of the trial court to amend pleadings when to do so would be clearly in the furtherance of justice, may be reversible error. *Smith, Sturgeon & Co. v. Grosslight*, 123 Mich. 87. The court may refuse an amendment where the case has been pending more than a year. *Lessenau v. Forester*, 163 Mich. 112. At the close of the case the court may refuse to allow defendant to substitute an entirely different and inconsistent defense. *Hermann & Co. v. People's Department Store*, 160 Mich. 224. Refusal to allow an amendment of the declaration after plaintiff has rested and the court is about to direct a verdict is not error. *Prochaska v. Fox*, 137 Mich. 521.

**APPLICATION TO AMEND:** Application to amend must be promptly made on discovery of the defect to be remedied. *Montgomery v. Merrill*, 36 Mich. 97; *Gray v. Judge*, 49 Mich. 628. Notice of the application must be given when the amendment is to be made on extrinsic showing. *Montgomery v. Merrill*, 36 Mich. 102; *Denison v. Smith*, 33 Mich. 155. See *Haynes v. Knowles*, 36 Mich. 409; *Green v. Kindy*, 43 Mich. 279. When showing is insufficient, see *Krohn v. Judge*, 157 Mich. 185.

Where on the trial of an action for libel charging a sheriff with drunkenness and with neglect of duty and making improper arrests, it is within the province of the court to allow plaintiff to amend his declaration. *Aronson v. Baldwin*, 178 Mich. 565. In this case the court said: "The plaintiff was charged in the article with several distinct offenses and had he, in the first instance, selected the charges embraced within the italics and based his libel suit thereon no reasonable objection could have been urged against it. If such a course would have been proper at the outset, it follows that it was proper to bring the pleadings to that position by amendment. Indeed, if this were not the rule, one might combine a false charge with a truthful one and afterwards show the truthful one in justification of the false one. The case of *Batherick v. Tribune Co.*, 50 Mich. 629 (16 N. W. 172; 45 Am. Rep. 63), is cited in support of defendant's contention that the amendment was improper. In that case an attempt was made to restrict the justification by the innuendo, while in this case the scope of the justification was narrowed by means of

an amendment to the declaration. The course pursued by plaintiff in this case seems to be approved in that opinion wherein it says,

"That if he proposed to narrow the controversy to a single charge he should have complained only of that portion of the article which made it, instead of putting the whole before the jury and counting upon the whole as damaging."

We are of the opinion that the trial court committed no error in allowing the amendment, \* \* \* \* \*.

The matter lies within the discretion of the court where the defendant was allowed at the trial of an action of assumpsit to amend its plea by interposing a notice of set-off and it appearing that the attention of the trial court had not been called to the point that a set-off was not proper. *Wellman v. O'Connor-Martin Co.*, 178 Mich. 692.

An answer may be amended on the hearing so as to raise the defense that the contract is void because made on Sunday. *Berston v. Gilbert*, 180 Mich. 638. Answer may be amended, on hearing, to set up defense of execution of contract on Sunday. *Berston v. Gilbert*, 180 Mich. 638. In an action against a buyer for damages for injuries received from wearing a dyed overcoat, an amendment to the declaration, which charged defendants with being manufacturers of the coat, to conform to the proof establishing that defendants were mere jobbers, is allowable. *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45. In an action for damages for breach of warranty made on a sale of a horse, the original declaration may be amended by merely alleging a breach of contract and thus caused to conform to the proof. *Patterson v. Gore*, 177 Mich. 591. Under this section, the court has authority in an action for breach of contract to permit a trial amendment of a declaration, so as to charge that the rescission was in bad faith. *Isbell v. Anderson Carriage Co.*, 170 Mich. 304.

The statute of amendments is very broad, and in furtherance of justice should be liberally construed by the court. *Garnsley v. Boyce*, 158 Mich. 9. See *Roze v. St. Mary's Canal Land Co.*, 153 Mich. 367. The rule under this statute is that where an amendment is made in furtherance of justice, and the plaintiff was not taken by surprise or deprived of any essential right thereby, the court may permit the amendment. *Hopkins v. Briggs*, 41 Mich. 175; *Cummin v. Wilcox*, 47 Mich. 501; *Chapman v. Colby*, 47 Mich. 47; *Collins v. Beecher*, 45 Mich. 436; *Green v. Kindy*, 43 Mich. 281; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 187; *Lyman v. Becannon*, 29 Mich. 466.

The true test to determine the permissibility of an amendment is whether the effort is to introduce what is a new subject of controversy or on the other hand, to either amplify or correct the statement of the cause of action originally intended and which is the real subject of controversy between the parties. *Gensler v. Nicholas*, 151 Mich. 532. In this case the court quotes from *Cooper v. Granberry*, 33 Miss. 117 as follows: "The statute under which the complaint was filed, in the clearest manner authorized the amendment. The object of the suit was to recover a particular tract of land, and it would have been simply useless litigation, after the error was confessed, if the amendment had not been permitted. The object of the amendment was to bring before the court the true subject of litigation, and not to go through the forms of a trial in regard to a subject, about which there was no controversy between the parties."

In *Beecher v. Wayne Circuit Judges*, 70 Mich. 367, the court said: "This statute has always been very liberally construed, and this court has said in numerous cases that courts should be liberal in permitting notice of special matter of defense to be given or amended in furtherance of justice. *Browne v. Moore*, 32 Mich. 254; *Johnson v. Kibbee*, 36 Id. 269; *Hopkins v. Briggs*, 41 Id. 175 (2 N. W. Rep. 199). It has also been held by this court, in numerous cases, that the allowance of an amendment to the notice attached to the plea is within the discretion of the trial court, and not subject to review on error except where it is made to appear there had been an abuse of discretion. *Browne v. Moore*, 32 Mich. 256."

An amendment may be permitted during the trial. *Arndt v. Bourke*, 120 Mich. 265. In this case the court said: "We do not feel at all certain that the original declaration was not broad enough to allow the proof offered by the plaintiff to be received, but, under the record, we do not deem it necessary to pass upon that question. The legislature has provided for the amendment of pleadings so as to allow the trial upon the merits to proceed without unnecessary delay. 3 Comp. Laws, 1897, §10268, and the many cases cited in the note thereto. The amendment allowed was a proper one. It is apparent counsel were advised at the commencement of the trial, it would be permitted during the trial. Had they claimed they were not prepared to meet the issue as framed, the court undoubtedly, upon a proper showing, would not have compelled the trial to proceed. The action of the court in permitting the amendment was not error."

See *Lebnard v. Leahy*, 166 Mich. 406; *Willet v. Michigan Central R. Co.*, 114 Mich. 411; *Sarmiento v. Catherine C.*, 110 Mich. 120; *Welch v. Hull*, 73 Mich. 47; *Kelly v. Waters*, 31 Mich. 404; *Waldron v. Har- ring*, 28 Mich. 493; *Evers v. Sager*, 28 Mich. 47; *Borden v. Clark*, 26 Mich. 410.

It is permissible to make amendment of plea of general issue. *Houghteling v. Gogebic Lumber Co.*, 165 Mich. 498.

See *Holser v. Skae*, 169 Mich. 484; *Cleveland v. Rothschild*, 138 Mich. 90; *Dunn v. Detroit Savings Bank*, 118 Mich. 547; *Hohn v. Interstate Casualty Co.*, 115 Mich. 79; *Freer v. White*, 91 Mich. 74; *Barber v. Smith*, 41 Mich. 144; *Drew v. Dequinder*, 2 Doug. 93.

In *Wood v. Insurance Co.*, 96 Mich. 439, the court said: "This statute has been given a very liberal construction by this Court, but in no case has it ever been contended that an amendment to bring in new parties in an action at law could be allowed. In *Wood v. Lenawee Circuit Judge*, 84 Mich. 521, an amendment to a declaration was allowed substituting heirs of a member of a mutual benefit association as plaintiffs in a suit brought in the name of the administrator to recover upon an insurance policy. This was allowed upon the ground that it was not a substitution of new parties to the action, but the substitution of persons beneficially interested, as in both cases, whether in the name of the administrator or of the heirs, it was really a claim of the heirs. The real parties remaining the same, the changed was of nominal parties only, and the amendment was permissible, under the authority of *Morford v. Dieffenbacker*, 54 Mich. 593; *Kimball & Austin Manfg. Co. v. Vroman*, 35 Id. 310; *Merrill v. Kalamazoo*, Id. 211; *Kinney v. Harrett*, 46 Id. 87." See *Silvers v. Michigan Mutual Ben. Assoc.*, 94 Mich. 39.

The power to amend is a highly valuable one, and it should not be limited beyond what is necessary to keep it within safe bounds. Many errors occur through inadvertence or the carelessness of officers that some power of correction is absolutely essential, and these errors occur under such a variety of circumstances and differ so greatly in the manner in which they affect interests when discovered, that it is not safe to lay down any very strict rules regarding the time and the manner of permitting amendment. *Montgomery v. Merrill*, 36 Mich. 102; *Gray v. Saginaw Circuit Judge*, 49 Mich. 628.

It is a proper exercise of the discretion of the court to permit an amendment of the verifications and the filing of a replication after decree. *Daly v. Circuit Judge*, 102 Mich. 394.

In *Ripley v. Davis*, 15 Mich. 79, the court said: "While liberality should be exercised by the circuit courts in granting amendments for the furtherance of justice, yet as each application must depend upon its own circumstances, and can best be disposed of by the court which has had the case before it from the commencement, the practice has wisely vested such court with a power of final disposition with which we have no inclination to interfere." *King v. Wayne Circuit Judge*, 41 Mich. 727.

See *Merrill v. Leisenring*, 157 Mich. 133.

The allowance of an amendment to the declaration on the day of the trial, by which somewhat general averments were made more specific. *Wolverine Spice Co. v. Fallas*, 182 Mich. 361; 21 D. L. N., 871; 148 N. W., 701. This statute does not authorize amendment of an answer to a bill of complaint by striking out the crossbill part thereof, if such amendment would operate to the prejudice of other parties. *Leach v. Dolese*, 186 Mich. 695; 22 D. L. N. 584; 153 N. W. 47. Amendments are permissible in attachment proceedings on ex parte application. *Bradford & Co. v. Baxter*, 203 Mich. 233. Where the notice attached to the plea was not sufficiently broad to allow the defense of failure to make affirmative proof within as required by the policy, the trial judge was empowered to grant the amendment. *Sweeney v. Travelers' Ins. Co.*, 199 Mich. 587; *Charlet v. Teakle*, 197 Mich. 429; *Lyon v. State Bank of Carson City*, 194 Mich. 118; *Van Allen v. Sprague*, 206 Mich. 118; *Fletcher v. Fletcher*, 206 Mich. 160; *Ford v. Bailey*, 207 Mich. 77.

A wide discretion is vested in courts of chancery to allow amendments to a bill to conform to the proofs taken. *Cole v. Cole*, 193 Mich. 660.

CITED: *Woolkins v. Haid*, 49 Mich. 301; *Sarmiento v. The Catherine C.*, 110 Mich. 120; *Houghteling v. Lumber Co.*, 165 Mich. 500; *Leonard v. Leahy*, 169 Mich. 408; *Isbell v. Carriage Co.*, 170 Mich. 309; *Patterson v. Gore*, 177 Mich. 599. See also *Hayes v. St. Clair*, 173 Mich. 638.

### (12479). Opportunity to Answer Amended Pleadings.

Sec. 2. If such amendment be made to any pleading in matter of substance, the adverse party shall be allowed an opportunity, according to the course and practice of the court, to answer the pleading so amended.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 104, being C. L. '57,

(4416); C. L. '71, (6048); How. 7632; C. L. '97, (10269), remains unchanged.

**CONSTRUED:** Where the variance introduced by the amendment is deemed material. *Flsh v. Barbour*, 43 Mich. 19; *Casserly v. Wayne Circuit Judge*, 124 Mich. 157; *Green v. Kindy*, 43 Mich. 279; *Haynes v. Knowles*, 36 Mich. 409; *Montgomery v. Merrill*, 36 Mich. 97; *M. C. R. R. Co. v. Judge of Kalamazoo Circuit*, 35 Mich. 228; *Denison v. Smith*, 33 Mich. 155; *Gorman v. Judge of Newaygo Circuit*, 27 Mich. 138; *Hensler v. Wayne Circuit Judge*, 13 Mich. 206; *Drew v. Judge of Washtenaw Circuit*, 1 Doug., 434.

### (12480). Amendment After Judgment.

**SEC. 3.** After judgment rendered in any cause, any defect or imperfections in matter of form, contained in the record, pleadings, process, entries, returns, or other proceedings, may be rectified and amended by the court, in affirmance of the judgment, so that such judgment shall not be reversed or annulled; and any variation in the record, from any process, pleading or proceeding had in such cause, shall be reformed and amended according to such original process, pleading or proceeding.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 104, being C. L. '57, (4417); C. L. '71, (6049); How. 7633; C. L. '97, (10270), remains unchanged.

**CONSTRUED:** Amendment of verification and filing of replication after decree. *Daly v. Judge*, 102 Mich. 394. Under this section a variation in the declaration from the summons in the name of the party defendant can be amended. *Bole v. Lumber Co.*, 77 Mich. 241. Judgment; the clerk's entries may be amended in affirmance of. *Owners, etc., v. Hale*, 1 Doug. 313. Even after error brought. *Id.* See *Lyman v. Becannon*, 29 Mich. 466; *Kenyon v. Woodward*, 16 Mich. 332; *Cook v. Perry*, 43 Mich. 625. Amending judgment by striking out a party's name. *Arnold v. Nye*, 23 Mich. 286, 297. It is only where the record itself shows what the amendment should be that it need not actually be made. An imperfect statement can not be enlarged beyond what it means or fairly implies. But no statement is good that does not indicate the nature, at least, of the wrong complained of. (*Campbell, J.*) *Schindler v. Railway Co.*, 77 Mich. 154. Entry of judgment nunc pro tunc. *Grand Rapids Savings Bank v. Widdicomb*, 114 Mich. 639. Amendment of execution, see *Forsythe v. Judge*, 180 Mich. 635. An incorrect entry of the form of action of a verdict may be directed by the court to be amended to conform to the fact.

It is not error to deny a motion to amend a judgment by adding to it a clause awarding costs to plaintiff, where the circuit judge found that there was no mistake, carelessness, or fraud in the entry of the judgment. Failure to amend a complaint as to a mere matter of form, is not reversible error. *Williams v. Lansing*, 152 Mich. 169; *Miller v. Tanners' Supply Co.*, 150 Mich. 292; *Grand Rapids Savings Bank v. Widdicomb*, 114 Mich. 639; *Bole v. Sands, etc., Lumber Co.*, 77 Mich. 239; *Lyman v. Becannon*, 29 Mich. 466; *Arnold v.*

Nye, 23 Mich. 286; *Kenyon v. Woodward*, 16 Mich. 332; *Owners, etc., v. Hale*, 1 Doug. 313.

It is only where the record itself shows what the amendment should be, that it need not actually be made. An imperfect statement cannot be enlarged beyond what it means or fairly implies. But no statement is good that does not indicate the nature, at least, of the wrong complained of. *Schindler v. R. Co.*, 77 Mich. 154. Under this statute a variation in the declaration from the summons in the name of the party defendant can be amended. *Bole v. Lumber Co.*, 77 Mich. 241; *Van Allen v. Sprague*, 206 Mich. 118; *Ford v. Bailey*, 207 Mich. 80.

CITED: *Long v. Wayne Circuit Judge*, 136 Mich. 13; *Reynolds v. Cavanaugh*, 139 Mich. 391; *Brown v. Brown*, 163 Mich. 339; *Ostrowski Judge*, 170 Mich. 563.

#### (12481). Amendment of Returns.

SEC. 4. All returns made by any sheriff or other officer, or by any court or subordinate tribunal, to any court, may be amended in matter of form by the court to which such returns shall be made, in their discretion, as well before as after judgment.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 104, being C. L. '57, (4418); C. L. '71, (6050); How. 7634; C. L. '97, (10271), remains unchanged.

AMENDMENT OF RETURN: A party dissatisfied with the sheriff's return should ask for an amendment thereof; he cannot dispute the return. *Flynn v. Judge*, 136 Mich. 23. A sheriff cannot be compelled to amend his return. *Flynn v. Judge*, 138 Mich. 126. See *Montgomery v. Merrill*, 36 Mich. 97; *Watson v. Toms*, 42 Mich. 561; *McComber v. Wright*, 108 Mich. 109.

Amend return so as to show jurisdiction. *Haynes v. Knowles*, 36 Mich. 409. See *Green v. Kindy*, 43 Mich. 279. To show the service of a copy of note attached to the declaration. *Wilcox v. Sweet*, 24 Mich. 355; *Calender v. Olcott*, 1 Mich. 344. Amending return by permission of court. *Kidd v. Dougherty*, 59 Mich. 243; *Arnold v. Nye*, 23 Mich. 286; *Myers v. Prosser*, 40 Mich. 644; *People v. Judges*, 1 Doug. 417. Where the sheriff returned that he levied the same upon real estate belonging to the execution debtor, had it appraised under the law pertaining to homestead, and sold it at auction, and where realtor claimed that this was a false return, and, on a motion to vacate the sale, sought to contradict the return, this court held that this motion could not prevail in the face of the return standing of record in the case, and it was intimated that a proper practice to obtain an amendment of the return, for it is decided that an amendment to a return as to a matter of fact must be made voluntarily, and could not be compelled. *Bradford & Co. v. Baxter*, 203 Mich. 233.

#### (12482). Judgment Not Stayed or Reversed for Certain Imperfections.

SEC. 5. When a verdict shall have been rendered in any



cause, the judgment thereon shall not be stayed, nor shall any judgment upon confession, or default, be reversed, impaired, or in any way affected, by reason of the following imperfections, omissions, defects, matters or things, or any of them, in the pleadings, process, record or proceedings, namely:

1. For any default or defect in process; or for misconceiving any process, or awarding the same to a wrong officer; or for the want of any suggestion for awarding process, or for any insufficient suggestion;

2. For any imperfect or insufficient return of any sheriff or other officer, or that the name of such officer is not set to any return actually made by him;

3. For any variance between the original writ, bill, plaint and declaration, or between either of them;

4. For any misleading, miscontinuance, or discontinuance, insufficient pleading, or misjoining of issue;

5. For the want of any warrant of attorney by either party; except in cases of judgment by confession, where such warrant is expressly required by law;

6. For any party under twenty-one years of age, having appeared by attorney, if the verdict or judgment be for him;

7. For the want of any allegation or averment, on account of which a motion to dismiss could have been maintained;

8. For omitting any allegation or averment of any matter, without proving which the jury ought not to have given such verdict;

9. For any mistake in the name of any party or person, or in any sum of money; or in the description of any property; or in reciting or stating any day, month or year, when the correct name, time, sum or description shall have been once rightly alleged in any of the pleadings or proceedings;

10. For a mistake in the name of any juror or officer;

11. For the want of a right venue, if the cause was tried by a jury of the proper county;

12. For any informality in entering a judgment, or making up the record thereof; or in any continuance or other entry upon such record;

13. For any other default or negligence of any clerk or officer of the court, or of the parties, or their counselors or attorneys, by which neither party shall have been prejudiced.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 104, being C. L. '57, (4419); C. L. '71, (6051); How. 7635; C. L. '97, (10272), omitting in

the first paragraph, however, "nihil dicit, or non sum informatus" and changing in the seventh sub-division "omission a special demurrer" to "a motion to dismiss," changed.

**CONSTRUED:** If the defect is such as after verdict would be cured by the statute of jeofails, the trial court should either disregard it altogether or direct amendment forthwith. *Sutton v. VanAikin*, 51 Mich. 465. The right of amendment does not extend to matters of jurisdiction. *Hoben v. Citizens Telephone Co.*, 176 Mich. 599.

**SUB-DIVISION 1:** *Bogue v. Granger*, 47 Mich. 124.

**SUBDIVISION 2:** *Denison v. Smith*, 33 Mich. 158. The protection of the statute is against mere formal defects in the return, or those which prejudice neither party. *Id.* See *Calender v. Olcott*, 1 Mich. 344; *Wilcox v. Sweet*, 24 Mich. 355.

A return that does not show that jurisdiction of the person was acquired, cannot be corrected. *Hoben v. Citizens Telephone Co.*, 176 Mich. 599.

**SUB-DIVISION 4:** *Elliott v. Farwell*, 44 Mich. 189; *Schaffer v. Boyce*, 41 Mich. 257; *People v. Parsons*, 163 Mich. 335. Where the declaration sets up a cause of action under state law, and the proofs show that plaintiff can recover only under the federal interstate commerce laws, the court on error will consider the declaration as amended to permit the proper proofs. *Fernette v. Railroad*, 175 Mich. 675.

**SUBDIVISION 5:** *Benalleck v. People*, 31 Mich. 204.

**SUB-DIVISION 7:** *Hoard v. Little*, 7 Mich. 470; *Stange v. Clemens*, 17 Mich. 402, 408; *Kean v. Mitchell*, 13 Mich. 213, 214; *Dickinson v. Dustin*, 21 Mich. 561, 564; *Rowland v. Supt.*, 49 Mich. 555. See also *Smith v. Cowles*, 123 Mich. 6; *Sutton v. VanAikin*, 51 Mich. 465.

**SUB-DIVISION 8:** *Stone v. Covell*, 29 Mich. 359, 363; *Delashman v. Berry*, 21 Mich. 516, 521; *Kean v. Mitchell*, 13 Mich. 213; *McHardy v. Wadsworth*, 8 Mich. 349; *Barton v. Gray*, 57 Mich. 637.

**SUB-DIVISION 9:** *Bole v. Lumber Co.*, 77 Mich. 242; *Lyman v. Becannon*, 29 Mich. 466; *Morse v. Hewitt*, 28 Mich. 481, 491. See *Town v. Smith*, 14 Mich. 352-3; also note "Misnomer" to Compilers' Section 12478.

**SUB-DIVISION 11:** Want of right venue cured. *G. R. & I. R. R. Co. v. Southwick*, 30 Mich. 446.

**SUB-DIVISION 12:** *Kenyon v. Woodward*, 16 Mich. 332; *Ferton v. Feller*, 33 Mich. 199, 205. Omission to describe the land recovered in ejectment. *Morse v. Hewitt*, 28 Mich. 481, 491. See *Cook v. Perry*, 43 Mich. 623. Entry of judgment nunc pro tunc. *Savings Bank v. Widdicomb*, 114 Mich. 639. A judgment in tort inadvertently entered as a judgment in assumpsit may be corrected. *Forsythe v. Washtenaw Circuit Judge*, 180 Mich. 635. And may be corrected at the next term of court. *Reynolds v. Cavanaugh*, 139 Mich. 391. See also *Prussian Nat. Ins. Co. v. Eisenhardt*, 153 Mich. 204; *Long v. Wayne Circuit Judge*, 136 Mich. 12.

**SUB-DIVISION 13:** *Babcock v. Cook*, 55 Mich. 7; *Bogue v. Granger*, 47 Mich. 124. Defect in rule to plead. *Howell v. Maltz*, 35 Mich. 500; *Elliott v. Ives*, 44 Mich. 190. Neglect to enter an order by stipulation, referring a cause. *Bewick v. Fletcher*, 39 Mich. 29. Or order of discontinuance. *Cook v. Perry*, 43 Mich. 623. Or to make a formal amendment to declaration. *Emery v. Whitwell*, 6 Mich. 474. Neglects and omissions not prejudicial to other party cured. *Wilcox v. Sweet*, 24 Mich. 355; *Norvell v. McHenry*, 1 Mich.

227. Where the rule to plead has not been entered it may be entered nunc pro tunc. *Coe v. Hinkley*, 109 Mich. 614. A verdict that is too indefinite and uncertain cannot be corrected. *Long v. Wayne Circuit Judge*, 136 Mich. 13.

A jurisdictional defect in the service of summons on the agent of defendant corporation is not aided by these sections, since such defect "is against the right and justice of the matter of the suit" and the right of amendment does not extend to matters of jurisdiction. *Hoben v. Citizens Telephone Co.*, 176 Mich. 596.

A declaration alleging injury on a railroad may be amended in the Supreme Court to aver that such inquiry arose from interstate commerce, so as to make the Federal Liability Act apply. *Fernette v. Pere Marquette Railroad Co.*, 175 Mich. 672.

In *Denison v. Smith*, 33 Mich. 158, the court said: The statute only allows a default on proof of service in any case. C. L. §§5724, 5732. It is claimed, however, that by the statute of amendments no judgment by default shall be reversed for any 'imperfect or insufficient return.' C. L. § 6051. This, however, must be read in the light of the whole section, and cannot go beyond formal defects or those by which 'neither party shall have been prejudiced.'

A defect in jurisdictional showing cannot be held formal or immaterial. And the return in the present case was not imperfect or informal. It was full and perfect in declaring the service to have been in the county of Kent (which phrase under this statute means outside of Grand Rapids), and therefore notified the defendant *Denison* that *Bush* was 'not found' in the jurisdiction, and that he himself could not be held. An amendment might be proper to found further proceedings and service upon, but after such a return *Denison* was not bound to watch the records, and could not be affected by the amendment *ex parte*. Still less could it be retroactive against him."

#### (12483). Omissions and Defects.

SEC. 6. The omissions, imperfections, variances and defects in the preceding section of this chapter enumerated, and all others, of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties, or the trial, shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 104, being C. L. '57, (4420); C. L. '71, (6052); How. 7636; C. L. '97, (10273).

AMENDMENT: The supreme court will not allow amendments, which would so change the character of the case and so alter the record as to render a correct disposition of the case by the trial judge an irregular, improper, incorrect, and reversible proceeding. *Dabits v. Hauser*, 210 Mich. 416.

FORMER LAW CITED: *Town v. Smith*, 14 Mich. 353; *Kenyon v. Woodward*, 16 Mich. 326; *Stange v. Clemens*, 17 Mich. 411; *Johr v. Supervisors*, 38 Mich. 536; *Bewick v. Fletcher*, 39 Mich. 29; *Babcock v. Cook*, 55 Mich. 7; *Hudson v. Feige*, 58 Mich. 151; *Steers v. Holmes*,

79 Mich. 433; Wood v. Lenawee Circuit Judge, 84 Mich. 524; Smith v. Pinney, 86 Mich. 493; Enright v. Standard Life & Acci. Insurance Co., 91 Mich. 244-5; Lockwood v. Michigan Mutual Life Insurance Co., 108 Mich. 336; Smith v. Cowles, 123 Mich. 6; Fernette v. Railroad, 175 Mich. 675; See Turner v. Muskegon Circuit Judge, 88 Mich. 361.

In *Hoben v. Citizens' Telephone Co.*, 176 Mich. 598, the court said:

It cannot be said that the fair import of this language is that the summons was served upon Sherman E. Hosmer, the agent of defendant, or that said Hosmer was the agent of defendant. For this reason the justice did not obtain jurisdiction over the defendant. *Kirby Carpenter Co. v. Trombley*, 101 Mich. 447 (59 N. W. 809). The appearance of the defendant upon the return day was a special appearance for the purpose of filing a motion to quash. This appears by the docket entry and return of the justice.

Nor can it be said that this jurisdictional defect was aided by our statute of amendments (section 10272, 10273, 3 Comp. Laws). It cannot be held that this defect was one 'not being against the right and justice of the matter of the suit,' within the meaning of the statute; and therefore cannot be amended in this court. The right of amendment does not extend to matters of jurisdiction. See *State Security & Realty Co. v. Badger*, 200 Mich. 104; *Johnson v. County of Muskegon*, 195 Mich. 731.

(12484). Process Not to be Amended Without Order of Court.

SEC. 7. No process, pleading or record, shall be amended or impaired by the clerk or other officer of any court, or by any other person, without the order of such court, or of some other court of competent jurisdiction.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 104, being C. L. '57, (4421); C. L. '71, (6053); How. 7637; C. L. '97, (10274), remains unchanged.

(12485). Application of the Provisions of this Chapter.

SEC. 8. The provisions of this chapter shall extend to all actions and proceedings in courts of law and equity.

HISTORY: This section supersedes Sec. 8, R. S. '46, Ch. 104, being C. L. '57, (4422); C. L. '71, (6054); How. 7638; C. L. '97, (10275), unchanged.

FORMER LAW CITED: *Town v. Smith*, 14 Mich. 352-3; *People v. Miller*, 15 Mich. 359; *Wood v. Lenawee Circuit Judge*, 84 Mich. 524. See *Emery v. Whitwell*, 6 Mich. 474; *Killackey v. Killackey*, 156 Mich. 127.

(12486). Imperfection in Appeal.

SEC. 9. No appeal shall be dismissed on account of any informality or imperfection in the bond, affidavit or other proceedings, for the taking of such appeal, if plaintiff shall either by amendment, or by furnishing a new bond, affidavit or other paper, supply the deficiency or defect.

HISTORY: This section merges and supersedes Sec's. 203, 205 of

Act 153 of '55, being C. L. '57, (3855)-(3857); C. L. '71, (5451)-(5453); How. 7018, 7020; C. L. '97, (922)-(924), unchanged.

**AFFIDAVIT:** An appeal cannot be dismissed absolutely for defects and informalities in the affidavit and bond for appeal, where a new and proper bond and affidavit are tendered. The proper practice on motion to dismiss for such defects is to make an order nisi. *Detroit & Birmingham Plank Road Co. v. Wayne Circuit Court*, 27 Mich. 303; *Swarthout v. Lucas*, 102 Mich. 494. Also where the affidavit was sworn to before a notary who was an attorney in the case. *Bradley v. Andrews*, 51 Mich. 100. This section has reference to fatally defective affidavits. *Hamilton v. Jenison*, 52 Mich. 409.

If the affidavit which is required in case of an appeal from justice's court is lost or mislaid, the circuit court may permit another one to be filed upon a sufficient showing that the affidavit was in fact filed. *Hyman v. Kadrovach*, 180 Mich. 370.

**DISMISSAL:** A motion to dismiss for lack of jurisdiction in the circuit court comes too late after a general appearance in the circuit court. *McCombs v. Johnson*, 47 Mich. 594; *Shaw v. Moser*, 3 Mich. 71; *Tower v. Lamb*, 6 Mich. 36. The denial of a motion to dismiss is not ground for an exception. *Altman v. Young*, 38 Mich. 410. *Mandamus* lies to vacate an improper order of dismissal. *Detroit & Birmingham Plank Road Co. v. Wayne Circuit Judge*, 27 Mich. 303. See *Cole v. Wayne Circuit Judge*, 106 Mich. 692.

**BOND:** See *Detroit & Birmingham Plank Road Co. v. Wayne Circuit Judge*, 27 Mich. 303. The court may allow the bond to be amended so as to comply with the statute as to the justification by the surety. *Hyman v. Kadrovach*, 189 Mich. 371.

Justification of surety may be added after verdict in circuit court as on appeal. *Hyman v. Kadrovach*, 180 Mich. 370.

In *Cole v. Wayne Circuit Judge*, the court said: "2 How. Stat. 7018, 7020, provide that no appeal shall be dismissed for any imperfection in the affidavit or bond, provided a new affidavit is made, and a new bond given, to be approved by the court. It is, however, the duty of the appellant to offer a new affidavit and bond, in which case an order nisi is the proper practice. *Detroit, etc., Plank Road Co. v. Wayne Circuit Judge*, 27 Mich. 303. In *Bradley v. Andrews*, 51 Mich. 100, the record shows that a new affidavit was proffered. The bond in this case was defective, in that there was no justification by the sureties. It does not appear that, either on the hearing of the motion to dismiss or the subsequent motion to set aside the order of dismissal, the relator offered to remedy the defect by filing a new bond, or to produce a justification by the sureties. For this reason he is not entitled to the writ of mandamus. In *Detroit, etc., Plank Road Co. v. Wayne Circuit Judge* a new affidavit and bond were proffered. The court was under no obligation to grant an order that the relator did not ask. He stood there insisting that his appeal was valid, and its validity is the sole question before us."

Where a bond given on appeal from a justice's judgment was insufficient in amount, it operated as a stay of proceedings, and the party appealing had a right under this statute to amend the bond or file a new one. *Hascall v. Brooks*, 105 Mich. 385.

The correct practice on a motion to dismiss an appeal for defects in a bond, is to make an order nisi that the appeal be dismissed un-

less within the time specified, a new and correct affidavit and bond be filed. *Detroit & Birmingham Plank Road Co. v. Judge of Wayne County*, 27 Mich. 303.

See *McCombs v. Johnson*, 47 Mich. 592; *Altman v. Young*, 38 Mich. 410; *Tower v. Lamb*, 6 Mich. 362; *Shaw v. Moser*, 3 Mich. 71.

In *Hamilton v. Circuit Judge for Wayne County*, 52 Mich. 410, the court said: "This is a statute in furtherance of justice. The purpose is to save to the party his appeal where through inadvertence or otherwise an affidavit in conformity to the statute has not been filed. The defective affidavit which the party is to be allowed to supplant with one which is sufficient, is an affidavit which is fatally defective; for it is not fatally defective it is of course sufficient, and no new one is needed. An affidavit in due form but to which, through inadvertence, the party has failed to make oath, is such a defective affidavit. The court should have permitted a perfect affidavit to be filed, if needful to sustain the appeal; but we do not think it was needful after the appellee had appeared and noticed the case for trial. The defect was thereby waived." See *Flowers v. Wayne Probate Judge*, 208 Mich. 204.

Where the affidavit was sworn to before an attorney in the case, the appeal should not be dismissed. *Bradley v. Andrews*, 51 Mich. 101.

#### (12487). When Bond Deemed Sufficient.

SEC. 10. Whenever a bond is or shall be required by law to be given by any person, in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all respects to the form thereof prescribed by any statute, but the same shall be deemed sufficient if it conforms thereto substantially, and does not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given.

HISTORY: Re-enacts Sec. 41, R. S. '46, Ch. 107, being C. L. '57, (4542); C. L. '71, (6186); How. 7770; C. L. '97, (10409), unchanged.

CITED: *Beebe v. Young*, 13 Mich. 221; *Kidd v. Dougherty*, 59 Mich. 242; *King v. Gridley*, 69 Mich. 91; *Bublitz v. Trombley*, 113 Mich. 413; *Donley v. Fowler*, 147 Mich. 288; *Small v. Barton*, 187 Mich. 532. Where in an action of replevin brought to recover the possession of distrained beasts and an indemnity bond was given instead of a replevin bond and where the plaintiff was under the impression that he had given a proper bond and later files a proper bond on being given an opportunity to do so, the writ of replevin will not be quashed. *Donley v. Fowler*, 147 Mich. 290. Where the bond conforms substantially to the requirements of the statute and does not vary in any matter to the prejudice of the rights of the relator, it must be held good under this section as to him. *King v. Gridley*, 69 Mich. 91; *Flowers v. Wayne Probate Judge*, 208 Mich. 204.

#### (12488). Amendment of Bond and New Bond.

SEC. 11. Whenever such bond has been heretofore, or shall hereafter be given, and shall be defective in any respect, the

court, officer, or body who would be authorized to receive the same, or to entertain any proceedings in consequence of such bond, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect, or may, on the application of the person required to give such bond, allow a new one to be substituted in the place thereof, bearing date at the time when such bond was required to be given, and such bond shall thereupon be deemed valid from the time of the execution of such defective bond. When application is made to amend, said court, officer, or body shall have power to amend such bond in any respect, and without regard to the particular amendment applied for, so as to make said defective bond such a one as might have been required when the latter was given. When a new bond is allowed, it shall be such in form, penalty, and other respects, as might have been demanded when the defective bond was given.

**HISTORY:** Re-enacts Sec. 42, R. S. '46, Ch. 107, being C. L. '57, (4543); C. L. '71, (6187); As Am. '83, p. 112, Act 120, Eff. Sept. 8; How. 7771; C. L. '97, (10410), unchanged.

**CONSTRUED:** Amendment of appeal bond in chancery, or substitution of new one. *Beebe v. Young*, 13 Mich. 221; *McClintock v. Laing*, 19 Mich. 305; *Torrent v. Booming Co.*, 21 Mich. 159; *Kidd v. Dougherty*, 59 Mich. 242; *King v. Gridley*, 69 Mich. 91; *Bublitz v. Trombley*, 113 Mich. 413. A writ of replevin will not be quashed because an indemnity bond was given by mistake instead of a replevin bond, and a proper bond is later filed. *Donley v. Fowler*, 147 Mich. 288. Where a bond of indemnity was given in place of a replevin bond, it was not ground for dismissal. *Donley v. Fowler*, 147 Mich. 288. In *Bublitz v. Trombley*, 113 Mich. 415, the court said: "The learned circuit judge was evidently of the view that under section 3374 no waiver of a sufficient bond could occur. But we think it clear that under sections 7770 and 7771 an amendment to the bond might have been permitted. While it is true that the language of the statute is that the failure to give such a bond shall be deemed a discontinuance of the suit by the plaintiff, this is to be construed in connection with section 7771, and, so construed, it is enough to say that it shall be deemed a discontinuance of the suit at the election of defendant, and provided the plaintiff is not prepared, upon being given an opportunity, to give a new bond, and provided further that the defendant has not waived the giving of a bond." Where a defective appeal bond from probate court was given, the remedy is not by dismissing the appeal in the first instance absolutely, but conditionally, in case an amended or new bond shall not be filed within a reasonable time to be fixed by the court as authorized by this statute. *King v. Gridley*, 69 Mich. 91. It is apparent that chancery appeal bonds may be amended or new ones substituted. *Torrent v. Muskegon Booming Co.*, 21 Mich. 30; *McClintock v. Laing*, 19 Mich. 305; *Beebe v. Young*, 13 Mich. 221; *Flowers v. Wayne Probate Judge*, 208 Mich. 199.

**CITED:** *Small v. Barton*, 187 Mich. 532.

## CHAPTER XVII.

### OF EVIDENCE.

#### (12489). Testimony in Chancery, How Taken.

**SECTION 1.** In all chancery cases, the testimony shall be taken in open court as in suits at law, unless the court shall specially order a reference to a circuit court commissioner, or other person authorized by law to administer oaths, to take such testimony. This section shall not be construed to preclude the taking of depositions in the cases provided by law.

**HISTORY:** This section supersedes part of Sec. 1 of Act 186 of '95, being C. L. '97, (10188); As Am. '95, p. 178, Act 129, Imd. Eff. May 17, modified so that testimony shall be taken in open court unless otherwise ordered.

**PROOFS TO BE TAKEN IN OPEN COURT IN CHANCERY CASES:** Under the new practice it will be unnecessary to claim the right to take proofs in open court. Proofs are to be so taken in all cases, unless the court specially orders a reference.

**NOTE:** Act 186, '95, (C. L. '97, 10188,) superseded by this section, was a re-enactment of Sec. 57 of R. S. '46, Ch. 90, relative to courts of chancery, being C. L. '57, (3511); C. L. '71, (5393); How. 6647. The history of that section since '46 is as follows: Am. '55, p. 417; App. Feb. 13; Act 165; Am. '58, p. 5, Eff. May 6, Act 4; Am. '69, p. 381, Eff. June 15, Act 170; Am. '73, p. 470, Eff. July 31, Act 186; Am. '77, p. 17, Eff. Aug. 21, Act 26; Am. '87, p. 358, Eff. Sept. 28, Act. 267. The amendment of '87 having provided that a jury might be demanded in chancery cases, the supreme court declared such provision unconstitutional in *Brown v. Judge*, 75 Mich. 274; *Maier v. Lihbridge*, 112 Mich. 491; *Nat'l Bank v. Blodgett*, 115 Mich. 160.

Act 186, 1895, was then passed incorporating what was left of the section.

**CONSTRUED:** This act does not prevent the taking of depositions *de bene esse* in chancery causes pursuant to Compilers' Section (12494). *Nolan v. Garrison*, 151 Mich. 138. Depositions can be taken before issue joined. *Id.*

**FORMER LAW:** Testimony in open court. See *Tarsney v. Judge*, 152 Mich. 641; *Kelly v. Gartner*, 90 Mich. 264; *Gray v. Ferguson*, 86 Mich. 382; *Lumber Co. v. Gustin*, 54 Mich. 624; *Dunn v. Judge*, 29 Mich. 228; *Drake v. Andrews*, 2 Mich. 206.

**REFERENCE FOR SPECIAL CAUSE:** An order requiring testimony to be taken by commissioner must be made by the court and not at chambers. *Eslow v. Albion twp.*, 27 Mich. 4.. And until such



special order is made, the statutory right remains. *Stebbins v. Judge*, 27 Mich. 170. The former statute provided that testimony be taken in open court where proper notice was given to opposite party, unless, "upon cause shown," the court otherwise direct. See *Stebbins v. Judge*, 27 Mich. 170; *Nolan v. Garrison*, 151 Mich. 138. A demand under the former practice for the examination of witnesses in open court did not deprive the court of the right to direct an accounting before the commissioner in a proper case. *Shouler v. Bonander*, 80 Mich. 540; Citing *Stebbins v. Judge*, 27 Mich. 170. There is no occasion for making up a record of questions and answers except where, in the opinion of a trial court, it is essential for a proper understanding of the evidence, and to show the manner of eliciting the testimony. *Andrews v. Lavery*, 159 Mich. 26.

This statute is constitutional and does not violate Section 20 of Art. 4 of the Constitution (Beecher's Annotated Michigan Constitution of '08, Art. 5, Section 21) which provides "no law shall embrace more than one object, which shall be expressed in its title." *Hughes v. Love*, 136 Mich. 171.

In *Beebe v. Birkett*, 108 Mich. 235, the court said: "The new act does not in express terms repeal the old, but it seems to cover the same ground as the old, with the exception mentioned. In our opinion it was intended to supplant the other; and the only question here is whether it extends to pending cases, or whether they shall be governed by the former practice. It is certain that this act of '95 should not be given retroactive effect, if vested rights were to be thereby affected; but a particular remedy is not necessarily a vested right. *Costa Rica v. Erlanger*, 3 Ch. Div. 69; *Berry v. Clary*, 77 Me. 482. It is a general rule that an act dealing with procedure, only, applies, unless the contrary intention is expressed, to all actions falling within its terms, whether commenced before or after the enactment. *Singer v. Hasson*, 50 Law T. (N. S.) 326; *In re Koch's Estate*, 5 Rawle, 338; *City of Indianapolis v. Imberry*, 17 Ind. 175. An act giving appeals from certain enumerated judgments and orders applies to such judgments and orders made prior to its passage. *McNamara v. Railway Co.*, 12 Minn. 388. The following cases seem to support this rule; *Bensley v. Ellis*, 39 Cal. 309; *Willis v. Fincher*, 68 Ga. 444; *Slocum v. Fayette Co.*, 61 Iowa, 169; *Larkin v. Saffarans*, 15 Fed. 147; *Rosenthal v. Wehe*, 58 Wis. 621; *Gill v. Wells*, 59 Md. 492; *Walston v. Com.*, 16 B. Mon. 15; *State v. Manning*, 14 Tex. 402; *People v. Mortimer*, 46 Cal. 114."

HEARING: *Hewlett v. Shaw*, 9 Mich. 346; *Lamb v. Jeffrey*, 41 Mich. 721. See Circuit Court Rule 36, (1916).

#### (12489a). Criminal and Quasi-Criminal Proceedings.

*AN ACT relating to the rules of evidence in criminal and quasi-criminal proceedings.*

*The People of the State of Michigan enact:*

SECTION A. *That the provisions and regulations governing the subject of evidence contained in act number three*

*hundred fourteen of the Public Acts of nineteen hundred fifteen, being the Judicature Act of nineteen hundred and fifteen, in so far as the same are applicable, shall govern with relation to evidence in all criminal and quasi-criminal proceedings.*

HISTORY: New section, P. A. '17, Act No. 208.

**(12490). Officer to Take Proofs.**

Sec. 2. The officer to whom any such reference may be made, shall take such proofs as may be offered; and the bill shall not be considered evidence before such officer of any fact stated therein.

HISTORY: Re-enacts Sec. 85, R. S. '46, Ch. 90, being C. L. '57, (3538); C. L. '71, (5121); How. 6675; C. L. '97, (490), changing however "master" to "officer" and omitting the last clause of the old section relating to testimony of the complainant should be received as evidence, modified.

TAKING PROOFS: No decree can be taken on the merits on the mere default of a person not personally served. State Tax Law Cases, 54 Mich. 415; Brown v. Thompson, 29 Mich. 75. See notes to Compilers' Section (12737). If the officer erroneously refuses to receive testimony, a motion should be made for an order requiring him to receive it; and this should be done immediately and without waiting for his report. Schwartz v. Sears, Walk. 19; Ward v. Jewitt, Walk. 45; Emerson v. Atwater, 12 Mich. 315.

**(12491). Examination of Plaintiff.**

Sec. 3. Whenever the bill shall have been filed for the payment or satisfaction of any sum of money, the court may, in its discretion, direct that the plaintiff be examined by such officer, as to any payments that may have been made to him, or to any person for his use on account of the demand mentioned in the bill, and which ought to be credited on such demand, or he may be examined in open court.

HISTORY: Re-enacts Sec. 86 R. S. '46, Ch. 90, being C. L. '57, (3539); C. L. '71, (5122); How. 6676; C. L. '97, (491); changing "complainant" to "plaintiff" and "master" to "officer," modified.

PAYMENTS: Complainant should be sworn as to payment. Brown v. Thompson, 29 Mich. 75. But it is not necessary when defendant appears. Stone v. Welling, 14 Mich. 524. This section cannot be construed to authorize the taking of proofs in open court without notice, in a foreclosure suit, where defendant is in court. Hoock v. Sloan, 145 Mich. 19.

**(12492). Report of Proofs and Examinations.**

Sec. 4. Such officer shall report the proofs and examina-

tions had before him; and on the coming in of the report, or on proof and examination in open court, as the case may be, the court shall make such order thereupon as shall be just.

**HISTORY:** Re-enacts Sec. 87, R. S. '46, Ch. 90, being C. L. '57, (3540); C. L. '71, (5123); How. 6677; C. L. '97, (492), changing "master" to "officer," modified.

**EXAMINATION AND REPORT:** A commissioner may be compelled to proceed with the execution of an order of reference made to him. *Warner v. Randall*, 37 Mich. 473. In foreclosure cases, the court may dispense with a reference to compute the amount due and make its own computation. *Ireland v. Woolman*, 15 Mich. 253; *Vaughn v. Nims*, 36 Mich. 297. And also in a case of accounting. *Barnebee v. Beckley*, 43 Mich. 613.

(12493). **Objection to Competency.**

**Sec. 5.** In all chancery cases, the court shall rule upon all objections to the competency, relevancy or materiality of testimony, or evidence offered, the same as in suits at law; and in all cases where the court is of the opinion that any testimony offered is incompetent, irrelevant, or immaterial, the same shall be excluded from the record: *Provided, however,* That if the testimony so offered and excluded is brief, the court may in its discretion permit the same to be taken down by the stenographer separate and apart from the testimony received in the case; and in case of appeal, such excluded testimony may be returned to the appellate court under the certificate of the trial court: *Provided further,* That where such excluded testimony is not taken and returned to the supreme court on appeal, if upon the hearing of such appeal, the supreme court, shall be of the opinion that any such testimony is competent and material, it may order the same to be taken by deposition, or under a reference, and returned to said court.

**HISTORY:** New section.

**COURTS SHALL RULE UPON OBJECTIONS TO TESTIMONY:** Hereafter the court is required to rule upon the competency, materiality and relevancy of evidence in the same manner as in suits at law.

It is provided, however, that the court may in its discretion, if the testimony offered and excluded is brief, permit the same to be taken down and returned to the supreme court in the event of appeal. While the language of the sections says, that it shall be taken down separate and apart from the testimony received in the case, it is thought that this will be substantially complied with if it is made a part of the record in such a way as to clearly show that the court excluded such testimony from its consideration in reaching its conclusions. While it is thought that in cases where the question arising is in any way involved in doubt, the courts will

permit excluded testimony thus to be made a part of the record, it is believed that the courts will exclude entirely from chancery records a great deal of plainly incompetent and irrelevant testimony which heretofore they have been compelled to receive. In case the supreme court is of the opinion that any testimony not taken and returned is competent and material, it may order the same to be taken by deposition or under a reference and returned to the supreme court for its consideration.

**OBJECTION TO TESTIMONY:** In chancery cases, whether the testimony is taken in open court or before a commissioner, all the testimony offered should be admitted. If objected to, it is taken and admitted subject to the objection, which will be passed upon at the hearing and, however disposed of or considered on the hearing, the case, if appealed, brings up the entire testimony. *Bilz v. Bilz*, 37 Mich. 118. See *Bussey v. Bussey*, 71 Mich. 504.

Where testimony is admitted without objection in the trial court, objection will not be considered in the supreme court. *Lewis v. Jacobs*, 153 Mich. 666.

**EVIDENCE NOT REVIEWED ON APPEAL:** Evidence in a chancery case will not be reviewed on appeal where it is not taken down nor returned pursuant to Sec. 12493, C. L. '15. *Pellston Planing Mill & Lumber Co. v. Van Wormer*, 198 Mich., 654.

**EVIDENCE IN CHANCERY CASES:** Courts in chancery have greater authority under the Judicature Act over the introduction of evidence, than under the old practice, and the court is required to rule authoritatively upon all objections and parties cannot as a matter of right continue a line of evidence against sustained objections. *Atkinson v. Akin*, 197 Mich. 299.

### Of Depositions.

#### (12494). Testimony Taken De Bene Esse.

**SEC. 6.** The testimony of any witness may be taken by deposition de bene esse, in any civil cause or matter, begun or pending in any court of record, at law or in chancery, or before any probate court, or commissioners on claims appointed by any probate court, or arbitrators, referees, or circuit court commissioner, or justice of the peace, in the state of Michigan, or in any other civil proceeding, when the witness is or is about to go or resides out of the state of Michigan, or is about to go, or reside more than fifty miles from the place of trial, or beyond the jurisdiction of the court; or when the witness is sick, aged or infirm, or where there is reasonable cause for apprehension that his testimony can not be had at the trial of the cause, or where it is needed for use on hearing of motions, petitions, proceedings for injunctions, or upon any other interlocutory or other proceedings prior to final hearing of any cause; and in all cases where affidavits are permitted to be used in proceedings before the court; also

when it is desired to take conditionally and perpetuate testimony in suits to be begun; and in any other case not above provided for when it shall appear to the court or judge thereof that the purposes of justice will be aided thereby. The deposition may be taken before any judge of any court of the United States, or of any state of the United States, or of any foreign country, or before any commissioner of a circuit court in Michigan, or of the United States, or of any state, or any commissioner for Michigan, or any consul, or consular officer, justice of the peace, officer, or notary public, authorized by the laws of this state, or of any other state, or of the United States, or by the laws of any foreign country, to administer oaths, not being of counsel or attorney for either of the parties, nor interested in the event of the cause. The seal of such court or official, or a certificate of such authority, given under the seal of any court of record, shall be prima facie evidence of authority to act. Reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition, to the opposite party or his attorney of record, which notice shall state the name of the witness or witnesses, and the time and place of taking his deposition, and the name of the official before whom the same will be taken, and in all cases in rem, attachment or replevin, the person having the agency or possession of the property at the time of seizure, shall be deemed the adverse party until a claim shall have been put in or appearance entered in the cause; and whenever, by reason of the absence from the jurisdiction of the party, or want of an opposite attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts within the jurisdiction where the suit is pending, shall think reasonable, and direct. Any person may be compelled to appear and depose as provided by this act, by the order or process of any court and to produce books and papers in the same manner as witnesses may be compelled to appear and testify in court.

**HISTORY:** Re-enacts Sec. 1 of Act 180 of '95, being C. L. '97, (10136), omitting "or solicitor" and changing "whether the suit is begun" to "whether the suit is pending," therefore modified.

**FORMER LAWS:** Act 180 of '95, p. 334, C. L. '97, (10136-43) relative to the taking of testimony by deposition, is repealed by this act.

Section 9 of the last repealed act repeals How. Secs. 6639-44; Sec. 6765; Secs. 6416-47; Secs. 7452-77; Secs. 7479-82; Secs. 7766-7; C. L. '71, (5085-90), (5202); (5847-78); (5883-5908); (6182-3); C. L. '57, (3503-8); (3617); (4227-58); (4263-88); (4538-9); but depositions taken under the old laws before Jan. 1, '96, were to be "received and considered by the courts of this state."

Under the act of '48, How. Secs. 7459-78; C. L. '71, (5890)-(5909); C. L. '57, (4270-89) repealed by the last preceding act. The following decisions should be noted: The act provided for taking depositions within this state and in other states, but not before commissioners of deeds. *Wattles v. Moss*, 46 Mich. 52. They could be taken only before a judicial officer. *Id.* 54. Strict compliance with the provisions of the act was necessary. *Campau v. Dewey*, 9 Mich. 409; *Patterson v. Railway Co.*, 45 Mich. 100. The witness may be examined through an interpreter. *Id.* 408. The testimony on verbal interrogatories may be taken in narrative form. *Id.* Adjournment of examination to another town than that designated in the notice. *Wixom v. Stephens*, 17 Mich. 518. Objections to testimony could be made, but the commissioner could not pass upon them or rule out testimony. *Parsons v. Dickinson*, 23 Mich. 58. Must be taken in the presence of officers. *Pickard v. Polhemus*, 3 Mich. 187; *Burtch v. Hogge*, Har. 31. Reading over deposition to witness. *Godfrey v. White*, 43 Mich. 189; *People v. McKinney*, 49 Mich. 335. See, also, *Bliss v. Paine*, 11 Mich. 102-3; *Dunn v. Dunn*, 11 Mich. 292; *Angel v. Rosenburg*, 12 Mich. 258-9, 260; *Emlaw v. Emlaw*, 20 Mich. 11; *Eslow v. Mitchell*, 26 Mich. 503-4; *Simmons v. Norris*, 53 Mich. 157; *Watson v. Hillman*, 57 Mich. 610; *Thompson v. Clay*, 60 Mich. 627; *Brown v. Watson*, 66 Mich. 231; *Turnbull v. Richardson*, 69 Mich. 415; *Woolenslagle v. Runals*, 76 Mich. 545; *Pinkham v. Cockell*, 77 Mich. 270; *Ford v. Cheever*, 105 Mich. 683.

**CONFLICTING STATUTES:** This section is not in conflict with Compilers' Section 12489 relative to taking testimony in chancery suits. *Nolan v. Garrison*, 151 Mich. 140. Testimony on commission in criminal cases, see Compilers' Section 15736.

**DEPOSITIONS:** Testimony by deposition may be taken for use upon a hearing for a new trial. *Eikhoff v. Judge*, 129 Mich. 151. The deposition of a party to an action may be taken at the instance of the opposing party. *St. John v. Judge*, 161 Mich. 299. Where defendant proceeds to take the deposition of a non-resident plaintiff, but plaintiff appears at the trial ready to be sworn, his deposition can not be required. *Young v. Judge*, 116 Mich. 12.

**PROCEDURE:** Commission directed to a firm by their name. *Eaton v. Peck*, 26 Mich. 57. Computation of the time on service of notice. *Id.* *Arnold v. Nye*, 23 Mich. 286. As to notice under this act, see, *Drosdowski v. Sup. Council of Chosen Friends*, 114 Mich. 178. As to what constitutes reasonable notice within the meaning of this act, see *McCall Co. v. Jacobson*, 139 Mich. 455. No affidavit of the facts essential to give jurisdiction is required. It is sufficient if they are set out in the notice. *Wanner v. Judge*, 169 Mich. 236. An objection based upon an alleged irregularity in the form of the notice must be raised before the trial. *Record Pub. Co. v. Merwin*, 115 Mich. 10.

**REFUSAL TO TESTIFY:** Contempt proceedings where witness

refuses to testify by deposition *de bene esse*. *St. Johns v. Judge*, 161 Mich. 299; *Wanner v. Judge*, 169 Mich. 232.

FORMER LAW CITED: *Taylor v. Taylor's Estate*, 138 Mich. 664.

See also *People's Ice Co. v. Steamer Excelsior*, 43 Mich. 339, 340.

In *Wanner v. Wayne Circuit Judge*, 169 Mich. 237, the court said: "In *Young v. Kent Circuit Judge*, 116 Mich. 10 (74 N. W. 206), it was said that the question of good faith is involved in proceedings under this act, and to be considered by the court in passing upon the rights of a party to take depositions. In *St. John v. Wayne Circuit Judge*, 161 Mich. 302 (126 N. W. 219); wherein the discretionary act of the trial judge was sustained, it was said:

'We do not feel called upon to determine whether, if the witness had refused to attend, the court in compelling attendance might have acted upon the showing which was made, or whether it would have been improper to require a further showing.

'When a court is asked to bring before it, by its process, a witness who has refused in another place to answer questions, for the purpose of meeting charges of misconduct and contempt in so refusing, the court may consider the character of the interrogatories to which answers were refused.'

We think the court, under such circumstances, may also consider whether the facts necessary to give jurisdiction for taking testimony *de bene esse* are established, and in his discretion determine, from the showing made, if the interests of justice demand punitive proceedings. With the parties before him, the court decided and returned that petitioner did not show any statutory reason for taking the deposition of Stevenson. On the contrary, the court found and held that he was a resident of the state; that it was not made to appear his testimony was material, or that he was about to leave the state; that there was no competent showing that he would not be subpoenaed as a witness in the regular way when the trial of the cause was reached in due course; and that, in the judgment of court, it was not necessary to take the depositions of said Stevenson as proposed. In so finding, the court necessarily passed upon the facts put in issue by the conflicting affidavits of the parties, and, apparently, came to the conclusions 'governed somewhat by the circumstances surrounding the case.' Under this statute the deposition of a party to an action may be taken at the instance of the opposing party. *St. John v. Wayne Circuit Judge*, 161 Mich. 302; *Young v. Kent Circuit Judge*, 116 Mich. 10.

A deposition, taken under this section, in a suit in chancery, before the cause is at issue, may be used as evidence although after issue is joined, the examination of all witnesses in open court is demanded, this section not having been repealed by (10188). *Nolan v. Garrison*, 151 Mich. 138.

In *McCall Co. v. Jacobson*, 139 Mich. 457, the court said: "The sufficiency of this notice depends upon the proper construction of the following portion of section (10136), 3 Comp. Laws:

'Reasonable notice must first be given in writing by the party \* \* \* proposing to take such deposition, to the opposite party or his attorney of record.'

This is a comparatively new statute in this state, having been adopted in '95 (see *Drowsowski v. Order of Chosen Friends*, 114

Mich. 180); but before we adopted it, it was an old statute in other states, and had been judicially construed.

As it is idle to consider what constitutes reasonable notice, under this statute, unless we have a right to review the decision of the trial court, we must first determine whether or not we have that right. While in these cases 'something may properly be left to the wise legal discretion of the trial court' (see *Sing Cheong Co. v. Yung Wing*, 59 Conn. 535; *Harris' Appeal*, 58 Conn. 492)—that is, as I understand it, this court will not review decisions of the trial court as to the sufficiency of the notice, in so far as they rest upon facts and circumstances known to the trial judge and not known to the appellate tribunal; (see *Drosdowski v. Order of Chosen Friends*, supra), it is settled that, as a general proposition, the decisions of a trial court as to what constitutes a sufficient notice, are reviewable by an appellate court (see *Sing Cheong Co. v. Yung Wing*, supra; *McGinnis v. Washington Hall Ass'n.*, 12 Grat. (Va.) 602; *Trevelyan's Adm'r v. Lofft*, 83 Va. 146; *American Exchange Nat. Bank v. First Nat. Bank*, 27 C. C. A. 277; *Carlisle v. Tuttle*, 30 Ala. 613; *Hipes v. Cochran*, 13 Ind. 175; *Manning v. Gasharie*, 27 Ind. 399). This accords with sound reason. Otherwise a statute of the state which it must be presumed was intended to establish a uniform practice has possibly established a different practice in each of our many courts, if not in each case tried in those courts. As there were not in this case, as in *Drosdowski v. Order of Chosen Friends*, supra, any circumstances better known to the trial judge than to this court, it is our duty to review the decision holding that the notice under consideration was insufficient."

Where a deposition was taken for use on a previous hearing before commissioners on claims, showing that the witness was over eighty years of age and unable to travel, it was properly admitted on the trial in circuit court, under this statute; and it cannot therefore be presumed that the cause for taking the deposition has been removed. *Taylor v. Taylor's Estate*, 138 Mich. 664; *Emlaw v. Emlaw*, 20 Mich. 11.

An affidavit of the facts essential to give jurisdiction to take testimony de bene esse, under this section, is not necessary, a statement of the facts in the notice to take deposition being sufficient. *Wanner v. Mandell*, 169 Mich. 231; 134 N. W. 993; *Eikhoff v. Wayne Circuit Judge*, 129 Mich. 150.

This statute authorizes the taking of depositions of witnesses generally. It includes the parties to the suit, and under it either is entitled in good faith to take the deposition of the party residing outside of the state. *Young v. Kent Circuit Judge*, 116 Mich. 12.

What is reasonable, is nowhere defined in the law, and cannot well be defined, but must depend on the circumstances of each case. *Drosdowski v. Order of Chosen Friends*, 114 Mich. 180.

See *Pinkham v. Cockell*, 77 Mich. 266; *People v. McKinney*, 49 Mich. 334; *Godfrey v. White*, 43 Mich. 189; *Hamilton v. People*, 29 Mich. 173; *Greenman v. O'Conner*, 25 Mich. 30; *Page v. Stevens*, 23 Mich. 357; *Parsons v. Dickenson*, 23 Mich. 58; *Campau v. Dewy*, 9 Mich. 408; *Pickard v. Polhemus*, 3 Mich. 186; *Burtch v. Hogge*, Har. Ch. 31.

In speaking of this section in *Hamilton v. Macey Co.*, 195 Mich. 748; 162 N. W. 289, the court said: "While in proceedings of this nature



we recognize the propriety of ignoring so far as is reasonable possible technicalities, to the end that early adjudication may be had, we are still of opinion that the board in its consideration of evidence should be bound by rules promulgated under its own authority."

**DEPOSITION TO ESTABLISH A LOST WILL:** In proceedings to establish and probate a lost will, any irregularities in the taking of the deposition of an aged and infirm witness (this section), who it was claimed had drawn the will, were waived, where attorneys for contestants were present and made no objection when said deposition was received in evidence upon the trial in the probate court.

In re Zick's Estate, 205 Mich. 681, 172 N. W. 382.

**DEPOSITIONS OBJECTIONS TO:** All objections to notices, manner of taking and returning depositions will be waived, unless made within the statutory time and noticed for hearing as provided by circuit court rule No. 37. Cohn-Goodman Co. People's Savings Bank of Grand Haven, 203 Mich. 316.

**NOTICE OF TAKING DEPOSITIONS:** Section 12494, C. L. '15, requires that reasonable notice be given of the taking of depositions in any civil case, the names of the witnesses, time and place of taking the same, and the name of the official before whom to be taken. Hamilton v. Macey Co., 195 Mich. 750.

#### (12495). Testimony How Taken Under Commission.

**SEC. 7.** In any case where the deposition of a witness can be taken upon notice, his deposition may instead be taken under commission, upon which section nine of this chapter shall be printed, and any circuit court commissioner in the state of Michigan, or the court in which such proceeding is begun or pending, or the judge, clerk or register thereof, or in any case pending before a justice of the peace, such justice shall upon affidavits showing reason therefor, issue a commission (upon which shall be printed section nine of this chapter) for the taking of the testimony of such witness before any person therein appointed as commissioner. Written interrogatories to be put to such witness by such commissioner, may be attached to the commission; if attached, a copy thereof shall be attached to the notice which shall in any case be given to the opposite party or his attorney, of the time and place of taking testimony under such commission. Cross and redirect interrogatories, which it is desired the commissioner shall put to the witness, shall thereupon be promptly furnished to the respective parties and to such commissioner. Where default or order pro confesso has been entered in the cause, notices shall not be necessary.

**HISTORY:** Re-enacts Sec. 2 of Act 180 of '95, being C. L. '97, (10137), without material change. Modified.

**CONSTRUED:** As to interrogatories, under old law, see Arnold v.

Nye, 23 Mich. 294. Must not be so framed as to allow the deponent to express opinions based on hearsay. Conely v. McDonald, 40 Mich. 150; Angell v. Rosenbury, 12 Mich. 159. See Simonds v. Cash, 136 Mich. 564; Ford v. Cheever, 105 Mich. 679; Locke v. Tuttle, 41 Mich. 409; Van Sickle v. Gibson, 40 Mich. 170; Hamilton v. People, 29 Mich. 173; Greenman v. O'Connor, 25 Mich. 30; Page v. Stephens, 23 Mich. 357; Cook v. Bell, 18 Mich. 392; Facey v. Otis, 11 Mich. 213; Bliss v. Paine, 11 Mich. 102.

(12496). Attendance of Witnesses.

SEC. 8. Courts of record of this state shall have the power to compel the attendance of witnesses and the giving of their testimony, and the production of books, papers and other evidences, before commissioners or persons authorized to take testimony and also under commissions or letters rogatory, issued out of any court of any other state, or of the United States, or of any foreign government or country.

HISTORY: Re-enacts Sec. 3 of Act 180 of '95, being C. L. '97, (10138), remains unchanged.

CONSTRUED: Failure of defendant to appear for cross-examination. Paige v. Stephens, 23 Mich. 357. See Titus v. Judge, 168 Mich. 508; VanDyke v. Doughty, 174 Mich. 352-6. Under this section and section (10153), the commissioner under letters rogatory may, in his own name, apply to the court issuing the summons to compel a witness to give testimony. Van Dyke v. Doughty, 174 Mich. 351. In this case the court said: "The court may require a witness to answer any legal and pertinent question. The limiting words, legal and pertinent, are not found in section (10138) or in section (10139). Undoubtedly, the sections must be read together. The judge who made the order was of the opinion that it was not his duty to inquire with detail into the merits of the controversy, and determine that the testimony proposed to be taken could not be material to the issue, but that the true rule to be followed in such cases is—

"That unless the matter of the interrogatories cannot possibly enter into the merits of the case, the question should be answered, and the objection disposed of on the trial."

Where a defendant testifies on his own behalf, and fails to appear at the proper time for cross examination, he forfeits the right to use his deposition, and it will be suppressed. Page v. Stephens, 23 Mich. 357.

(12497). Witnesses Shall be Sworn to and Examined.

SEC. 9. Each witness shall be sworn or affirmed by the officer or person empowered to take such testimony, to tell the truth, the whole truth, and nothing but the truth, concerning the matter at issue in the cause. Every witness may be examined, cross-examined, and re-examined, orally, and also so examined in addition to written, direct or cross-interroga-

tories. Examinations may be adjourned from time to time. Testimony may be written or taken stenographically and transcribed under direction of the officer so taking the same and shall be signed by the witness and certified as correct by the official before whom it is taken, but signatures of witnesses may be waived in writing by agreement of parties. The deposition when taken shall be forthwith inclosed by the official before whom the same is taken, and indorsed with the title of the court and cause, and that the deposition was taken and sealed up by him, and how it is to be sent, and he shall sign the indorsement, and the same shall be transmitted by mail or otherwise, to the court in which the cause is pending, and in case such deposition is taken for use before commissioners on claims appointed by any probate court to such court, and then be opened by the court or clerk or register, and written notice thereof then given by mail or otherwise to the parties. Objections to notices of, or objections to the manner of taking the testimony, or of certifying or returning the deposition, shall be regarded as waived unless made in writing within ten days after knowledge or notice of the return thereof.

**HISTORY:** Re-enacts Sec. 4 of Act 180 of '95, being C. L. '97, (10139), excepting the time for making the objections is changed from three to ten days. Remains unchanged.

**CONSTRUED:** Irresponsive answers. *Greenman v. O'Connor*, 25 Mich. 30; *Hamilton v. People*, 29 Mich. 185; *Bliss v. Paine*, 11 Mich. 102. Answer not admissible, unless it would be, on the stand in open court. *Id.* 102-3. Answers as to family relationship, etc., may be based on family tradition. *Van Sickle v. Gibson*, 40 Mich. 170. Separate jurat not necessary, when the commissioner certifies that the witness was sworn. *Id.* As to return of depositions, see *Cook v. Bell*, 18 Mich. 392; *Van Sickle v. Gibson*, 40 Mich. 170; *Locke v. Tuttle*, 41 Mich. 409; *Facey v. Otis*, 11 Mich. 213. Objections based on alleged irregularities of notice must be raised before trial. *Record Publishing Co. v. Merwin*, 115 Mich. 10.

When objection waived. *Simonds v. Cash*, 136 Mich. 564; *Detroit Lumber Co. v. Yacht "Petrel"*, 163 Mich. 248. This section does not require that depositions be on file three days before being offered in evidence. *McCall v. Jacobson*, 139 Mich. 459. It is the duty of the commissioner to transmit the depositions to the court, and not to one of the attorneys. *Detroit Lumber Co. v. Yacht "Petrel"*, 163 Mich. 248.

See *Record Publishing Co. v. Merwin*, 115 Mich. 11; *Ford v. Cheever*, 105 Mich. 683.

The general rule is that where the matter of the interrogatories do not possibly enter into the merits of the case, the question should be answered, and the objection disposed of on the trial. *Van Dyke v. Doughty*, 174 Mich. 356.

**(12498). Perpetuation of Testimony.**

**SEC. 10.** To perpetuate testimony, any person who expects to be a party to a suit, which may thereafter be commenced in any court of record, may cause the testimony of any witness material to him in the prosecution or defense of such suit to be taken conditionally, and perpetuated, under a commission so issued by any circuit court commissioner or judge of a court of record, upon affidavit, showing the necessity or reason therefor, and, so far as known, the persons interested in such matter. The commission shall direct upon whom notice shall be served, and to what court the deposition shall be returned, and such court shall have custody and control thereof until required for use in such suit. Testimony taken under this section may be used in case it cannot again be obtained at the time of trial.

**HISTORY:** Re-enacts Sec. 5 of Act 180 of '95, being C. L. '97, (10140). Unchanged.

**People's Ice Co. v. Steamer Excelsior**, 43 Mich. 339. It is the duty of the trial court, where a defective appeal and stay bond is filed in good faith, to allow the defective bond to be withdrawn and one properly executed to be substituted. **Small v. Barton**, Judge, 187 Mich. 532; 22 D. L. N. 617; 153 N. W. 703. The admission of the deposition was not error where the case was removed to the federal court, for it was the same case between the same parties for the same cause of action all the time. **Johnson v. Federal Union Surety Co.**, 194 Mich. 292; 160 N. W. 548.

**(12499). Testimony Taken by Stipulation.**

**SEC. 11.** Parties to actions and parties interested in suits to be begun may have testimony taken and returned in any manner agreed upon by stipulation in writing.

**HISTORY:** Re-enacts Sec. 6 of Act 180 of 1895, being C. L. '97, (10141). Remains unchanged.

**CONSTRUED:** Depositions recognized by stipulation. **Matson v. Melchor**, 42 Mich. 477. Taking testimony before notary by stipulation. **Crone v. Angell**, 14 Mich. 346-7. Before a justice. **Knight v. Emmons**, 4 Mich. 554; **People v. Judge of Ionia Circuit**, 39 Mich. 122; **Damouth v. Klock**, 29 Mich. 289; **Sawyer v. Sawyer**, Walk Ch. 48; **Brown v. Byrne**, Walk. Ch. 453; **Burtch v. Hogge**, Walk. Ch. 453.

**(12500). Use of Depositions.**

**SEC. 12.** Depositions taken under this act may be read and considered in evidence at the trial or on any hearing, and on appeals and re-trials of the same cause of action, but the court shall have power to regulate the use, to prevent abuses

thereof, and may order the retaking of testimony, or the production of the witness, if within the jurisdiction, notwithstanding that his deposition has been taken. In any case, either party, may obtain subpoena and compel the usual attendance and re-examination of the witness, notwithstanding his deposition has been taken, if he is within the jurisdiction of the court and able to attend, and give his testimony.

**HISTORY:** Re-enacts Sec. 7 of Act 180 of '95, being C. L. '97; (10142), omitting from such section however, "in the usual way, for or at the trial." Modified.

**CONSTRUED:** A deposition may be read in evidence without showing at the trial that the reasons for taking the same still exist, the rule in *Emlaw v. Emlaw*, 20 Mich. 11, having been abrogated by amendment to the statute. *Talcott v. Freedman*, 140 Mich. 37. Before any deposition can be read in evidence at the trial of the cause, it must be made to appear satisfactorily to the judge that the reason stated in the notice for taking the testimony existed at the time it was taken. *Wanner v. Wayne Circuit Judge*, 169 Mich. 236. Objections to deposition at the trial. *Angell v. Rosenbury*, 12 Mich. 258-9; *Bliss v. Paine*, 11 Mich. 102-3; See *Taylor v. Taylor's Estate*, 138 Mich. 664; *St. John v. Wayne Circuit Judge*, 161 Mich. 299; *Woolenslagle v. Runals*, 76 Mich. 545; *Dunn v. Dunn*, 11 Mich. 292.

**DEPOSITIONS—ADMISSIBILITY:** Depositions taken in a case while pending in the Federal Court, are admissible in the circuit court to which the cause had been remanded, where counsel had notice of the taking of the same and had cross-examined the witnesses. *Johnson v. Federal Union Surety Co.*, 194 Mich. 293.

#### (12501). Fees for Taking Deposition.

**SEC. 13.** Fees for taking depositions shall be as follows: For taking, certifying, sealing and forwarding depositions, two dollars; and for each one hundred words contained in such deposition, ten cents, which shall be considered as costs in the case; and for copies of testimony furnished to any party, three cents for each one hundred words contained in such copy. Each party shall pay for his own examinations or cross-examinations in the first instance.

**HISTORY:** This section re-enacts Sec. 8 of Act 130 of '59, being C. L. '97, (10143). Unchanged.

See *Taylor v. Taylor's Estate*, 138 Mich. 658; *Berkery v. Wayne Circuit Judge*, 82 Mich. 160.

#### (12502). Affidavits Taken in Other States.

**SEC. 14.** In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial

proceedings in this state, to entitle the same to be read, it must be authenticated as follows:

1. It must be certified by the consul general, deputy consul general, or some consul or deputy consul of the United States resident in such foreign country, to have been taken and subscribed before him, specifying the time and place where taken and have the consular seal attached; or

2. It must be certified by some judge of a court having a seal to have been taken and subscribed before him, specifying the time and place where taken;

3. The genuineness of the signature of such judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court under the seal thereof;

4. If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.

**HISTORY:** Re-enacts Sec. 33, R. S. '46, Ch. 102, being C. L. '57, (4259); C. L. '71, (5879). As Am. '79, p. 145, Act 147, Eff. Aug. 30; How. 7448; C. L. '97, (10144); As Am. '09, p. 356, Act, 191, Eff. Sept. 1. Unchanged.

**CONSTRUED:** Certificate of notary's official character, *Berkey v. Wayne Circuit Judge*, 82 Mich. 167. See *Seventh Day Adventists v. Sanitarium*, 166 Mich. 509; *Lobuzek v. Am. Car & Foundry Co.*, 194 Mich. 539.

#### (12503). Admission in Evidence.

**Sec. 15.** The records and judicial proceedings of any court in the several states and territories of the United States and of any foreign country shall be admitted in evidence in the courts of this state upon being authenticated by the attestation of the clerk of such court with the seal of such court annexed, or of the officer in whose custody such records are legally kept with the seal of his office annexed.

**HISTORY:** Re-enacts Sec. 34, R. S. '46, Ch. 102, being C. L. '57, (4260); C. L. '71, (5880); How. 7449; As Am. '97, p. 31, Act 30, Imd. Eff. Mar. 12; C. L. '97, (10145); As Am. '09, p. 356, Act 191, Eff. Sept. 1. Unchanged.

**CONSTRUED:** *Capling v. Herman*, 17 Mich. 535. Under this section, as amended by Pub. Acts '09, No. 191, proof of the appointment of the administrator by a court of another state, consisting merely of the action of the court as shown by the records and files, and not containing a copy of the order of appointment certified by the probate register is not sufficient. *General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium & Benev. Ass'n*, 166 Mich. 504.

Under this section, as amended by Pub. Acts, '09, No. 191, a certified copy of the probate of a will of a foreign resident in the courts of a foreign country, is admissible. *General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium & Benev. Ass'n*, 166 Mich. 504, 18 D. L. N. 522, 132 N. W. 94.

### Of Copies of Records, Etc.

#### (12504). Copies to be Admitted.

**SEC. 16.** Copies of such records and proceedings, in the courts of a foreign country, may also be admitted in evidence upon due proof:

1. That the copy offered has been compared by the witness with the original, and is an exact copy of the whole of such original;
2. That such original was in the custody of the clerk of the court, or other officer legally having charge of the same; and
3. That such copy is duly attested by a seal, which shall be proved to be the seal of the court in which such record or proceeding shall be.

**HISTORY:** Re-enacts Sec. 35, R. S. '46, Ch. 102, being C. L. '57, (4261); C. L. '71, (5881); How. 7450; C. L. '97, (10146). Unchanged.

**CONSTRUED:** *Capling v. Herman*, 17 Mich. 535; *Seventh-Day Adventists v. Sanitarium*, 166 Mich. 505.

#### (12505). Proof of Court Records.

**SEC. 17.** The preceding sections shall not prevent the proof of any record or judicial proceedings of the courts of any foreign country, according to the rules of the common law, in any other manner than that herein directed.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 102, being C. L. '57, (4262); C. L. '71, (5882); How. 7451; C. L. '97, (10147), omitting however the last clause of such section. Modified.

**FORMER LAW CITED:** *Seventh-Day Adventists v. Sanitarium*, 166 Mich. 509; See *Capling v. Herman*, 17 Mich. 535. See *Dean v. Chapin*, 22 Mich. 275.

**(12506). Authenticated Copies.**

SEC. 18. A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceeding prior to, and including the making of such order, judgment or decree.

**HISTORY:** New section.

**PROOF OF JUDGMENTS AND DECREES:** Heretofore in order to prove a judgment or decree it has been necessary, in addition to the production of a certified copy of the judgment or decree, to prove the validity of all prior proceedings in the cause. It is now provided that a duly authenticated copy of any order, judgment or decree of any court of record in this state shall be *prima facie* evidence of the jurisdiction of the court over the parties to such proceeding and of all facts recited in the judgment or decree and of the regularity of all prior proceedings. *Kenyon v. Baker*, 16 Mich. 372.

**(12507). Certified Copies.**

SEC. 19. Copies of all papers, records, entries and documents, required or permitted by law to be filed by any public officer in his office, or to be entered or recorded therein and duly filed, entered or recorded according to law, certified by such officer to be a true transcript compared by him with the original in his office, shall be evidence in all courts and proceedings, in like manner as the original would be if produced.

**HISTORY:** Re-enacts Sec. 74 R. S. '46, Ch. 102, being C. L. '57, (4311); C. L. '71, (5931); How. 7504; C. L. '97, (10169), with one slight change in phraseology. Modified.

**CERTIFIED COPIES:** This section does not apply in any case, where the originals would not prove themselves. *Shelden v. Merrill*, 69 Mich. 156. Nor does it apply when the question of the forgery of the original instrument is in issue, either in a criminal or civil suit. *People v. Swetland*, 77 Mich. 53. The certificate is sufficient if it contains the substance of what is required by the statute, even if it does not exactly correspond in form. *Bills v. Keesler*, 36 Mich. 69; *Huntoon v. O'Brien*, 79 Mich. 227. The officer must certify to a copy of the entire document. It is not within his province to certify to a legal conclusion. He must give an accurate copy. His duty is ministerial and an imperfect copy is no copy. The copy is evidence only as the original, if produced, would be evidence, and must exactly represent it. *Doyle v. Mizner*, 42 Mich. 338.

A certified copy of the record of the internal revenue collector is



admissible in evidence under this section. *People v. Lalonde*, 171 Mich. 288.

**UNITED STATES PATENTS:** May be proved by certified copies from the general land office. *Lacey v. Davis*, 4 Mich. 140; *Boyce v. Stambaugh*, 34 Mich. 348. Also assignments of a land office certificate, when filed with the commissioner of the general land office. *Clark v. Hall*, 19 Mich. 356. And field notes of government surveys. *Gilman v. Riopelle*, 18 Mich. 145.

**FORMER LAW CITED:** *Eesley Light, etc., Co. v. Power Co.*, 172 Mich. 83; See *People v. Kemp*, 76 Mich. 420.

Defendant's admission of its corporate capacity does not preclude plaintiff from offering in evidence a certified copy of defendant's articles of incorporation and reading the same to the jury. *Eesley Light & Power Co. v. Commonwealth Power Co.*, 172 Mich. 78.

The copy of an internal revenue license is admissible, where it is recorded, and the internal revenue collector is, under the statute, required to furnish certified copies to prosecuting officers of the state. *People v. Lalonde*, 171 Mich. 286.

In *Doyle v. Mizner*, 42 Mich. 338, the court said: "We have, of course, no means of knowing whether any other paper ever got into the office of the secretary of state, although the history of the case seems to negative any such fact. But the certificate of the secretary is of no validity as evidence. A paper without acknowledgment could not lawfully be filed and recorded in his office. When he certifies he must certify to a copy of the entire document. It is not within his province to certify to a legal conclusion as the character of an acknowledgment. He must give an accurate copy of it. His duty is purely ministerial, and an imperfect copy is no copy. The copy is only evidence as the original, if produced, would be evidence, and must exactly represent it. Comp. L. §5931." Where the certificate is not in exact verbal conformity with the form indicated by the statute, it is held that if the substance of the statute is complied with, the certificate is sufficient. *Bills v. Keesler*, 36 Mich. 70. A transcript of the record of the United States patent of lands, certified by the commissioner of the general land office to be "a true and literal exemplification from the records of this office" is held to be sufficiently certified under the United States statute to be admitted in evidence. *Boyce v. Stambough*, 34 Mich. 349. The mode of authenticating the documents, records, and proceedings of any of the departments, of courts of the United States is governed by the laws of the United States, and by the practice of such departments and courts, and not by the laws of the state. *Gilman v. Riopelle*, 18 Mich. 145; *Lacey v. Davies*, 5 Mich. 140. It is said that where the assignment of a land office certificate for the purchase of land is filed in the office of the commissioner of the general land office in order to procure the issuing of the patent to the assignee, it becomes a part of the records of the office and may be proved by exemplified copy authenticated by the commissioner. *Clark v. Hall*, 19 Mich. 356; *Gilman v. Riopelle*, 19 Mich. 145; *Lacy v. Davies*, 4 Mich. 140.

#### (12508). Conveyances.

**Sec. 20.** All conveyances and other instruments authorized

by law to be filed or recorded, and which shall be acknowledged or proved according to law, and if the same shall have been filed or recorded, the record, or a transcript of the record, or a copy of the instrument on file certified by the officer in whose office the same may have been filed or recorded, may be read in evidence in any court within this state without further proof thereof; but the effect of such evidence may be rebutted by other competent testimony.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 65, being C. L. '57, (2750); C. L. '71, (4233); How. 5685; C. L. '97, (8990); with certain changes in phraseology so as to include within the scope of the section instruments authorized by law to be filed or recorded. Modified.

**RECORDS AS PRIMARY EVIDENCE:** The general rule in regard to proof of documents is that the original shall be produced unless required to remain in some public office. If it belongs in such a place, it can be proved by an exemplification. If belonging in private hands, it must be introduced in evidence, unless lost or otherwise beyond the power of parties to prove it, except by secondary evidence. Our statutes are peculiar in allowing the record of deeds to be given in proof as primary evidence. No record of deeds can have such an effect except by statute, and such statutes are uncommon. *Bradley v. Silsbee*, 33 Mich. 330; *Brown v. Cady*, 11 Mich. 537-8. The record of a deed authorized to be recorded is evidence. *Wing v. McDowell*, Walk. 182; *Mason v. Payne*, Walk. 459; *Fitzhugh v. Barnard*, 12 Mich. 104; *Atwood v. Bearss*, 45 Mich. 471. And the record is prima facie evidence of the execution of the deed. *Bassett v. Hatheway*, 9 Mich. 31; *Mee v. Benedict*, 98 Mich. 270. When a deed includes land in more than one county, it may be recorded in any one of the counties and the record thereof is evidence anywhere in the state. *Wilt v. Cutler*, 38 Mich. 189. When the instrument will be presumed to have been sealed, although the record shows no seal. *Starkweather v. Martin*, 28 Mich. 471. As to the record of deeds properly executed by only part of the grantors therein, see note, "Record of deeds," to Compilers' Section (11710). As to deeds defectively recorded, see note, "Manner of recording," to Compilers' Section (11713). The record of a deed not sufficiently executed to be legally entitled to record may be used as evidence of the contents of such deed. *Post v. Rich*, 36 Mich. 10. A properly recorded certificate of an execution sale of land is entitled to the same record privileges as other conveyances of land, and is within the meaning of the term "conveyances" in the recording laws. *Drake v. McLean*, 47 Mich. 102. When proof of identity of persons is also necessary. *Van Auken v. Monroe*, 38 Mich. 725; *Boothroyd v. Engles*, 23 Mich. 19. The record of a deed not entitled to record is not evidence. See note "When record not notice," to Compilers' Section (11721). A book of township plats, found in the office of the register of deeds is not admissible in evidence, where there is no law requiring it to be kept, or declaring it to be evidence. *Smith v. Lawrence*, 12 Mich. 431. A deed of lands in another state will not prove itself in Michigan under our statutes. *Gault v. Van Zile*, 37 Mich. 22. The record need not be signed by the register to make it evidence. *Wilt v. Cutler*, 38 Mich. 189.

**CERTIFIED COPIES AS EVIDENCE:** Copies from a county record of all deeds are prima facie evidence. *Bradley v. Silsbee*, 33 Mich. 330. And are admissible in any part of the state. *Wilt v. Cutler*, 38 Mich. 189. But the record in one county of a certified copy from the register of deeds of another county, of the record in such other county, is not admissible in evidence. *Shotwell v. Harrison*, 22 Mich. 410. Unless there is special authority therefor, as in Compilers' Sections (11729), (11766). The deposition of the register of deeds as to the contents of deeds recorded in his office, without giving copies thereof, is inadmissible. *Angell v. Rosenbury*, 12 Mich. 241. As to the form of certificate, see last section.

**ORIGINAL DEED:** Is properly admitted in evidence without proving hand-writing where it is properly executed and acknowledged and duly recorded. *Webb v. Holt*, 113 Mich. 340. In case of forgery it is the best evidence. *People v. Swetland*, 77 Mich. 57.

**WHEN FORGERY IS CHARGED:** This statute does not apply when the question of the forgery of the original instrument is in issue, either in a criminal or civil suit. When the main issue is whether a deed, mortgage or discharge of mortgage has been forged, the original instrument is the best evidence, and ought to be produced, if it can be. *People v. Swetland*, 77 Mich. 57.

**FORMER LAW CITED:** *Cameron v. Culkins*, 44 Mich. 533.

It is manifest that the record of a deed properly executed by some of the grantors but improperly by others will be evidence of the deed as to those only by whom it was properly executed. *Rayner v. Lee*, 20 Mich. 386; *F & M. Bank v. Bronson*, 14 Mich. 371; *Hall v. Redson*, 10 Mich. 21. Where a deed is authorized to be recorded the record of it is evidence. *Atwood v. Bearss*, 45 Mich. 471; *Fitzhugh v. Barnard*, 12 Mich. 104; *Mason v. Payne*, Walk. Ch. 469; *Wing v. McDowell*, Walk. Ch. 182.

Where deeds are not authorized by law to be recorded, the record of the deed is not evidence. *Buell v. Irwin*, 24 Mich. 145; *F. & M. Bank v. Bronson*, 14 Mich. 361; *Galpin v. Abbott*, 6 Mich. 17; *Dutton v. Ives*, 5 Mich. 515; *Wing v. McDowell*, Walk. Ch. 125.

Under the statute a deed of lands in another state could not prove itself. *Gault v. Van Zile*, 37 Mich. 22. The register must produce a copy of the record for he cannot testify orally to the contents of the record. *Angell v. Rosenbury*, 12 Mich.

Where the record of a deed shows that it was executed by Harmon and acknowledged by Hiram, it is not admissible as evidence unless proof is submitted that they apply to the same person. *Boothroyd v. Engels*, 23 Mich. 19.

The record of a deed properly executed and acknowledged, may be read in evidence without further proof of delivery. *Barras v. Barras*, 192 Mich. 591.

### (12509). Certified Copies of Deeds.

**SEC. 21.** The record of deeds or other instruments affecting the title to lands heretofore recorded in counties in this state other than the one in which the lands described therein are located, or a certified copy thereof, shall be deemed prima

facie evidence of the execution and delivery of such instrument, and as such shall be received in all courts in this state, and such certified copy may be recorded in the county in which such land is situated, with like effect as the original deed or other instrument.

**HISTORY:** Re-enacts and supersedes Sec. 1 of Act 258 of '89, being How. 5720a; C. L. '97, (9052), though such section is not expressly repealed. See Compilers' Section (11785), remains unchanged.

Under the statute it may be said that prima facie evidence does not apply when the question of the forgery of the original instrument is in issue either in a criminal or civil suit. *People v. Swetland*, 77 Mich. 53; *Pritchard v. Kalamazoo College*, 82 Mich. 587; *Cameron v. Culkins*, 44 Mich. 533.

In *Wilt v. Cutler*, 38 Mich. 192, the court said: "The statute declares that all conveyances when properly executed and recorded, the record, or a transcript thereof, properly certified to, 'may be read in evidence in any court within this State' without further proof thereof. There would seem to be no ambiguity in the language here used. And yet we are asked to incorporate, by construction, a clause into this section which would entirely change it and make it read, 'may be read in evidence in any court of the county where the lands lie within this state.' This could only be done by construing this section in connection with (4525), and incorporating a part of the provisions of the latter in to those of the former. It is not at all clear, however, that by so doing we would thereby carry out the evident intent of the legislature. Had it been the intention to limit (4233) in this manner, we cannot but think that it would not have been left to judicial construction to effect such object when the legislature could in a much easier and clearer manner have accomplished it at the time. Besides, when we interline the words 'of the county where the lands lie,' the words following 'within this state' are thereby rendered of no force, but without such interpolation they have decided bearing, as showing an intention not to limit the admissibility of the record to the county in which the instrument has been recorded, but to extend it to any court in any portion of the state.

Let us see how any other construction would operate in practice. We have a statute which authorizes the prosecution of suits for trespass upon lands, when the defendant is not an actual resident of the county in which such lands are situate, in any county where such defendant may be. §5976. Should it become necessary in such case for the plaintiff to introduce record evidence of his title to the lands upon which the trespass had been committed, where the suit was prosecuted in some other county, he must necessarily fail if the position contended for by plaintiff in error is correct. Our statute (§5146) authorizes bills for the foreclosure or satisfaction of mortgages to be filed in the circuit court in chancery of the county where the mortgaged premises or any part thereof are situated. Must the complainant in such case, where a question of record notice to subsequent purchasers or incumbrancers is not involved, introduce a certified copy of the record of his mortgage from the records of each county in which the mortgaged premises are situate in case he is so

unfortunate as to be unable to produce the original instrument, and if in such a case he has omitted to record his mortgage in each county in which the lands lie, must he thereby lose his lien to that extent or be compelled to give secondary evidence of his mortgage as of a lost instrument? Of if a party having lands in several counties, claiming title thereto under the same conveyance, brings an action of replevin to recover possession of timber cut and carried away therefrom, in the absence of the original must a certified copy from the record in each county, from whence the timber was taken, be produced on the trial, or would the record from one county suffice? Very many other cases might be supposed similar to the above, but we do not consider it necessary to extend further in this direction. In each and all cases we think the record or a certified copy thereof from any county, where the conveyance had been properly recorded, would be admissible, not only as to the lands situate in such county, but as to all others embraced in such conveyance, and situate within this state." It may be said that under the laws in force in '70, the absence of any trace of the "device by way of seal" which a grantor was authorized to adopt as a sufficient seal, upon the record of a deed, is not sufficient to warrant an inference that the original was unsealed, or to justify the rejectment of the record as evidence. *Starkweather v. Martin*, 28 Mich. 471.

**THE GENERAL RULE UNDER THIS STATUTE:** The general rule in regard to proof of document is, that the original shall be produced unless required to remain in some public office. If it belongs to such a place it can be proved by an exemplification. If the original document or paper is in private hands, it must be introduced in evidence unless lost or otherwise beyond the power of parties to prove it except by secondary evidence. Our statutes are peculiar in allowing the record of deeds to be given in proof as primary evidence. No record of deeds can have such an effect except by statute and such statutes are uncommon. *Bradley v. Silsbee*, 33 Mich. 330. In this case the court said: "There are, under the common law, and perhaps under some of the laws of the United States, some public acts of record, where the original is always found in the public office, and the copy issued to the party interested is itself an exemplification. Our statutes do not go upon this theory. The patent is signed by the governor and verified by the secretary of state as his certifying officer, and the original is delivered to the grantee in all cases. It may be recorded in the county records, and evidence of its contents, thus preserved. Copies from a county record of all deeds are prima facie evidence. C. L. (§4233)."

Under this section the original deed with the certificate of record indorsed thereon is admissible without preliminary proof. *Webb v. Holt*, 113 Mich. 338.

Where the record of a deed of standing timber is entitled by law to be recorded, it is prima facie evidence of the execution of the deed. *Mee v. Benedict*, 98 Mich. 260; *Bassett v. Hathaway*, 9 Mich. 31.

#### (12510). Certificate of Paper Not Found.

**SEC. 22.** Whenever any officer to whom the legal custody of any paper, document or record shall belong, shall certify

that he has made diligent examination in his office for such paper, document or record, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified, in all causes, matters and proceedings in the same manner and with like effect as if such officer had personally testified to the same in the court, or before the officer before whom such cause, matter or proceeding may be pending.

**HISTORY:** Re-enacts Sec. 75, R. S. '46, Ch. 102, being C. L. '57, (4312); C. L. '71, (5932); How. 7505; C. L. '97, (10170), unchanged.

**CERTIFICATE OF OFFICER:** By statute the certificate of the secretary of state, in this case, was presumptive evidence of the facts so certified in the same manner and with like effect as if such officer had personally testified in open court upon the trial. *Macbeth-Evans Glass Co. v. Gumbinsky*, 201 Mich. 22.

**(12511). Proceedings Before Justices of the Peace in Other States.**

**Sec. 23.** The official certificate of any justice of the peace within any other state of the United States, of the proceedings and judgment in any case before him as such justice, with the certificate of the clerk of any court of record in the county or district in which such justice has executed his office, attested by his official seal, setting forth that the signature to the certificate of the justice is genuine, and that he was such justice at the date of such proceedings and judgment, shall be sufficient evidence of such proceedings and judgment.

**HISTORY:** Re-enacts Sec. 76, R. S. '46, Ch. 102, being C. L. '57, (4313); C. L. '71, (5933); How. 7506; C. L. '97, (10171). Unchanged.

**CONSTRUED:** A properly certified transcript of a justice's judgment rendered in another state on personal service and appearance is sufficient of the justice's jurisdiction. *Campbell v. Wallace*, 46 Mich. 320. A certificate of a justice of the peace of another state, of proceedings before him, is void, if it fails to show that the certifying officer is a clerk of a court of record. *Howard v. Coon*, 93 Mich. 442.

**(12512). Printed Copies of Constitution and Laws.**

**Sec. 24.** The printed copies of the constitution, laws and resolutions of this state, whether of a public or private nature, which shall be published under the authority of the government, shall be admitted as sufficient evidence thereof in all courts, and in all proceedings within this state.

**HISTORY:** Re-enacts Sec. 77, R. S. '46, Ch. 102, being C. L. '57, (4314); C. L. '71, (5934); How. 7507; C. L. '97, (10172); changing

"all statutory acts and resolutions of this State" to "the constitution, laws and resolutions of this State" as above. Unchanged.

**CONSTRUED:** Where there is a discrepancy between the original on file and the printed copies thereof, the original must prevail. *Hulburt v. Merriam*, 3 Mich. 144. Courts take judicial notice of the laws. *Hurlbut v. Britain*, 2 Doug. 195-6; *People v. R. R. & L. E. R. R. Co.*, 12 Mich. 389; *Groesbeck v. Seeley*, 13 Mich. 340; *People v. Mahaney*, 13 Mich. 481; *People v. Land Com'r.*, 23 Mich. 270.

**HOWELL'S STATUTES:** Act 13 of '83, p. 8, makes the first and second volumes of Howell's annotated statutes admissible as evidence in all courts and proceedings, and Act 90 of '89, p. 97, makes the third volume like evidence.

### (12513). Printed Copies of Laws of Other States.

**SEC. 25.** Printed copies of the constitution, laws and resolutions of any other of the United States, or of any territory thereof or of any foreign state, if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts shall be admitted in all courts, and in all proceedings within the state, as prima facie evidence thereof; and the courts of this state may take judicial notice thereof without their formal introduction in evidence.

**HISTORY:** Re-enacts Sec. 78, R. S. '46, Ch. 102, being C. L. '57, (4315); C. L. '71, (5935); How. 7508; As Am. '85, p. 79, Act 82, Eff. Sept. 19; C. L. '97, (10173); with a slight change in the phraseology and the addition of the last clause. Modified.

**PROOF OF LAWS OF FOREIGN STATES:** Hereafter the courts may take judicial notice of the constitutions, laws and resolutions of any other state of the United States, any territory thereof or of any foreign state as appearing in printed volumes of statutes or reports, purporting to be published under the authority of the respective governments, without the formal introduction of such volumes in evidence.

**CONSTRUED:** Formerly the courts could not take judicial notice of the statutes of other states. *Worthington v. Hanna*, 23 Mich. 534; *G. W. Ry. Co. v. Miller*, 19 Mich. 314. But the addition of the last clause of the above section changed this rule. Under the former rule foreign statutes had to be proved by copies authenticated in some mode recognized by law. *People v. Lambert*, 5 Mich. 349; *Kermott v. Ayer*, 11 Mich. 183-4; *Ellis v. Maxson*, 19 Mich. 186; *Jones v. Palmer*, 1 Doug. 379. The marriage laws of Pennsylvania may be proved by "Brightley's Purdon's Digest." *People v. McQuaid*, 85 Mich. 123. The question, "If purporting to be published under the authority of the state," is a question for the court to decide, upon inspecting the printed copy. *Gray v. Gibson*, 6 Mich. 320. Printed copies prima facie evidence. *Morse v. Hewitt*, 28 Mich. 487; *People v. Lambert*, 5 Mich. 360; *People v. Calder*, 30 Mich. 88; *Wilt v. Cutler*, 38 Mich. 189. May be proved by exemplifications. *People v. Lambert*, 5 Mich. 360. Cannot be proved by parole without some showing why secondary

evidence becomes necessary. *People v. Lambert*, 5 Mich. 349; *Kermott v. Ayer*, 11 Mich. 184; *Kopke v. People*, 43 Mich. 41. The laws of another state, as printed, are presumed to have remained unchanged, unless otherwise shown. *People v. Calder*, 30 Mich. 85. The reports of the courts of another state, as well as its printed statutes, are admissible in evidence. *Rice v. Rankans*, 101 Mich. 378, 386.

In *Worthington v. Hanna*, 23 Mich. 534, the court said: "While we cannot assume judicially to know what any foreign law is, there is no principle which will justify us in holding any thing void under foreign law which is lawful here, until the variance is shown. To that extent we may presume a conformity between our laws and foreign laws. *Crane v. Hardy*, 1 Mich. 56. And, in order to sustain the presumptive validity of foreign transactions, we have, in the absence of proof to the contrary, held them valid when conforming to the common law. *Hugh, Appellant*, 2 Doug. 516; *Ellis v. Maxson*, 19 Mich. 186."

The general rule is established under the statute that the laws of another state, printed in their official form, are presumed to have remained unchanged, unless otherwise shown. *People v. Calder*, 30 Mich. 85. Thus the reports of the courts of another state as well as its printed statutes are admissible in evidence. *Rice v. Rankans*, 101 Mich. 378. By the introduction of *Brightley's Purdon's Digest*, the marriage laws of Pennsylvania may be proved. *People v. McQuaid*, 85 Mich. 123. It is a question for the court to decide upon inspection of the printed copy whether the statute purported to be published under the authority of the state is authoritative or not. *Gray v. Gibson*, 6 Mich. 320. Statutes of foreign states and countries must be proved by copies authenticated in some mode recognized by law. *People v. Lambert*, 5 Mich. 349; *Kermott v. Ayer*, 11 Mich. 183; *Ellis v. Maxson*, 19 Mich. 186; *Jones v. Palmer*, 1 Doug. 379.

The general rule is, under the statute, that printed copies are *prima facie* evidence. *Morse v. Hewitt*, 28 Mich. 487; *Wilt v. Cutler*, 38 Mich. 189; *People v. Calder*, 20 Mich. 88; *People v. Lambert*, 5 Mich. 360.

#### (12514). Municipal Laws and Ordinances.

SEC. 26. All laws, by-laws, regulations, resolutions and ordinances of the common council, or of the board of trustees of any incorporated city or village in this state may be read in evidence in all courts of justice and in all proceedings before any officer, body or board, in which it shall be necessary to refer thereto, either from a record thereof, kept by the clerk or recorder of such city or village, or from a printed copy thereof, purporting to have been published by authority of the common council or board of trustees, in a newspaper published in such city or village, or from any volume of ordinances, purporting to have been printed by authority of the common council or board of trustees of such city or village; and such record, certified copy or volume shall be *prima facie* evidence of the existence and validity of such laws,



regulations, resolutions and ordinances, without proof of the enactment, publishing, or any other thing concerning the same.

**HISTORY:** Re-enacts Sec. 76, R. S. '46, Ch. 102, being C. L. '57, (4313); C. L. '71, (5933); How. 7506; C. L. '97, (10171). Unchanged.

**CONSTRUED:** A properly certified transcript of a justice's judgment rendered in another state on personal service and appearance is sufficient evidence of the justice's jurisdiction. *Campbell v. Wallace*, 46 Mich. 320. A certificate of a county clerk to the certificate of a justice of the peace of another state, of proceedings before him, is void, if it fails to show that the certifying officer is a clerk of a court of record. *Howard v. Coon*, 93 Mich. 442.

It will be error in a private action to exclude the records of a city council offered to prove charges in theatres ordered in the interest of the public safety. *Norris v. McFadden*, 159 Mich. 424. As to the method of proving the contents of city or village ordinances, the rule under this statute is that the same method is required as is necessary for proving a statute. *Napman v. People*, 10 Mich. 352.

Courts do not take judicial notice of a municipal ordinance. *People v. Quider*, 172 Mich. 288. In this case the court said: This is a prosecution under a general law of the state. The recorder's court when trying it was not a municipal court, but a state court and its judge exercised the powers of a circuit judge. As such he could not take judicial notice of a municipal ordinance. In failing to prove the ordinance as alleged in the complaint, the prosecution failed to make out a prima facie case, and, as the case then stood, the motion of a respondent's counsel for a directed verdict should have been granted."

### (12515). Common Law of Other States.

**SEC. 27.** The unwritten or common law of any other of the united States, or of any territory thereof or of any foreign state or country, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as evidence of such law; and the courts may take judicial notice of the same as in the case of statutes.

**HISTORY:** Re-enacts Sec. 79, R. S. '46, Ch. 102, being C. L. '57, (4316); C. L. '71, (5936); How. 7509; C. L. '97, (10174); adding however the last clause of the above section. Modified.

**CONSTRUED:** The addition of the last clause to the above section (see history above), allowing courts to take judicial notice of the common law of foreign countries apparently makes a considerable change in the rule as formerly applied. Under the former rule courts could not assume judicially to know the laws of a foreign state. See *Worthington v. Hanna*, 23 Mich. 534; *G. W. Ry. Co. v. Miller*, 19 Mich. 314. In the absence of proof to the contrary, it will be presumed that the common law, as in force in this state, prevails in a foreign country. *Rue High, Appellant*, 2 Doug. 515; *Crane v. Hardy*, 1 Mich. 56; *Ellis v. Maxson*, 19 Mich. 186; *Hutchins v. Kimmell*, 31 Mich. 133. The unwritten law of another state must,

from the nature of things, be proved by parol evidence. *People v. Lambert*, 5 Mich. 361; *Morrissey v. People*, 11 Mich. 340-1.

As to proof of foreign statutes, see Compiler's Section (12513) and notes.

(12516). Any Device by Way of Seal.

SEC. 28. Any device affixed to any deed or instrument in writing by way of seal, by any person signing the same, executed since the thirty-first day of December, eighteen hundred and twenty-seven, or hereafter to be executed, shall be received in all courts, and upon all occasions as evidence that the same deed or instrument was duly sealed, and equally valid and effectual, as if the same had been actually sealed; but this section shall not apply to official and corporate seals, in cases where, according to law, an actual sealing may be required.

HISTORY: Re-enacts Sec. 80, R. S. '46, Ch. 102, being C. L. '57, (4317); C. L. '71, (5937); How. 7510; C. L. '97, (10175). Unchanged.

CONSTRUED: The ancient significance of private sealing has almost wholly disappeared, and so far has respect for it declined, that the legislature has first permitted the use of "any device" "by way of seal" and then enacted that "no bond, deed of conveyance, or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party." *Bay Co. v. Brock*, 44 Mich. 53-4.

SEAL EVIDENCE OF CONSIDERATION: See Compiler's Section (12534).

(12517). Certified Copies of Judgment.

SEC. 29. Whenever any certified copy of a judgment or decree shall have been, or shall be recorded in any register of deeds' office, such record may be read in evidence in all courts of this state, with like force and effect as such certified copy.

HISTORY: Re-enacts and merges Secs. 3 and 4 of Act 5 of '73, being C. L. '97, (9046) and (9047). Unchanged.

(12518). Original Entry or Transcript from Justice's Docket.

SEC. 30. The original entry of any judgment or other proceeding, or a transcript from the docket of any justice of the peace of any judgment had before him; of the proceedings in the cause previous to judgment; of the execution issued thereon, if any, and the return to such execution, if any, when certified by the justice having control of such docket,

shall be evidence in all courts to prove the facts stated in such originals or in such transcripts.

**HISTORY:** Re-enacts and merges Secs. 240 and 241 of Act 153 of '55, being C. L. '57, (3892)-(3893); C. L. '71, (5488)-(5489); How. 7055-6; C. L. '97, (959)-(960). Unchanged.

**CONSTRUED:** Clark v. Holmes, 1 Doug. 390.

**ORIGINAL ENTRY:** A justices's judgment may be proved by his docket. Schlatterer v. Nickodemus, 50 Mich. 317. When a judgment has been entered in the docket, it cannot be proved by the parol evidence of the justice of the contents of his docket. The docket is the best evidence of the judgment. Hickey v. Hinsdale, 8 Mich. 273. See Goodrich v. Burdick, 26 Mich. 41.

**TRANSCRIPT:** Evidence of judgment. Hickey v. Hinsdale, 8 Mich. 267. To what extent. Goodrich v. Burdick, 26 Mich. 41. If the transcript complies with this section and is duly certified it may be read in evidence without further statements. Goodsell v. Leonard, 23 Mich. 374. Certificate. Id.; Aldrich v. Mattland, 4 Mich. 211. Certified by a justice having control of the docket of another justice. Facey v. Fuller, 13 Mich. 527; Goodsell v. Leonard, 23 Mich. 374. When not certified, it may be proved by the oath of the justice; but, if neither certified nor otherwise proved, it is not admissible in evidence to prove the judgment. Wilber v. Goodrich, 34 Mich. 84. As to supplementing an ambiguous transcript by other evidence, see Smalley v. Lighthall, 37 Mich. 348; see O'Donnell v. Wade, 151 Mich. 103; Antcliff v. June, 81 Mich. 477; Gadsby v. Stimer, 79 Mich. 260; Schlatterer v. Nickodemus, 50 Mich. 317.

#### (12519). May be Proved by Oath of Justice.

**SEC. 31.** The proceedings in any cause or matter, had before a justice, may also be proved by the oath of the justice; and in case of the death or absence of the justice, they may be proved by producing the original minutes of such proceedings, entered in a book kept by such justice, accompanied by proof of his hand-writing, or they may be proved by producing copies of such minutes, sworn to by a competent witness, as having been compared by him with the original entries, with proof that such entries were in the handwriting of the justice.

**HISTORY:** Re-enacts Sec. 242 of Act 153 of '55, being C. L. '57, (3894); C. L. '71, (5490); How. 7057; C. L. '97, (961). Unchanged.

**CONSTRUED:** See Hickey v. Hinsdale, 8 Mich. 273; Schlatterer v. Nickodemus, 50 Mich. 317.

#### (12520). Copies of Papers in the U. S. Land Office.

**SEC. 32.** Copies of all papers, documents, plats, maps, entries, or records filed, entered, or recorded in any land office of the United States situated in the state of Michigan, certi-

fied by the register or receiver of such land office to be a correct transcript compared by him with the original in said land office, shall be evidence in all courts and proceedings in like manner and to the same extent as the original would be if produced.

**HISTORY:** Re-enacts Sec. 1 of Act 26 of '81, being How., 7530; C. L. '97, (10197). Unchanged.

**(12521). Records of Board of St. Mary's Canal.**

**SEC. 33.** Copies of all papers, documents, maps, plats, entries, or records filed with the board of control of the Saint Mary's Falls Ship Canal, or entered in the records of the proceedings of said board of control, certified by the auditor general of this state to be a true transcript compared by him with the original in the office of said board of control, shall be evidence in all courts and proceedings in like manner and to the same extent as the original would be if produced.

**HISTORY:** Re-enacts Sec. 2 of Act 26 of '81, being How. 7531; C. L. '97, (10198). Unchanged.

**(12522). Observations of Weather Service.**

**SEC. 34.** Any copy of the record of observations in regard to the condition of the weather taken under the direction of the signal service department of the United States, when certified by the officer in charge thereof at the place where the same is taken and kept, that the same is a true copy of the record on file in said signal service office, may be received in evidence in any civil cause in any court, and shall be prima facie evidence of the facts and circumstances therein contained and stated.

**HISTORY:** Re-enacts Sec. 1 of Act 53 of '81, being How. 7533; C. L. '97, (10201). Unchanged.

**WEATHER RECORD:** Weather record kept for years at the asylum for the insane held competent evidence. *De Armond v. Neasmith*, 32 Mich. 231.

**(12523). Proof of Publication.**

**SEC. 35.** When notice of any application to any court or judicial officer for any proceeding authorized by law, is required by law to be published in one or more newspapers, an affidavit of the printer of any such paper, or of his foreman or principal clerk, annexed to a printed copy of such notice

taken from the paper in which it was published, and specifying the times when, and the paper in which such notice was published may be filed with the proper officer of the court, or with the judicial officer before whom such proceeding shall be pending, at any time within six months after the last day of the publication of such notice.

**HISTORY:** Re-enacts Sec. 67, R. S. '46, Ch. 102, being C. L. '57, (4304); C. L. '71, (5924); How. 7497; C. L. '97, (10162). Unchanged.

**CONSTRUED:** Requisites of affidavit of publication. *Gillett v. Needham*, 37 Mich. 143. See *Powers' Appeal*, 29 Mich. 508-9; *Dexter v. Cranston*, 41 Mich. 448; *Pettiford v. Zoellner*, 45 Mich. 363. The statute does not require that the notice shall be cut from the paper. What it does require is identity of the notice annexed with that published. *Wilkinson v. Conaty*, 65 Mich. 614.

#### (12524). Proof of Publication of Notice of Sale.

**SEC. 36.** When any notice of a sale of real property is required by law to be published in any newspaper, an affidavit of the printer of such paper, or of his foreman, or principal clerk, annexed to a printed copy of such notice taken from the paper in which it was published, and specifying the times when and the paper in which it was published, may be filed at any time within six months after the last day of such publication, with the county clerk of the county in which the premises sold are situated, or if such sale were made in pursuance of the order of any judge of probate or court of chancery, such affidavit may be filed with such judge of probate or with a clerk of such court of chancery, as the case may be.

**HISTORY:** Re-enacts Sec. 68, R. S. '46, Ch. 102, being C. L. '57, (4305); C. L. '71, (5925); How. 7498; C. L. '97, (10163), changing "register" to "clerk." Unchanged.

**CONSTRUED:** Form of Affidavit. *Brown v. Phillips*, 40 Mich. 264. An affidavit showing publication in a daily paper "once in each week for seven successive times," giving the date of the first publication, is not sufficient to prove compliance with the requirement of publication once in each week for six successive weeks. *Perrien v. Fetters*, 35 Mich. 233. Affidavit made too late. *Mundy v. Monroe*, 1 Mich. 68. See *Woods v. Munroe*, 17 Mich. 242. Affidavit by bookkeeper of paper. *Schlee v. Darrow Estate*, 65 Mich. 371. Publication is provable by publisher's affidavit. *Vroman v. Thompson*, 51 Mich. 452. See *Dexter v. Cranston*, 41 Mich. 448.

#### (12525). Presumptive Evidence.

**SEC. 37.** The original affidavit so filed pursuant to the two last sections, and copies thereof duly certified by the officer

in whose custody the same shall be, shall be presumptive evidence in all cases, of the facts contained in such affidavits.

**HISTORY:** Re-enacts Sec. 69, R. S. '46, Ch. 102, being C. L. 57, (4306); C. L. '71, (5926); How. 7499; C. L. '97, (10164), unchanged.

**(12526). Affidavit of Printer Prima Facie Evidence.**

**SEC. 38.** The affidavit of the printer, or foreman, or clerk of any printer of a public newspaper, published in this state, of the publication of any notice or advertisement, which by any law of this state shall be required to be published in such newspaper, shall be entitled to be read in all courts of justice in this state, and in all proceedings before any officer, body or board in which it shall be deemed necessary to refer thereto, and shall be prima facie evidence of such publication, and of the facts therein stated.

**HISTORY:** Re-enacts Sec. 70, R. S. '46, Ch. 102, being C. L. '57, (4307); C. L. '71, (5927); How. 7500; C. L. '97, (10165), unchanged.

**CONSTRUED:** In providing that an affidavit by the printer of the newspaper shall be prima facie evidence, the statute does not exclude other proof, such as the affidavit of some other person who knows the fact. *Matthews v. Otsego Supervisors*, 48 Mich. 587. This section rather than Compilers' Section (12523) governs with respect to proof of publication of orders to appear. *Brown v. Phillips*, 40 Mich. 269. Sufficient publication of notice of a guardian's sale may be shown by other evidence than the affidavit thereof, which is for the purpose of a permanent record. *Persinger v. Jubb*, 52 Mich. 304. Computation of time of publication. *Dexter v. Cranston*, 41 Mich. 451-2.

As to affidavit of publication, see notes to Compilers' Section (12524).

Where the affidavit was made by one describing himself as "a foreman of the Livingston Republican" instead of by "the foreman of the printer of said newspaper," the distinction is more nice than wise. *Dexter v. Cranston*, 41 Mich. 453. The affidavit of publication, given in the decision, is sufficient under the statute. *Brown v. Phillips*, 41 Mich. 269. An affidavit of publication, annexed to a report of sale under a foreclosure decree, and therein referred to, must be considered as proof of the fact therein stated. *Perrien v. Fetters*, 35 Mich. 233.

**(12527). Copy of Affidavit.**

**SEC. 39.** Whenever a certified copy of any affidavit, record, document or paper, is declared by law to be evidence, such copy shall be certified by the clerk or officer in whose custody the same is by law required to be, to have been compared by him with the original, and to be a correct transcript therefrom, and of the whole of such original; and if such officer have any official seal by law, such certificate shall be attested by such seal; and if such certificate be given by the clerk

of any county, in his official character as such clerk, it shall be attested by the seal of the court of which he is clerk.

**HISTORY:** Re-enacts Sec. 71, R. S. '46, Ch. 102, being C. L. '57, (4308); C. L. '71, (5928); How. 7501; C. L. '97, (10166), unchanged.

**CONSTRUED:** This section does not apply to certificates of transcripts from justices' judgments, they being sufficiently certified to, if they comply with Compilers' Section (14281), relative thereto. *Goodsell v. Leonard*, 23 Mich. 374. See *Gilman v. Riopelle*, 18 Mich. 158.

**(12528). When Seal Not to be Affixed.**

**SEC. 40.** But the preceding section shall not be construed to require the affixing of the seal of any court to any certified copy of any rule or order made by such court, or of any paper filed therein, when such copy is used in the same court, or before any officer thereof; nor to require the seal of the supreme court to be affixed to a certified copy of any rule or order of that court, when used in any circuit court.

**HISTORY:** Re-enacts Sec. 72, R. S. '46, Ch. 102, being C. L. '57, (4309); C. L. '71, (5929); How. 7502; C. L. '97, (10167), unchanged.

**(12529). Acknowledgment of Written Instruments.**

**SEC. 41.** Every written instrument, except promissory notes and bills of exchange, and except the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law, for taking the proof or acknowledgment of conveyances of real estate, and the certificate of the proper officer endorsed thereon, shall entitle such instrument to be received in evidence on the trial of any action, with the same effect, and in the same manner, as if such instrument were a conveyance of real estate.

**HISTORY:** Re-enacts Sec. 73, R. S. '46, Ch. 102, being C. L. '57, (4310); C. L. '71, (5930); How. 7503; C. L. '97, (10168), unchanged.

**CONSTRUED:** Where the signatures were conceded to be genuine, this under our statute, makes the acknowledgment presumptive evidence of genuineness without reference to the common law doctrine relative to subscribing witnesses. *Cameron v. Culkins*, 44 Mich. 533.

**(12530). Certificates and Records of Marriage.**

**SEC. 42.** The original certificates and records of marriage made by the minister, justice or other person authorized to solemnize marriages, as prescribed by law, and the record thereof made by the county clerk, or a copy of such record, duly certified by such clerk, shall be received in all courts

and places as presumptive evidence of the fact of such marriage.

**HISTORY:** This section perhaps supersedes Sec. 5, R. S. '46, Ch. 107, being C. L. '57, (3221); C. L. '71 (4732); How. 6222; C. L. '97, (8601); Compilers' Section (11375), unchanged.

**RECORDS MADE BY MINISTER:** Compilers' Section (11375), from which this section is probably taken, is Section 18 of Chapter eighty-three of the revised statutes of '46, the only material change being the clause, "as prescribed by law," which reads, "as prescribed by this chapter" in Compilers' Section (11375). The records "made by the minister, justice or other person," as "prescribed by law," were provided for in Sections 10, 11, of the same chapter. C. L. '57, (3213)-(3214). These provisions were repealed and superseded by new ones by Act 194 of the Public Acts of '67; (C. L. '97, 4606 et seq.). Act 194, '67 was repealed by Compilers' Section 69, page 308. Present law requiring clergymen and magistrates to keep a record of marriages, see Compiler's Section (11379).

**RECORDS MADE BY COUNTY CLERK:** See Compilers' Section (11378).

**PROOF IN CIVIL CASES:** The law is very liberal in the admission of evidence in proof of marriage and pedigree. *Shotwell v. Harrison*, 22 Mich. 415. A certificate of marriage in another state signed by the minister, may perhaps avail in civil proceedings, if properly supported. *People v. Lambert*, 5 Mich. 365. A duly authenticated certificate of a marriage, celebrated in a foreign country, may be received in evidence here. *Hutchins v. Kimmell*, 31 Mich. 126. Marriage is provable by conduct and reputation in all civil cases involving property rights. *Proctor v. Bigelow*, 38 Mich. 282. Reputation is important as evidence to establish the fact of marriage; but it is only one of the circumstances from which the true relations of the parties, as legal or otherwise, may be inferred; it is not in itself a fact which is at all important to the validity of the relation. And upon doubtful facts, the court ought to presume a lawful marriage rather than a notorious act of immorality. *Peet v. Peet*, 52 Mich. 467. There is no rule of law making marriage records the best evidence in any case, and even where they exist some parol evidence is usually necessary to identify the parties, in case of any controversy. *Proctor v. Bigelow*, 38 Mich. 283. There is no authority that requires the highest evidence of marriage in suits not directly involving the marriage relation as a part of the main issue. *Leonard v. Pope*, 27 Mich. 146. In an action by the husband for enticing away his wife, direct proof of a formal marriage is not requisite, but evidence of cohabitation and repute and of defendant's admissions that the plaintiff and his alleged wife were married may be allowed to satisfy the jury. *Perry v. Lovejoy*, 49 Mich. 532. See *Hoffman v. Simpson*, 110 Mich. 133. Proof that parties lived together as husband and wife following introduction of certificate of marriage admissible. *Mead v. Randall*, 111 Mich. 268.

**PROOF IN CRIMINAL CASES:** *Dixon v. People*, 18 Mich. 84. Proof of ceremony performed. *People v. Calder*, 30 Mich. 90. In criminal prosecution and cases of seduction, marriage is not provable by conduct and reputation. *Proctor v. Bigelow*, 38 Mich. 283. Where the action is for criminal conversation an actual marriage must be



proved and such evidence of cohabitation and repute, as would suffice in a prosecution for enticing away the wife, will not avail. *Perry v. Lovejoy*, 49 Mich. 532-3; *Hutchins v. Kimmell*, 31 Mich. 130. In a prosecution for adultery with a married woman, the recorded marriage certificate is admissible to aid in proving the marriage, though it may be insufficient without some identification of the parties. *People v. Broughton*, 49 Mich. 339; *People v. Isham*, 109 Mich. 76. A certificate of marriage in another state cannot avail as proof of marriage in criminal trials, where the defendant is entitled to confront the witnesses. *People v. Lambert*, 5 Mich. 365; *People v. Imes*, 110 Mich. 252. See *People v. Bennett*, 39 Mich. 209; *People v. Loomis*, 106 Mich. 250. See *In re Fitzgibbons' Estate*, 162 Mich. 416; *Killackey v. Killackey*, 156 Mich. 127. It is said that the law is very liberal in the admission of evidence in proof of marriage and pedigree. *Shotwell v. Harrison*, 22 Mich. 415. There is no rule making marriage records the best evidence in any case, and even where they exist, some parole evidence is usually necessary to identify the parties in case of any controversy. *Proctor v. Bigelow*, 38 Mich. 383; *Leonard v. Pope*, 27 Mich. 146. In an action by the husband for enticing away his wife, a direct proof of a former marriage is not requisite, but evidence relating to the marriage relations is admissible. *Perry v. Lovejoy*, 49 Mich. 532.

A duly authenticated certificate of marriage celebrated in a foreign country may be received in evidence. *Hutchins v. Kimmell*, 31 Mich. 126. The general rule is that marriage is provable by conduct and reputation. *Proctor v. Bigelow*, 38 Mich. 282. It may be said that reputation is important as evidence to establish the fact of marriage, but it is only one of the circumstances from which the true relations of the parties, as legal or otherwise, may be inferred. It is not in itself a fact which is at all important to the validity of the relation. Where the facts are doubtful, the court ought to presume a lawful marriage. *Peete v. Peete*, 52 Mich. 467.

### (12531). Record of License to Marry.

Sec. 43. The record of any license to marry, or of any marriage certificate, in any county clerk's office, or a certified copy thereof, shall be prima facie evidence in any court or proceedings in this state, with the same force and effect as if the original were produced, both as to the facts therein contained and as to the genuineness of the signatures thereto.

**HISTORY:** Re-enacts and supersedes Sec. 10 of Act 128 of '87, being How. 6222j; C. L. '97, (8611), though such section is not expressly repealed. See Compilers' Section (11385).

**PUBLIC RECORDS:** Marriage licenses and returns are public records. In *Kalamazoo Gazette v. Kalamazoo County Clerk*, 148 Mich. 460, the court said: "The controlling question in the case is whether marriage licenses and returns, provided for by the statute (3 Comp. Laws, (8604)-(8605)-(8606)-(8607)-(8608)-(8609)-(8610)-(8611) are public records open to inspection by those who have occasion to inspect them, or whether the clerk has a discretion to withhold such

records from inspection when in his opinion the publication of the contents is undesirable. It must be held that these records are public records. The statute (3 Comp. Laws, 8612 et seq.) makes provision for withholding from the public information in certain cases where the marriage has been solemnized by the probate judge. This statute, so far as it throws light upon the subject, indicates that the legislative branch of the government understood that the record provided for by the preceding sections was public. Public records (other than court records, as to which see *Schmedding v. May*, 85 Mich. 1) are, under Act No. 76, Public Acts '03, open to inspection for any lawful purpose. See *Burton v. Tuite*, 78 Mich. 363 (7 L. R. A. 73), and *Day v. Button*, 96 Mich. 600."

**(12532). Certificates of Purchase of Public Lands.**

SEC. 44. Certificates of the purchase of public lands, signed by the receiver, shall be evidence in any court in this state, that the possession of the lands described in said certificate or certificates, is in the person or persons, his, her, or their heirs or assigns, holding said certificate or certificates, as against any person or persons, not having a better title to such land than actual possession.

HISTORY: Re-enacts Sec. 1 of Act of Dec. 30, '34, p. 37, being C. L. '57, (4332); C. L. '71, (5952); How. 7532; C. L. '97, (10200), changing "territory" to "state." Modified.

**(12533). Breeding of Horses.**

SEC. 45. Whenever it becomes necessary to show the breeding of any horse in any action at law or in equity, the same may be shown by Wallace's Year Book, Wallace's American Trotting Register, The American Percheron Horse Breeders' and Importers' Association, Percheron Society of America, The American Percheron Horse Breeders' Association or the Percheron Stud Book of America; and whenever a horse is registered in any of the registers aforesaid, or with said society or either of said associations, the record of such registration or the society's or association's certificate of such registration under its corporate seal shall be prima facie evidence of the breeding of such horse.

HISTORY: Re-enacts Sec. 1 of Act 173 of '93, being C. L. '97, (10202), As Am. '11, p. 118, Act 82, Eff. Aug. 1. Changed.

**Miscellaneous Provisions.**

**(12534). Seal Presumptive Evidence of Sufficient Consideration.**

SEC. 46. In any action upon a sealed instrument, and

where a set-off is founded on any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed.

**HISTORY:** Re-enacts Sec. 90, R. S. '46, Ch. 102, being C. L. '57, (4327); C. L. '71, (5947); How. 7520; C. L. '97, (10185). Changed.

**CONSTRUED:** The rule created by this statute that sealed instruments may be impeached for want of consideration applies with equal force to all sealed instruments between party and party. *Hobbs v. Elec. Lt. Co.*, 75 Mich. 553. This statute places simple executory, and sealed executory, contracts upon the same footing. *Township of Danby v. Beebe*, 147 Mich. 317. See also *Hollenbeck v. Breakey*, 127 Mich. 555; *Robson v. Dayton*, 111 Mich. 442; *Boyer v. Sowles*, 109 Mich. 485; *Blagborne v. Hunger*, 101 Mich. 378; *Green v. Langdon*, 28 Mich. 226.

**SEAL:** The absence of a seal or scroll does not invalidate. *Barton v. Gray*, 57 Mich. 634; *Mee v. Benedict*, 98 Mich. 270; *Fowler v. Hyland*, 48 Mich. 181; *Lockwood v. Bassett*, 49 Mich. 549; *McKinney v. Miller*, 19 Mich. 151; *Jerome v. Ortman*, 66 Mich. 670. Yet the absence of a seal may be significant when the purpose of an instrument is not clear and its terms are indefinite, as helping to determine whether or not it was meant as a conveyance. *Spicer v. Bonker*, 45 Mich. 635. This section applies to leases under seal, they falling within the meaning of the word "contract." *Stewart v. Sprague*, 71 Mich. 58; *Dalton v. Laudahn*, 30 Mich. 350.

The ancient significance of private sealing has almost wholly disappeared. *Bay Co. v. Brock*, 44 Mich. 53-4; See *Blagborne v. Hunger*, 101 Mich. 377-8. A conveyance by a private corporation is not void for want of a seal. *Ismon v. Loder*, 135 Mich. 345. See *Compilers' Section* (12516). It is the seal which makes prima facie evidence of consideration. *Blagborne v. Hunger*, 101 Mich. 375.

### (12535). Proof of Incorporation.

**SEC. 47.** In any suit or proceeding, civil or criminal hereafter instituted in any of the courts of this state, wherein it shall become material or necessary to prove the incorporation of any company or corporation, or the existence of any joint stock company or association, whether the same be a foreign or domestic corporation, company, or association, evidence that such corporation, company, or association is doing business under a certain name shall be prima facie proof of its due incorporation or existence pursuant to law, and of its name.

**HISTORY:** Re-enacts Sec. 1 of Act 109 of '71, being C. L. '71, (5959); How. 7528; C. L. '97, (10194). Unchanged.

**PROOF OF CORPORATE EXISTENCE:** A uniform rule has been provided in cases brought by or against corporations either foreign or domestic that it shall not be necessary to prove the existence of

such corporation, such existence having been properly averred, unless the defendant shall have denied the same under oath in his plea or answer.

**PROOF OF CORPORATE EXISTENCE:** By the production of the charter and evidence of acts thereunder. *Cahill v. K. M. Ins. Co.*, 2 Doug. 124; *Way v. Billings*, 2 Mich. 397; *Swartwout v. M. A. L. R. R. Co.*, 24 Mich. 394; *L. S. Bldg. Co. v. Thompson*, 32 Mich. 294-5. See *Jhons v. People*, 25 Mich. 502; *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476; *Thatcher v. W. R. Nat. Bank*, 19 Mich. 196. Proof under this act. *Gravel Road Co. v. Paas*, 95 Mich. 376.

The plea of the general issue is an admission that plaintiff suing as a corporation, is properly incorporated. *Imperial Curtain Co. v. Jacob*, 163 Mich. 72. Doing business under a corporate name is *prima facie* evidence of due incorporation. *Id.* Unacknowledged articles not evidence of incorporation. *Doyle v. Mizner*, 42 Mich. 332. As to when parties dealing with a corporation are estopped from denying its corporate existence, see notes to Compilers' Section (11328). When proof is not necessary, see Compilers' Section (12460). See also *Wilson S. M. Co. v. Spears*, 50 Mich. 534. Failure to prove corporate existence may be obviated by proof of dealings recognizing it. *Chapman v. Colby*, 47 Mich. 46.

This section applies equally to foreign and domestic corporations, and the fact that a concern is doing business under a corporate name is *prima facie* evidence of its due incorporation. *Imperial Curtain Co. v. Jacob*, 163 Mich. 72. In this case the court said: "The statutes with reference to foreign corporations were not made merely for the purpose of preventing foreign corporations from coming into Michigan and making contracts here, but were passed principally for the purpose of preventing foreign corporations from carrying on their business in this state without subjecting themselves to certain liabilities and obligations."

It is apparent that where a body professing to be a corporation has been dealt with expressly as such, those who have so dealt with it cannot question its corporate existence. *Merchants & Mnfrs. Bank v. Stone*, 38 Mich. 779. In this case the court said: "In short the company was *prima facie* a lawful corporation when the note was taken, and the bank admitted in the very transaction that it was one in fact, and that admission cannot be disputed in this collateral way in order that the bank may call in question the corporate existence of the company and charge against the individual members the precise obligation which was unequivocally accepted as a corporate one." *Locke v. Leonard Silk Co.*, 37 Mich. 479; *Druse v. Wheeler*, 22 Mich. 439.

#### (12536). Proof of Copartnership.

**SEC. 48.** In any suit or proceeding hereafter instituted in any of the courts of this state, wherein it shall become material or necessary to prove the co-partnership of any firm or association, the plaintiffs may cause to be served upon the defendant, with a copy of the declaration filed in the cause, or with the process by which suit is commenced, an affidavit

stating that the plaintiffs were the persons comprising such partnership at the time the contract in question was made, or the cause of action accrued; and such affidavit shall be prima facie evidence of such existence of such partnership or association, unless the defendant shall file with his plea an affidavit denying the existence of such partnership or association.

**HISTORY:** Re-enacts Sec. 1 of Act 69 of '77, being How. 7529; C. L. '97, (10195). Unchanged.

**(12537). Seal of Corporation.**

**SEC. 49.** Any corporation, joint stock company, or partnership association, limited, may have a common seal which it may alter at pleasure, and such seal affixed to any instrument purporting to be executed by any such corporation, joint stock company or partnership association, limited, foreign or domestic, shall be prima facie proof of the due adoption of said seal, and that it was affixed to said instrument by due authority, and that said instrument was in fact lawfully executed by such corporation, joint stock company or partnership association, limited.

**HISTORY:** Re-enacts Sec. 1 of Act 162 of '93, being C. L. '97, (10196). Unchanged.

**CONSTRUED:** This statute does not require the corporate seal, but only makes it prima facie proof of due authority whenever it is attached. *Sarmiento v. Boat & Oar Co.*, 105 Mich. 302.

**(12538). Subscribing Witnesses.**

**SEC. 50.** Whenever upon the trial of any action, civil or criminal, or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto, except in cases of written instruments to the validity of which one or more subscribing witnesses are required by law.

**HISTORY:** Re-enacts Sec. 1 of Act 122 of '85, being How. 7531a; C. L. '97, (10199). Unchanged.

**(12539). Proof of Signatures or Handwriting.**

**SEC. 51.** Whenever in any suit or proceeding in any of the courts of this state, it shall be necessary or proper to prove the signature or the handwriting of any person, it shall be

competent to introduce in evidence for the purpose of comparison, any specimen or specimens of the handwriting or signature of such person, admitted or proved to the satisfaction of the court to be genuine, whether or not the paper on which such handwriting or signature appears is one admissible in evidence or connected with the case or not: *Provided*, That if such paper is not one admissible in evidence for some other purpose, or connected with the case, it shall not be admissible in evidence for the purpose of comparison unless it was made before the controversy arose concerning which such suit or proceeding was brought.

HISTORY: New section.

**SPECIMENS OF HAND-WRITING AS EVIDENCE:** Heretofore it has not been competent to introduce specimens of hand-writing or signatures as evidence for the purpose of comparison unless the paper on which the same appeared was a part of the case itself or was admissible in evidence for some purpose other than comparison. It is now provided that any specimen of hand-writing or signature of any person admitted or proved to the satisfaction of the court to be genuine may be admitted for the purpose of comparison, although not connected with the case or otherwise admissible. If not connected with the case and not admissible for any other purpose, it must, however, have been made before the controversy concerning which the suit or proceeding was brought arose.

**WAIVER STATUTORY RIGHTS:** Defendant not compelled to write his name for comparison. Where he does so voluntarily, he waives his rights therein. *People v. Sturman*, 209 Mich. 289.

**(12540). Proof of Open Account or Account Stated.**

**SEC. 52.** In all actions brought in any of the courts of this state, to recover the amount due on an open account or upon an account stated, if the plaintiff or some one in his behalf shall make an affidavit of the amount due, as near as he can estimate the same, over and above all legal set-off, and annex thereto a copy of said account, and cause a copy of said affidavit and account to be served upon the defendant, with a copy of the declaration filed in the cause, or with the process by which such action is commenced, such affidavit shall be deemed prima facie evidence of such indebtedness, unless the defendant with his plea shall, by himself or agent, make an affidavit and serve a copy thereof on the plaintiff or his attorney, denying the same; and if the defendant in any action shall give notice, with his plea of a set-off, founded upon an open account, or upon an account stated, and shall annex to such plea and notice a copy of such account, and an affidavit made by himself or by some one in his behalf, showing the

amount or balance claimed by the defendant upon such account, and that such amount or balance is justly owing and due to the defendant, or that he is justly entitled to have such account, or said balance thereof, set off against the claim made by said plaintiff, and shall serve a copy of such account and affidavit, with a copy of such plea and notice, upon the plaintiff or his attorney, such affidavit shall be deemed prima facie evidence of such set-off, and of the plaintiff's liability thereon, unless the plaintiff, or some one in his behalf, shall within ten days after such service in causes in the circuit court, and before trial in other cases, make an affidavit denying such account or some part thereof, and the plaintiff's indebtedness or liability thereon and serve a copy thereof upon the defendant or his attorney, and in case of a denial of part of such set-off, the defendant's affidavit shall be deemed to be prima facie evidence of such part of the set-off as is not denied by the plaintiff's affidavit: *Provided*, That any affidavit in this section mentioned shall be deemed sufficient if the same is made within ten days next preceding the issuing of the writ or filing of the declaration or plea.

**HISTORY:** Re-enacts Sec. 1 of Act. 112 of '67; As Am. '71, p. 242, Act 165, Eff. July 18, being C. L. '71, (5954); As Am. '79, p. 199, Act 222, Eff. Aug. 30; As Am. '81, p. 383, Act 272, Eff. Sept. 10; How. 7525; C. L. '97, (10191). Unchanged.

**AFFIDAVIT:** As the statute originally stood, it was held that the intent of it was that the oath to the account must be at least substantially contemporaneous with the beginning of the suit and that an affidavit made several days before that was of no force. *McHugh v. Butler*, 39 Mich. 185. The amendment of '79 added the last proviso, relative to ten days' time. When a plaintiff rests his case upon a void affidavit, he cannot afterward prove his account, in the ordinary way, unless the court in its discretion permits him to do so. *Id.* And where an irregular affidavit is admitted in evidence without any objection on the part of the defendant, he cannot, after the proofs are closed, object to it, even if seasonable objection would have been available. *Locke v. Farley*, 41 Mich. 405. An affidavit of account in an action by a corporation, which states that the affiant is treasurer of the company, sufficiently shows his authority to make it. *Forbes Lith. Mfg. Co. v. Winter*, 107 Mich. 116. The affidavit of an account with a partnership is some evidence of the existence of such partnership and a finding thereof on certiorari will not be reversed. *Mero v. Button*, 116 Mich. 680.

**PRIMA FACIE EVIDENCE:** If not denied by counter affidavit, the plaintiff's affidavit makes a prima facie case. *Morrill v. Bissell*, 99 Mich. 144; *Bjorkquest v. Wagar*, 83 Mich. 229. The service on plaintiff or his attorney of a copy of defendant's plea and notice of set-off, with a copy of the account and affidavit of amount due, is

a condition precedent to the acceptance of such affidavit as prima facie evidence of said set-off and of plaintiff's liability thereon. *McGowan v. Lamb*, 66 Mich. 615. And the affidavit, like other testimony, must be offered in evidence to make it operative, there being no provision for its being filed with the justice. *Gordon v. Sibley*, 59 Mich. 250.

FORMER LAW CITED: *Johnson v. Emerick*, 70 Mich. 220; *Kinney v. Robinson*, 49 Mich. 248; *Bullock v. Ueberroth*, 121 Mich. 298.

### (12541). Books of Account.

SEC. 53. In all trials, hearings, and proceedings in any cause or suit in any court, or before any officer, arbitrators, or referees, books of accounts, containing charges or entries for money paid, laid out, furnished or lent, shall be received and admitted as evidence, and deemed to be evidence of such charges and entries, and that such moneys were so paid, laid out, furnished or lent, as in such books charged or entered, and of the liability of the person charged therefor, in the same manner and to the same extent as books of account containing charges for goods, wares, or merchandise sold and delivered, are received and admitted as evidence of sale and delivery of such goods and merchandise, and of the liability of the person charged therefor: *Provided*, This section shall not apply to cases where persons acting or having acted as commission merchants or agents for the sale of produce, grain, or other property on commission, except as to the amount charged as commissions for selling, or buying such produce, grain or other property unless accompanied by a voucher or receipt for the money so claimed to be laid out, lent, or furnished.

HISTORY: Re-enacts Sec. 2 of Act 112 of '67, being C. L. '71, (5955); How. 7526; As Am. '85, p. 106, Act 105, Eff. Sept. 19; C. L. '97, (10192). Unchanged.

BOOKS OF ACCOUNT: See *Countryman v. Bunker*, 101 Mich. 218, and reporter's note thereto, giving a synopsis of Michigan cases relative to books of account as evidence at common law and under this statute. *Baxter v. Reynolds*, 112 Mich. 471.

As to compelling the production of books and papers, see *Eddy v. Judge*, 114 Mich. 668.

As to accounts of commission merchants, see *Richards v. Burroughs*, 61 Mich. 121.

CITED: *Lester v. Thompson*, 91 Mich. 250; *Union Life Ins. Co. v. Smith*, 119 Mich. 176.

See *Montague v. Dougan*, 68 Mich. 100; *In re Bresler's Estate*, 155 Mich. 571.



**(12542). Proof and Disproof of Loss of Instrument.**

SEC. 54. Whenever a party to any instrument shall have been permitted to prove by his own oath the loss of any instrument, in order to admit other proof of the contents thereof, the adverse party may also be examined by the court on oath, to disprove such loss, and to account for such instrument.

HISTORY: Re-enacts Sec. 87, R. S. '46, Ch. 102, being C. L. '57, (4324); C. L. '71, (5944); How. 7517; C. L. '97, (10182). Unchanged.

**(12543). Proof of Lost Negotiable Promissory Note.**

SEC. 55. In any suit founded on any negotiable promissory note or bill of exchange, or in which such note, if produced, might be allowed as a set-off in the defense of any suit, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given on such trial, and notwithstanding such bill or note was negotiable, such party shall be entitled to recover the amount due thereon, as if such note or bill had been produced.

HISTORY: Re-enacts Sec. 88, R. S. '46, Ch. 102, being C. L. '57, (4325); C. L. '71, (5945); How. 7518; C. L. '97, (10183). Unchanged.

CONSTRUED: In an action on a lost note, the transaction which resulted in the giving of the note may be shown. *Sick v. Schug*, 179 Mich. 578. See *Higgins v. Watson*, 1 Mich. 428; *Walker v. Gillett*, 98 Mich. 59; *McKinney v. Hamilton*, 53 Mich. 497.

LOST NOTE, BOND ON: Requiring a bond of indemnity under this section in a suit brought on a lost note, is confined in its operation to negotiable instruments. *Reese v. Dyer*, 199 Mich. 210.

LOST CHECK: Where an employee lost the check received by him for services, his remedy is to sue his employer upon the check giving the statutory bond (as required by Section 12544), if the check was not received as payment, then he could maintain an action for his salary. *Garavaglio v. Verona Mining Co.*, 210 Mich. 676.

**(12544). Bond of Indemnity to be Given.**

SEC. 56. But to entitle a party to such recovery, he shall execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties to be approved by the court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs, and personal representatives against all claims by any other person on account of such note or bill, and against all costs and expenses by reason of such claim: *Provided*, That such party

shall not recover costs in such case, unless (before the commencement of such suit) he shall have executed and tendered to such adverse party, or, in case of several defendants, to one of such defendants, a bond conditioned as aforesaid, with sureties as aforesaid, approved by the judge or clerk of such court, or the circuit court commissioner of the county where such suit is brought, or, in actions brought before justices of the peace, by such justice: And *Provided further*, That upon filing such last mentioned bond with the clerk of said court, or with such justice, at the time of the commencement of such suit, no other or further bond shall be necessary to entitle such party to such recovery upon such note or bill, with costs as aforesaid.

**HISTORY:** Re-enacts Sec. 89, R. S. '46, Ch. 102, being C. L. '57, (4326); As Am. '71, p. 165, Act 102, Imd. Eff. April 13; C. L. '71, (5946); How. 7519; C. L. '97, (10184). Unchanged.

**SHALL EXECUTE BOND:** See *Coon v. Bouchard*, 74 Mich. 487; *Sick v. Schug*, 179 Mich. 580; *Smith v. City Nat. Bank*, 182 Mich. 76; and cases cited in note to preceding section.

**(12545). Admission of Member of Corporation.**

**Sec. 57.** In suits by or against a corporation, the admission of any member thereof not named on the record as a party to such suit, shall not be received as evidence against such corporation, unless such admission was made concerning some transaction, in which such member was the authorized agent of such corporation.

**HISTORY:** Re-enacts Sec. 87, R. S. '46, Ch. 102, being C. L. '57, (4319); C. L. '71, (5939); How. 7512; C. L. '97, (10177), except that "an aggregate corporation" changed to "a corporation." Unchanged.

**(12546). Competency to Make Will.**

**Sec. 58.** In proceedings for the probate of wills, it shall not be necessary for the proponent in the first instance to introduce any proof to show the competency of the decedent to make a will, but the like presumption of mental competency shall obtain as in other cases.

**HISTORY:** New section.

**BURDEN OF PROOF IN WILL CASES:** The rule as to the burden of proof in probating wills has been changed so that the presumption of competency applies as in other cases. The proponent need not introduce any evidence on this subject in the first instance.

As to the change therein as to the burden of proof as to mental competency in a will contest, see *In re Haslick's Will* (*Martus v.*

Haslick), 195 Mich. 432; 161 N. W., 965; In re Curtis' Estate, 197 Mich. 474; In re Gardner's Estate, 198 Mich. 203.

**(12547). When Witness Not Excused from Answering.**

SEC. 59. Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses.

HISTORY: Re-enacts Sec. 84, R. S. '46, Ch. 102, being C. L. '57, (4321); C. L. '71, (5941); How. 7514; C. L. '97, (10179). Unchanged.

CONSTITUTIONALITY: See Const. II, 16, and notes.

**(12548). Witness in Prosecutions Under Act 255 of 1899.**

SEC. 60. No person shall be excused from attending and testifying, or from producing books, papers, contracts, agreements and documents in any cause, suit or proceeding, civil, criminal or otherwise, based upon or growing out of any alleged violation of any of the provisions of act two hundred fifty-five of the Public Acts of eighteen hundred ninety-nine, relating to trusts and combinations in restraint of trade or of any act amendatory or declaratory thereof, or supplemental thereto in any court of competent jurisdiction, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to fine, punishment, penalty or forfeiture. The attendance and testimony of such persons in such cases and the production of such books, papers, contracts, agreements and documents may be enforced in the same manner as in any other cause, suit or proceeding. But no person shall be prosecuted or subjected to any fine, imprisonment, penalty or forfeiture for or on account of any matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in any such case, suit or proceeding. No testimony so given by him shall in any prosecution be used as evidence, either directly or indirectly, against him: *Provided*, That immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under

oath, or produces evidence, documentary or otherwise, under oath: *Provided further*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

**HISTORY:** This section supersedes Sec. 11a of Act 255 of '99, as Added '11, p. 5, Act 2, Eff. Aug. 1, excepting for change in phraseology.

See Compilers' Section (15013) et seq. for Act 255, '99, above referred to, modified.

**(12549). Minister or Priest not to Disclose Confessions.**

**SEC. 61.** No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.

**HISTORY:** Re-enacts Sec. 85, R. S. '46, Ch. 102, being C. L. '57, (4322); C. L. '71, (5942); How. 7515; C. L. '97, (10180). Unchanged.

**CITED:** *People v. Pratt*, 133 Mich. 133.

**Of Privilege and Competency of Witnesses.**

**(12550). Physician Not Allowed to Disclose Professional Information.**

**SEC. 62.** No person duly authorized to practice medicine or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided, however*, That in case such patient shall bring an action against any defendant to recover for any personal injuries, or for any malpractice, if such plaintiff shall produce any physician as a witness in his own behalf, who has treated him for such injury, or for any disease or condition, with reference to which such malpractice is alleged, he shall be deemed to have waived the privilege hereinbefore provided for, as to any or all other physicians, who may have treated him for such injuries, disease or condition: *Provided further*, That after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, the heirs at law of such patient, whether proponents or contestants of his will, shall be deemed to be personal representatives of such deceased

patient for the purpose of waiving the privilege hereinbefore created.

**HISTORY:** Re-enacts Sec. 86, R. S. '46, Ch. 102, being C. L. '57, (4323); C. L. '71, (5943); How. 7516; C. L. '97, (10181); As Am. '09, p. 418, Act 234, Eff. Sept. 1; inserting however in such section the two provisos as above, therefore, modified.

**PRIVILEGED TESTIMONY OF PHYSICIANS:** It is provided that when any person shall bring an action to recover for personal injuries or for mal-practice, if the plaintiff produces as a witness in his own behalf, any physician who has treated him for such injury or for any disease or condition with reference to which said mal-practice is alleged, he shall be deemed to have waived the privilege usual to the testimony of physicians as to any other physician who may have treated him for such injury, disease or condition.

**CONSTRUED:** This section applies to hearings before the tribunals of beneficial insurance associations. *Dick v. International Congress*, 138 Mich. 373. Under Compilers' Section (5607) certificates of death are admissible on the issue of the cause of death, though the physician who made them cannot testify to the facts therein stated. *Krapp v. Metropolitan Life Ins. Co.*, 143 Mich. 369. As to the rule regarding the waiver of the privilege by the heirs of a deceased person prior to the amendment of the former law by act 234 of '09, p. 418; see *In re Mansbach's Est.*, 150 Mich. 348. Since the amendment; *In re Oldenberg's Est.*, 177 Mich. 152.

**PURPOSE OF STATUTE:** The object of the statute is to prevent the abuse of the confidential relation existing between the physician and his patient, and is for the protection of the latter, and where the relation is such that no confidence is reposed there is none to be abused. *Scripps v. Foster*, 41 Mich. 742; *Briesenmeister v. Knights of Pythias*, 81 Mich. 531; *People v. Glover*, 71 Mich. 307. The statute was passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. *G. R. & I. R. R. Co. v. Martin*, 41 Mich. 671; *People v. De France*, 105 Mich. 570.

**PRIVILEGED COMMUNICATIONS:** The information here referred to is not confined to communications made by the patient to the physician, but the law protects, with the veil of privilege, whatever in order to enable the physician to prescribe, was disclosed to any of his senses and which in any way was brought to his knowledge for that purpose. *Briggs v. Briggs*, 20 Mich. 41; *Fraser v. Jennison*, 42 Mich. 225; *Cooley v. Foltz.*, 85 Mich. 47; *Briesenmeister v. Knights of Pythias*, 81 Mich. 525; *Dotton v. Albion*, 57 Mich. 577. All disclosures made by the patient to his physician respecting his ailments are privileged, whether they are necessary to enable the doctor to prescribe for him as a physician or not. *Briesenmeister v. Knights of Pythias*, 81 Mich. 531.

A physician who attends a woman in her life time, cannot testify to the condition found by him in an autopsy held against the consent of the patient's husband. *Thomas v. Tp. of Byron*, 168 Mich. 599. A physician cannot state that he treated a patient for a certain ailment. *Lammiman v. Railway*, 112 Mich. 603; *Jones v. Life Assurance Co.*, 120 Mich. 220. The records of an insane asylum made by a physician showing physical condition of an inmate, are privileged. *Mass. Mut. Life Ins. Co. v. Mich. Asylum*, 178 Mich. 193.

A physician was asked, "excluding information obtained while treating insured, and judging from appearance at the time of treatment, was she a woman of good health?" Held inadmissible. *Rose v. Order of Patricians*, 126 Mich. 581.

**NOT PRIVILEGED:** The privilege does not cover information not necessary to enable the doctor to prescribe for his patient. *Campau v. North*, 39 Mich. 606; *Lincoln v. Detroit*, 101 Mich. 249; *Dittrich v. Detroit*, 98 Mich. 248; *People v. Cole*, 113 Mich. 83. A physician may testify that he is the family physician of a patient and as to the number and dates of his professional visits. *Briesenmeister v. Knights of Pythias*, 81 Mich. 525. The fact as to treatment by a physician is not a matter of privilege. *Dittrich v. Detroit*, 98 Mich. 248; *Brown v. Ins. Co.*, 65 Mich. 306. A dentist is not within the terms or spirit of this statute. *People v. De France*, 105 Mich. 563.

A physician can testify to the state of one's health and mental condition where the information is not obtained from the patient and is not necessary to enable the physician to prescribe. *Steketee v. Newkirk*, 173 Mich. 232.

**PERSONAL PRIVILEGE:** This statute merely establishes a privilege and is of no force when the patient consents to a disclosure. *G. R. & I. R. R. Co. v. Martin*, 41 Mich. 667. It is the patient's privilege and not the doctor's. *Lincoln v. Detroit*, 101 Mich. 249. And it continues indefinitely. *Storrs v. Scougale*, 48 Mich. 395.

**MUST BE CLAIMED:** The privilege must be claimed before the testimony is admitted or it is waived. *Briesenmeister v. Knights of Pythias*, 81 Mich. 525; *Lincoln v. Detroit*, 101 Mich. 249.

**MAY BE WAIVED:** The patient may waive the privilege if he wishes. *Fraser v. Jennison*, 42 Mich. 225. And what he may do in his lifetime, those who represent him after his death may do for the protection of the interests they claim under him. *Id.* But no one else can waive it. *Storrs v. Scougale*, 48 Mich. 395. And if not claimed before the testimony is admitted the privilege is waived. *Briesenmeister v. Knights of Pythias*, 81 Mich. 525. See *Dotton v. Albion*, 57 Mich. 577.

To call a physician as a witness to one's physical condition is not a waiver of the privilege as to knowledge of the same condition acquired by other physicians. *Slater v. Sorge*, 166 Mich. 177. In *re Oldenberg's Est.*, 177 Mich. 152.

**FORMER LAW CITED:** *People v. Pratt*, 133 Mich. 133. See *Trimble v. Morrish*, 152 Mich. 624; *McIntyre v. Murphy*, 153 Mich. 347.

**AT COMMON LAW:** At common law information obtained by physicians and surgeons was not privileged. They were at liberty to disclose, either in or out of court, any information they receive from their patients, irrespective of the effect such disclosure would have upon their rights, reputation, or feelings of their patients. Medical persons are bound to reveal confidential communications, when called upon in courts of justice. *Rex v. Gibbens*, 1 C. & P. 97. In *Duchess of Kingston's trial*, 20 How. St. Tr. 573, the court held that a surgeon has no privilege, and said, "if a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." Thus, at common law physicians and surgeons do not possess the privilege exempting

them from testifying to facts learned in the confidence of their professional relation. *Campau v. North*, 39 Mich. 606.

**PRIVILEGE GRANTED BY STATUTE:** The ground of the statute on which communications to physicians are privileged, is the supposed necessity of a full knowledge of the facts and secret ailments of the patient, to advise and prescribe correctly, and unless such consultations are privileged and confidential, men will be incidentally punished by being obliged to suffer the consequent injuries without relief from the medical art. The object of the statute is a beneficial one and rests upon principles of convenience and policy. It has been said that the policy of the statute is to enable a patient, without danger of exposure, to disclose to his physician all information necessary for his treatment. Suppose a patient has a fever, or a fractured leg or skull, or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him, testify to these matters? In doing so, there would be no breach of confidence, and the policy of the statute would not be involved. These and other cases which might be supposed, while perhaps within the letter of the statute, would not be within the reason thereof. *Cessante ratione legis, cessat et ipsa lex*. Thus the statutory provision of exclusion is solely enacted for the purpose to enable persons to secure medical aid without betrayal of confidence. *Fraser v. Jennison*, 42 Mich. 206; *G. R. & I. R. Co. v. Martin*, 41 Mich. 667; *Scripps v. Foster*, 41 Mich. 742. In *Briggs v. Briggs*, 20 Mich. 34, the court said: "Every reputable physician must know of the existence of the statute; and he must know from its very tenor as well as from the obvious reasons underlying it that it is not at his option to disclose professional secrets. A rule is prescribed which it is not to be allowed to violate, a privilege is guarded which does not belong to him, but to his patient, and which continues indefinitely, and can be waived by no one but the patient himself."

**THE RIGHT OF THE COURT:** The court reserves the right to know somewhat of the circumstances under which the information sought to be obtained from physicians as witnesses was acquired, and the court must be able to see that it is within the policy of the statute. The objection must be taken before the witness testifies, and must be claimed before the testimony is admitted. *Briesenmeister v. Supreme Lodge*, 81 Mich. 525.

**RELATIONSHIP:** The relation must be that of physician and patient, for it does not extend to cases where no confidential relation exists. *People v. Glover*, 71 Mich. 306.

**PERSONAL PRIVILEGE:** The statutory rule of exclusion is for the patient's benefit and not for the physician's. *Scripps v. Foster*, 41 Mich. 742. Thus the privilege is a personal one. *Briesenmeister v. Supreme Lodge*, 81 Mich. 525.

**THE RULE:** The general rule is that a physician or surgeon is incompetent to testify to facts which have been communicated to him for the purpose of enabling him to perform his professional duty, or which were in any way brought to his knowledge for that purpose. *Briggs v. Briggs*, 20 Mich. 34; *Storrs v. Scougale*, 48 Mich. 388. Thus a physician is disqualified from testifying to any matters relating to the ailments and condition of a patient. *Cooley v. Foltz*, 85 Mich. 47. Any information or knowledge which the physician may receive during the treatment of a patient which is not pertinent or connected

with the treatment of the patient, is not privileged. Thus a physician may properly testify that he is the family physician of a certain person, and as to the number and dates of his professional visits to such person. *Briesenmeister v. Supreme Lodge Knights of Pythias*, 81 Mich. 525; *Dalman v. Koning*, 54 Mich. 321. So may a physician testify as to the general health and mental condition of a patient. *Steketee v. Newkirk*, 173 Mich. 222. Again where deceased stated in an application for an insurance policy that a certain doctor had treated her for typhoid fever, in an action on the policy, the doctor was not precluded from answering the questions whether he had or had not done so. *Brown v. Metropolitan Life Insurance Co.*, 65 Mich. 306. So the statement of the prosecutrix in a bastardy proceeding to her physician as to the paternity of her child, is not within the privilege. *People v. Cole*, 113 Mich. 82. But a physician cannot testify in a personal injury action that he had treated plaintiff for alcoholism. *Wilkins v. Detroit United Ry.*, 169 Mich. 437.

**INTERPRETATION OF THE STATUTORY PROVISION:** It has been said that the disclosure by a physician of information acquired in his professional character, in attending on a patient, when not made in the course of his professional duty, is a plain violation of professional propriety, but the law does not prohibit such disclosure in his general intercourse. The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive a liberal interpretation in order to carry out its evident beneficial purposes. It provides that the physician shall not be compelled to disclose any information acquired in his confidential relations with his patient. The provision of the statute was clearly intended for the benefit of the patient whose interests, reputation, and sensibilities may be injured and grossly outraged by its disclosure. The fact that the physician acquired the information in order to prescribe for or treat the patient, cannot affect the physician in the least degree unfavorably, nor that he should be compelled to disclose as a physician the information or knowledge thus acquired. The object of the section, therefore, was to protect the patient, to whom it was quite unimportant, from the consequences of such disclosure and shows that the provision that the physician shall not be compelled to make the disclosure as a witness, renders the statement of the patient privileged as to him, and that this was within the intention of the makers of the statute clearly implied from its language, and that it should not be disclosed by the physician without the patient's consent. *Briggs v. Briggs*, 20 Mich. 34.

**WAIVER:** The privilege can only be waived by the patient. *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525. Any heir proposing or contesting a will may waive the privilege as to communication by the deceased to a physician. *Oldenberg v. Leiberg*, 177 Mich. 150. Plaintiff by offering his physician as a witness does not waive his right to object to the qualifications of his former physician to testify in behalf of defendant. *Slater v. Sorge*, 166 Mich. 178. The statements in the proofs of death furnished by the beneficiary are a waiver of the statutory privilege only in so far as such statements refer to the subject matter claimed as privilege. *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525. Those who represent the patient's interest, after his death, may waive the privilege, so that the proponents of a will may show the testator's competency by the testimony of his



physician. *Fraser v. Jennison*, 40 Mich. 206. But the prohibition cannot be waived by the contestant of the will of the deceased patient. *In re Mansbach's Estate*, 150 Mich. 348.

**THE EXTENSION OF THE STATUTE:** Where it was claimed by an insurance company that a policyholder committed fraud in procuring the insurance for the reason that he was suffering from paresis at the time he applied for his policy. It is held that the company cannot inspect the records showing his mental and physical condition made by a physician of a public asylum, on the ground that they are privileged under the statute. *Massachusetts Mutual Life Insurance Co. v. Trustees of Michigan Asylum*, 178 Mich. 193. The statutory provision does not extend to dentists. *People v. De France*, 104 Mich. 563. In this case the court said: "The question presented is whether this language includes a dentist. At the common law, information gained by a physician or surgeon while in attendance upon his patient was not privileged. The purpose of this statute was to throw around such disclosures as the patient is bound to make for the information of his attending physician the cloak of secrecy, and the prime object to the act was to invite confidence in respect to ailments of a secret nature, and the spirit of the act would not include a case where the infirmity was apparent to every one on inspection. In practice, however, the statute has not been so limited in construction, for the reason that the words of the act are broad enough to include any information necessary to enable the physician to prescribe or the surgeon to act. Nevertheless, the purpose of the act is to be considered in determining whether the dentist was intended to be included within its terms. Certainly the terms 'dentist' and 'surgeon' are not interchangeable, and if a dentist is to be held to be a surgeon, within the meaning of this act, it must be because his business as a dentist is a branch of surgery. It is apparent that the act relates to general practitioners, and to those whose business as a whole comes within the definition of 'physician' or 'surgeon.' A dentist is one whose profession it is to clean and extract teeth, repair them when diseased, and to replace them, when necessary, by artificial ones. The only case which we have found which bears directly upon this question is that of *State v. Fisher* (Mo. Sup.), 24 S. W. 167, 22 L. R. A. 799, in which a majority of the supreme court of Missouri held that a dentist is not to be considered a surgeon. We think there was no error in admitting the testimony of this witness; that he is not within the terms or the spirit of the act."

Statements made by deceased to attending physician as to the cause of her death were privileged. *Gilchrist v. Mystic Workers of the World*, 188 Mich., 466; 22 D. L. N., 939; 154 N. W., 575.

A question asked of a physician as to whether he had ever treated a brother or sister of plaintiff for diabetes was properly rejected, where there was no claim that the patient, who was not a party to the suit, had waived the privilege created by this section. *Fishleigh v. Detroit United Railway*, 205 Mich. 145, 171 N. W. 549.

### (12551). No Person Excluded from Testifying.

SEC. 63. No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime or for

any interest of such person in the matter, suit, or proceeding in question, or in the event of such matter, suit or proceeding, in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime, may be shown for the purpose of drawing in question the credibility of such witness, except as is hereinafter provided.

**HISTORY:** Re-enacts Sec. 99, R. S. '46, Ch. 102, being C. L. '57, (4339); As Am. '61, p. 168, Act 125, Imd. Eff. Mar. 11; C. L. '71, (5966); How. 7543; C. L. '97, (10210), unchanged.

**CONVICTION OF CRIME:** Under this statute a conviction of crime no longer disqualifies a person from testifying, but it may be shown for the purpose of affecting his credibility. *People v. Maunau-sau*, 60 Mich. 21. The statute does not abrogate entirely the effect of conviction of an infamous crime on a witness, but still allows it to be shown as a distinct fact bearing on his credit. *People v. Hall*, 48 Mich. 490. As bearing on credibility. *People v. Foote*, 93 Mich. 40; *People v. Hoffman*, 154 Mich. 148.

**INTEREST IN EVENT:** Formerly not competent as witness if interested. *Thomas v. Graham*, Walk. 120; *White v. Bailey*, 10 Mich. 155. Not excluded on account of being a party. *Roberts v. Miles*, 12 Mich. 305; *Hogan v. Sherman*, 5 Mich. 66. Interest as bearing on credibility. *People v. Kahler*, 93 Mich. 631.

**MARITAL RELATIONS:** Under this section the husband or wife is a competent witness for or against the other, with the latter's consent, but not without such consent, under Compilers' Section (12555). *People v. Gordon*, 100 Mich. 520. See *People v. Marble*, 38 Mich. 117; *Morrissey v. People*, 11 Mich. 327.

In an action by a husband for the alienation of his wife's affections, the divorced wife was a competent witness as to acts of physical violence by plaintiff towards her, and her feeling toward, and affection for him; the action not being instituted in consequence of adultery. *Hendrickson v. Harry*, 200 Mich. 41.

**STATUS OF WITNESS:** The question of the status of a witness as to interest, relationship or conviction of crime is not now, and never was, a collateral one, in the sense that the party cross-examining him is bound by his answer; and where a witness denied that he had ever been arrested or convicted of crime, the record of his conviction was held admissible to impeach him. *Helwig v. Lascowski*, 82 Mich. 619. And his credit cannot be impeached by the direct testimony of witnesses, but only by the record of a judgment. *People v. Maunau-sau*, 60 Mich. 21.

The fact that one, prosecuted for assault with intent to do great bodily harm, has theretofore been convicted of an assault, may go to the jury on the question of the defendant's credibility as a witness. *People v. Hoffman*, 154 Mich. 145. It has been repeatedly held that the credit of a witness cannot be impeached or assailed by the direct testimony of other witnesses to any criminality, or charge of criminality, unless he has actually been adjudged guilty; and this can only be shown by a record of a judgment. *People v. Maunau-sau*, 60 Mich. 21; *Driscoll v. People*, 47 Mich. 416; *Dickinson v. Dustin*, 21 Mich. 561; *Smith v. Brown*, 2 Mich. 162; *People v. Thomas*, 9 Mich. 314.

**(12552). Witness in Own Behalf.**

SEC. 64. On the trial of any issue joined, or in any matter, suit or proceeding, in any court, or on any inquiry arising in any suit or proceeding in any court, or before any officer or person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record, and persons for whose benefit such suit or proceeding is prosecuted, or defended, may be witnesses therein in their own behalf or otherwise, in the same manner as other witnesses, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against and compelled to attend and testify, as is provided by law for other witnesses. No person shall be disqualified as a witness in any civil or criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility: *Provided, however,* That a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.

**HISTORY:** Re-enacts Sec. 100, R. S. '46, Ch. 102, being C. L. '57, (4340); As Am. '61, p. 168, Act 125, Imd. Eff. Mar. 11; C. L. '71, (5967); As Am. '81, p. 335, Act 245, Imd. Eff. June 10; How. 7544; C. L. '97, (10211), making the section broader in its scope so as to cover civil cases. Modified.

**PARTIES AS WITNESSES:** In the amendatory act of '61 the legislature intended to prescribe the only rule that should govern as to the competency and examination of parties as witnesses. *Goodrich v. Allen*, 19 Mich. 254. Parties may testify. *Montague v. Dougan*, 68 Mich. 100; *People v. VanAlstine*, 57 Mich. 82. See *Roberts v. Miles*, 12 Mich. 297; *Hogan v. Sherman*, 5 Mich. 65; *McBride v. Clcotte*, 4 Mich. 484; *Fuller v. Parrish*, 3 Mich. 214; *Way v. Billings*, 2 Mich. 400.

**PRISONER'S STATEMENT:** Prior to the amendment of '81, under that of '61, a person accused of crime could only make a statement in his behalf. See *People v. Thomas*, 9 Mich. 314; *Maher v. People*, 10 Mich. 212; *Morrissey v. People*, 11 Mich. 331; *Annis v. People*, 13 Mich. 511; *Durant v. People*, 13 Mich. 351; *Grimm v. People*, 14 Mich. 300; *De Foe v. People*, 22 Mich. 224; *People v. Jones*, 24 Mich. 214; *People v. Morrigan*, 29 Mich. 4; *Gale v. People*, 26 Mich. 157; *Burden v. People*, 26 Mich. 162. See *Carne v. Litchfield*, 2 Mich. 340.

**DEFENDANT IN CRIMINAL CASE:** Where an information alleges that the respondent appeared as a witness "on his own behalf," that is a sufficient statement that he had been allowed to testify "at his own request." *People v. Brown*, 54 Mich. 15, 25. The request should be made to the court, otherwise it is the duty of the court to protect the defendant in his privilege of not being obliged to criminate himself. The request must proceed from the party charged. No one has the right to ask him to be sworn and put him upon his refusal. *People v. Van Alstine*, 57 Mich. 82. Cross-examination of defendant when sworn in his own behalf. *People v. Gale*, 50 Mich. 237.

Physical examination of respondent who testifies in his own behalf. *People v. Ecarius*, 124 Mich. 621. The failure of respondent in a criminal trial to testify does not create a presumption, against him. *People v. Payne*, 131 Mich. 480, and no inference can be drawn from the fact that he did not take the witness stand. *People v. Hammond*, 132 Mich. 430. Neither is the prosecuting attorney allowed to comment on the fact that respondent has not testified. *People v. Cahill*, 147 Mich. 202. Where accused in a criminal case does not testify it is error to refuse to give a requested instruction that no presumption of guilt should be inferred from the accused's failure to testify. *People v. Provost*, 144 Mich. 17; See also *People v. Mitchell*, 164 Mich. 583; *People v. Peterson*, 166 Mich. 14. In a criminal trial the prosecutor told the jury "The girl has told you her story and there is not a word to prove that she didn't tell exactly what occurred," Held, reversible error where the respondent was the only person who could have denied the story and he did not testify. *People v. Payne*, 131 Mich. 480. A respondent who testifies in his own behalf thereby waives his constitutional right to refuse to answer any question, material to the case, which would, in the case of any other witness, be legitimate cross-examination. *People v. Dupounce*, 133 Mich. 3.

This section renders fatally erroneous an instruction in a criminal prosecution, that the jury are not to give "any consideration" to the fact that the defendant has not taken the stand in his own behalf. *People v. Mitchell*, 164 Mich. 583. It is manifest that under this statute a conviction of crime no longer disqualifies a person from testifying, but it may be shown for the purpose of affecting his credibility, nor does it abrogate entirely the effect of conviction of an infamous crime on a witness but still allows it to be shown as a distinct fact bearing on his credit. *People v. Maunusau*, 60 Mich. 21; *People v. Hall*, 48 Mich. 490; *People v. Foote*, 93 Mich. 40. Furthermore, under this section the husband or wife is a competent witness for or against the other with the consent of either one, as the case may be, but not without such consent. *People v. Gordon*, 100 Mich. 520; *People v. Marble*, 38 Mich. 117; *Morrissey v. People*, 11 Mich. 327.

The question of the status of a witness as to interest, relationship or conviction of crime is not now, and never was, a collateral one, in the sense that the party cross-examining him is bound by his answer; and where a witness denied that he had ever been arrested or convicted of crime, the record of his conviction was held admissible to impeach him. *Helwig v. Lascowski*, 82 Mich. 619. The same rules of cross-examination apply to an accused who testifies as to other witnesses. *People v. Robinson*, 86 Mich. 415. Where accused testifies in his own behalf, evidence may be shown that he had been convicted of a crime, but it shall only have bearing upon his credibility.

*People v. Hoffman*, 154 Mich. 145. Whenever as permitted under the statute, an accused takes the stand he must answer any question material to the issue. *People v. Dupounce*, 133 Mich. 1; *People v. Hess*, 85 Mich. 128; *People v. Maczulski*, 194 Mich. 196; *People v. Lay*, 193 Mich. 32.

FORMER LAW CITED: *People v. Hoffman*, 154 Mich. 148; *People v. Owen*, 154 Mich. 582.

**(12553). Testimony of Opposite Party in Suits.**

SEC. 65. When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness, in his own behalf shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner, and not within the knowledge of any one of the surviving partners. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representatives or heirs of such decedent, unless he shall be called by such heirs or legal representatives. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation, nor when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation (or its assigns) shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person: *Provided*, That whenever the words "the opposite party" occur in this section it shall be deemed to include the assignors or assignees of the claim or any part

thereof in controversy: *Provided further*, That when the testimony of any person would be barred in case of the death of any of the persons hereinbefore mentioned, it shall also be barred if such person shall have been adjudged to be and still is at the time of the trial insane or mentally incompetent, as to all matters, which, if true, must have been equally within his knowledge at a time when he was sane and mentally competent: And *Provided further*, That whenever the deposition, affidavit or testimony of such party taken in his lifetime or when mentally sound shall be read in evidence in such suit or proceeding, the affidavit or testimony of the other party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit or testimony: And *Provided further*, That when the testimony or deposition of any witness has once been taken and used (or shall have heretofore been taken and used) upon the trial of any cause, and the same was, when so taken and used, competent and admissible under this section, the subsequent death or incompetency of such witness or of any other person shall not render such testimony incompetent under this section, but such testimony shall be received upon any subsequent trial of such cause.

**HISTORY:** This section Re-enacts Sec. 101, R. S. '46, Ch. 102, being C. L. '57, (4341); As Am. '61, p. 169, Act 125, Imd. Eff. Mar. 11; As Am. '63, p. 336, Act 188, Eff. June 22; C. L. '71, (5968); As Am. '75, p. 184, Act 155, Eff. Aug. 3; As Am. '81, p. 336, Act 245, Imd. Eff. June 10; How. 7545; As Am. '85, p. 156, Act 139, Eff. Sept. 19; As Am. '95, p. 245, Act 121, Eff. Aug. 30; C. L. '97, (10212); As Am. '01, p. 371, Act 239, Imd. Eff. June 6; As Am. '03, p. 36, Act 30, Imd. Eff. Apr. 9; inserting the additional proviso relating to persons insane or mentally incompetent, therefore, modified.

**MENTALLY INCOMPETENT PERSONS:** The statute with reference to matters equally within the knowledge of deceased persons has been broadened so as to bar any testimony which would have been barred in the case of the death of any person, if that person has been adjudged to be and still is at the time of the trial insane or mentally incompetent, as to all matters, which if true, must have been equally within his knowledge at a time when he was sane and mentally competent.

See Perkins' Evidence by Survivor.

**CONSTITUTIONALITY:** This statute is constitutional. *Wood v. Kaufman*, 135 Mich. 6.

**CONSTRUED:** In order to exclude such testimony it must—being an exception to the general rules of competency—be brought fairly within the statute. *Howard v. Patrick*, 43 Mich. 121; *Stevens v. Stevens Est.*, 181 Mich. 453. Questions to be excluded, must be distinctly aimed at such matters as are objectionable. *Jones v. Beeson*, 36 Mich. 214. Until testimony necessarily shows that a fact must have

been equally within decedent's knowledge, it ought not to be excluded. *Webster v. Sibley*, 72 Mich. 636. The statute applies only when the estate is in some way one of the parties and the heirs, assigns, devisees, or legatees are the others. *Brown v. Bell*, 58 Mich. 60; *McClintock's Appeal*, 58 Mich. 155.

The knowledge by a third person of facts equally within the knowledge of deceased, will not remove the statutory bar as to the testimony of the opposite party. *Taylor v. Bunker*, 68 Mich. 259; *Nichols v. Underwriters Assn.*, 129 Mich. 422. In *Downey v. Andrus*, 43 Mich. 65, the court reviewed all the decisions to that time pertaining to this section, and a summary of the legislation and cases on this subject will be found in the 104th Mich., pp. 159-76. See also *Latourette v. McKeen*, 104 Mich. 156.

**PURPOSE OF STATUTE:** The principal object of the prohibition was to prevent a living party from obtaining an unequal advantage from his own testimony, upon matters known only to himself and deceased, or better known to them than to others, and of which the deceased party can no longer speak. *Wright v. Wilson*, 17 Mich. 201. This statute was designed to protect the estates of deceased persons against claims which depend, in whole or in part, upon testimony of a party which cannot be refuted by the testimony of the deceased. *McHugh v. Dowd Estate*, 6 Mich. 414. It is evident that this statute is intended to reach the real party in interest and not a mere nominal party, who is not interested in the result of the allowance or disallowance of the claim against the estate, except as it becomes his duty as executor or administrator to prosecute or defend a suit in which the estate is interested. *Penny v. Croul*, 87 Mich. 18.

**EQUALLY WITHIN THE KNOWLEDGE:** The word "equally" does not relate to the degree of knowledge possessed by the parties, but is used in the sense of alike. So that the admissibility of the survivor's testimony does not depend upon his degree of knowledge, but is prohibited altogether. *Kimball v. Kimball*, 16 Mich. 215.

**OPPOSITE PARTY:** One holding property by gift mortis causa can not testify to the circumstances surrounding the gift. In *re Morse's Estate*, 170 Mich. 114. In the dispute over the final account of an administrator, over his failure to account for certain property, the one claimed by him to be the owner of the property in dispute may testify to such ownership. *Reed v. Whipple*, 140 Mich. 17. In an action against an estate for the support of decedent's widow, who had since died, the claimant was allowed to testify to matters within the knowledge of the deceased widow. In *re Howard's Est.*, 163 Mich. 561. In a suit between an administrator and the deceased's assignee relative to debts which are charges upon the property assigned, a creditor of deceased can testify regarding the debt owed to him. *Seymour v. Wallace*, 127 Mich. 670. In a suit prosecuted by the assigns of a deceased person against the representatives of his estate, an heir of decedent, although not a party to the record cannot testify. *O'Neil v. Greenwood*, 106 Mich. 573. A mere naked trustee is not a party in interest and not disqualified from testifying. *Jenkinson v. Brooks*, 119 Mich. 111. As to who is opposite party, see *City of Marquette v. Wilkinson*, 119 Mich. 419; *Reed v. Whipple*, 140 Mich. 18; *Duryea v. Granger's Est.*, 66 Mich. 599; *Bailey v. Holden*, 113 Mich. 402.

**ONLY OPPOSITE PARTY EXCLUDED:** One who does not stand in an antagonistic relation to the estate may testify. *Moore v. Machen*, 124 Mich. 218. The statute prevents the party opposed to the heir from testifying, but does not exclude the testimony of the heir in behalf of the estate. *Tabor v. Tabor*, 136 Mich. 257. The son of decedent, who is administrator, may testify in favor of the estate. *Moore v. Machen*, 124 Mich. 218; *Tabor v. Tabor*, 136 Mich. 257; But see *Peirson v. McNeal*, 137 Mich. 162. The testimony of children of a deceased son, who under the will took their father's part of the estate bequeathed, was admissible. *Pease v. Jennings*, 180 Mich. 683. In an action of replevin brought by the administratrix, she may testify. *Freda v. Tishbein*, 174 Mich. 392. In a contest over the probaton of a will a party appointed administrator, if otherwise not interested, may testify. In *re Darling's Est.*, 180 Mich. 474. An heir suing to set aside a deed made by deceased cannot testify. *Sheldon v. Carr*, 139 Mich. 662; *Beadle v. Anderson*, 158 Mich. 483; *Loomis v. Loomis*, 178 Mich. 223.

**WHAT TESTIMONY EXCLUDED:** A woman, endeavoring to prove her marriage to deceased in order to share in the distribution of his estate, is herself incompetent to testify. *Lorimer v. Lorimer*, 124 Mich. 637. As to use of book entries of matters within deceased's knowledge, but not made in his presence, see *Kwiecinski v. Newman's Estate*, 137 Mich. 288. In an action against tenants in common for the breach of a land contract, by representatives of deceased vendee, one of the defendants can testify that he never had dealings with deceased. *Schmitz v. Beals*, 115 Mich. 112. The rule does not preclude the survivor from contradicting a witness who testifies that a certain transaction occurred, or from testifying that he was at another place on the date of the supposed transaction. *Pillard v. Dunn*, 108 Mich. 301. The survivor is not allowed to show that a certain writing was upon a check at the time of delivery. *Blodgett v. Vogel*, 130 Mich. 481. One suing an estate on a lost note can testify as to how the note was lost. *Taylor v. Taylor's Est.*, 138 Mich. 663. In a controversy over a claim presented against an estate, the claimant cannot testify to the contents of a lost letter alleged by him to have been sent to deceased. In *re Dubois Estate*, 176 Mich. 412. It is questionable whether this statute has any reference to written documents, which are designed to supersede evidence resting in memory merely and capable of perversion, but when the representatives of the deceased have the means of proving the document by independent evidence, the case is not within the statute. *Moulton v. Moulton*, 21 Mich. 364. Where articles were purchased by decedent from a store, each time articles were purchased a separate contract was made and the clerk who sold the articles is incompetent to testify. *Gustafson v. Eger*, 132 Mich. 388. See also dissenting opinion, page 390. As to testimony excluded, see also *Beadle v. Anderson*, 158 Mich. 483; In *re Johnson's Estate*, 160 Mich. 587.

**HEIRS, ASSIGNS, DEVISEES, ETC.:** One in possession of decedent's property at the time of his death is a representative of deceased within the meaning of this act. *Burke v. Dunn*, 117 Mich. 431. The word "assigns" is used in its legal sense and signifies a person to whom any property or right is transferred by a deceased person in his lifetime. The statute is broad enough to cover successive transfers. *Ripley v. Seligman*, 88 Mich. 189. The case of *Twiss*



v. George, 33 Mich. 253, arose under the statute before the amendment of '75, which included "assigns," and cannot be taken as an exposition of the present law. *Id.*

In a suit between an insurance company and the beneficiary of the assured, the officers and agents of the company cannot testify to matters within the knowledge of the assured. *Wallace v. Mystic Circle*, 127 Mich. 389; *Krause v. Assurance Co.*, 99 Mich. 465; See *Lloyd v. Hollenbeck*, 98 Mich. 205.

**HUSBAND AND WIFE:** Where the matter in controversy is real estate, the wife of complainant cannot testify to matters within knowledge of deceased, as she is on account of dower rights she would have in the property if her husband was successful, a party in interest. *Laird v. Laird*, 115 Mich. 352.

But where a claim is presented for breach of contract to convey land, the wife of a claimant can testify. *Dunn v. Dunn's Estate*, 127 Mich. 385. Where a wife has a direct interest in the subject matter of the litigation, she is not a competent witness to testify to matters within the provisions of this statute. *Abbott v. Jones*, 164 Mich. 602; *Chaddock v. Chaddock*, 166 Mich. 89. But where the wife has no direct interest she may testify. *Graham v. Alexander*, 123 Mich. 169. As to when wife of claimant can testify, see also *Wessies v. VanDyke's Estate*, 159 Mich. 184; *In re Reidy's Est.*, 162 Mich. 157. Since the amendment in '01, a husband acting as agent for his wife cannot testify. *Gustafson v. Eger*, 132 Mich. 388; *Brown v. Brown*, 163 Mich. 343; *In re VanDyke's Estate*, 171 Mich. 199. A husband who resides with his wife and furnishes the table is regarded as the assignor of the wife's claim against decedent's estate for board, and his testimony, comes within the provisions of this section. *Stackable v. Stackable's Est.*, 65 Mich. 518; *Finn v. Sowder's Est.*, 139 Mich. 625. But a husband can testify in behalf of his wife in such an action, if previous to the rendition of the services, he agreed to let her have the remuneration. *In re De Spelder's Estate*, 181 Mich. 153; *Slack v. Norton*, 111 Mich. 213. In an action by a wife for services in caring for a party, since deceased, her husband can testify that he gave his wife to consent to enter into an arrangement with decedent to take care of him. *Ashley v. Smith's Est.*, 152 Mich. 199.

**AGENTS:** An agent cannot testify to transactions between himself, acting for his principal, and a deceased third party *Locklund v. Burman's Est.*, 146 Mich. 235; *Scheidt v. Roe*, 169 Mich. 584; *In re VanDyke's Estate*, 171 Mich. 199. As to the rule before the amendment in 1901 of the act superseded by this section, see *DeMary v. Burtenshaw's Estate*, 131 Mich. 328. The case of *Bullock v. Tompkins' Estate*, 125 Mich. 22, apparently holds that where an agent transacts business in behalf of a private individual, the opposite party after the agent's death, can testify regarding the transactions. As to testimony of adverse party regarding transactions with a corporation's agent, since deceased, see notes to "corporations" under this section. Where a party claims set-off as a defense to a suit by representatives of deceased, an agent concerned with the transaction cannot testify. *Gustafson v. Eger*, 132 Mich. 388. A clerk in the employ of defendant's agent, who collects money for defendant, is not an agent within the meaning of this act. *Rousseau v. Brotherhood of Yoeman*, 177 Mich. 572; *Krause v. Assurance Co.*, 105 Mich. 334. The agency must be with reference to the contract sued upon. *McCain v. Smith*, 172

Mich. 13. See also *Wallace v. Mystic Circle*, 121 Mich. 266; *Albring v. Ward*, 137 Mich. 355; *Detroit United Railway v. Smith*, 144 Mich. 238; *Brown v. Brown*, 163 Mich. 343; *Longe v. Kinney*, 171 Mich. 317; *Stetson v. Transportation Co.*, 182 Mich. 358.

**CORPORATIONS:** The statute is intended to protect the interest of corporations when the testimony relates to matters within the knowledge of a deceased officer. *People's National Bank v. Wilcox*, 136 Mich. 572. In a suit against a corporation, the opposite party cannot testify to transactions had with the company's agent who has since died. *Michels v. Underwriters Ass'n*, 129 Mich. 422; *Julius Kessler & Co. v. Zacharias*, 145 Mich. 699. That the surviving associates of a deceased secretary of a company had knowledge of the contents of a certain letter is not to be inferred from the fact that the letter related to official business. *Sheldon v. Fire Insurance Co.*, 124 Mich. 310. A clerk in the employ of a company's agent, who collects money for the company, is not an agent within the meaning of this act. *Rousseau v. Brotherhood of Yoeman*, 177 Mich. 572; *Id.* 186 Mich. 101. See also *Krause v. Assurance Co.*, 105 Mich. 334. This act as applied to corporations, includes only those who are authorized in the matter, with reference to which testimony is given, to act for the company. *Brennan v. Railroad Co.*, 93 Mich. 160; *Wallace v. Mystic Circle*, 121 Mich. 266. In order to exclude the testimony of its officers, the company must be a party to the suit. *McCain v. Smith*, 172 Mich. 13.

In a suit by the estate of a deceased person against a corporation, the testimony of the corporators is not excluded. *Rust v. Bennett*, 39 Mich. 521. The provisions of this act apply after the agent has severed his relations with the company. *Singer Mfg. Co. v. Benjamin*, 55 Mich. 333. Before evidence concerning instructions which were given plaintiff by a deceased officer of defendant corporation could be excluded, it must appear by the record that the facts were not within the knowledge of a surviving officer. *Stetson v. Transportation Co.*, 182 Mich. 359. The provisions of this act regarding corporations do not apply to partnerships. *DeMary v. Burtenshaw's Estate*, 131 Mich. 328. See *May v. Ullrich*, 132 Mich. 8; *Great Camp, K. O. T. M. v. Savage*, 135 Mich. 464. *Rayburn v. Mason Lumber Co.*, 57 Mich. 275; *Lyttle v. Railway Co.*, 84 Mich. 299; *Baumann v. Salt & Lumber Co.*, 94 Mich. 365.

**ASSIGNORS OR ASSIGNEES:** The proviso relative to assignors or assignees was inserted by the amendment of '85, and was intended to prevent the common practice of a claimant against an estate assigning his claim to another and thereby becoming eligible as a witness and defeating the spirit and intent of the statute. *Stackable v. Stackable's Estate*, 65 Mich. 518. And such assignor may be asked the purpose of such assignment and, if to make him a competent witness, he cannot testify, even if otherwise competent. *Buck v. Haynes' Estate*, 75 Mich. 397. See, also, *Insurance Co. v. O'Brien*, 92 Mich. 589. The amendment of 1885 not only cuts off the evasion of the statute by assignment, but also goes further and prohibits the assignee from testifying, who, in the absence of a fraudulent intent to evade the law in taking the assignment, would be the person to be benefited by the allowance of the claim. *Penny v. Croul*, 87 Mich. 18. See *Duryea v. Granger's Estate*, 66 Mich. 593. This provision relative to assignors does not preclude a husband from testifying in behalf

of his wife in an action by her against an estate for services rendered the decedent, where he had previously agreed to let her have the remuneration for her services. *Slack v. Norton*, 111 Mich. 213. One who files a bill to quiet title against the assigns of a deceased person, through whom he also claims by a prior conveyance, cannot testify to matters within the knowledge of deceased. *Bailey v. Holden*, 113 Mich. 402. In a suit by the assignee of an administrator, defendant cannot testify. *Molby v. Murray*, 173 Mich. 144. The grantee of an heir is a party in interest. *Olin v. Henderson*, 120 Mich. 154. See *Rayburn v. Mason Lumber Co.*, 57 Mich. 275; *O'Neil v. Greenwood*, 106 Mich. 573; *Seymour v. Wallace*, 121 Mich. 404; *Berry v. Adams*, 122 Mich. 20; *Miller v. Shumway*, 135 Mich. 657-659; *Shepard v. Shepard*, 164 Mich. 197; *Longe v. Kinney*, 171 Mich. 317.

**WAIVER OF STATUTE:** Where the opposing party has introduced as admissions the statements drawn from the survivor, under oath, in a preliminary proceeding, the opponent waives the benefit of the statute. *Smith's Appeal*, 52 Mich. 419; *Lilley v. Insurance Co.*, 92 Mich. 158; *Lange v. Klatt*, 135 Mich. 264; *Cady v. Burgess*, 144 Mich. 526. And where the representative of the deceased calls the survivor as a witness, the latter may give a full explanation of the matter enquired about. *Fox v. Barrett's Estate*, 117 Mich. 162; *Savings Bank v. Butler's Estate*, 98 Mich. 388. Where a party, defending a suit as administratrix, testified to matters within the knowledge of deceased, she did not waive the privilege of the statute. *In re Meeker's Estate*, 169 Mich. 306. An administrator cannot waive the provisions of this statute. *McHugh v. Dowd Estate*, 86 Mich. 414. But the decedent's assigns may waive them. *Ripley v. Seligman*, 88 Mich. 177. See further, on the subject of waiver, *Beardslee v. Reeves*, 76 Mich. 661; *Dunlap v. Dunlap*, 94 Mich. 11. And where decedent's administrator and his counsel sit by and make no objection to the admission of such testimony, they cannot expect the trial judge to rule it out on his own motion, and will not be granted a reversal on that ground. *Barbier v. Young*, 115 Mich. 100.

By failing to object to testimony excluded under this statute, its benefit is waived. *Howatt v. Green*, 139 Mich. 293. In a chancery suit if objection to such testimony is not made in the trial court, objection can not be made in the supreme court. *Lewis v. Jacobs*, 153 Mich. 666. But the benefit of the statute is not waived when the admission does not relate to matters equally within the knowledge of deceased. *Wilbur v. Grover*, 140 Mich. 193. In *Harper v. Corcoran*, 166 Mich. 480, the court, after citing a large number of authorities, said: "We think those cases clearly were intended to hold that this statute is waived only when the party compels the survivor to testify relative to matters equally within the knowledge of deceased." The introduction of testimony of an admission made out of court by defendant as to matters equally within the knowledge of deceased, does not constitute a waiver of this statute. *Harper v. Corcoran*, 166 Mich. 477.

**CITED:** *Campau v. VanDyke*, 15 Mich. 380; *Wheeler v. Arnold*, 30 Mich. 304; *VanWest v. Chidester*, 31 Mich. 209; *Mundy v. Foster*, 31 Mich. 321; *Chambers v. Hill*, 34 Mich. 523; *Schratz v. Schratz*, 35 Mich. 485; *Hart v. Carpenter*, 36 Mich. 402; *Harmon v. Dart*, 37 Mich. 53; *Ward v. Ward*, 37 Mich. 253; *Howard v. Patrick*, 38 Mich. 795; *Bachelder v. Brown*, 47 Mich. 366; *Eccard v. Brush*, 48 Mich.

3; Yerkes v. Blodgett, 48 Mich. 211; Foster v. Hill, 55 Mich. 546; McMillan v. Bissell, 63 Mich. 75; Wallace v. Wallace, 63 Mich. 331; Pendill v. Neuberger, 64 Mich. 220; Hood v. Olin, 68 Mich. 175; Hellman v. Schwenk, 68 Mich. 293, 301; Buffum v. Porter, 70 Mich. 623; McCutcheon v. Loud, 71 Mich. 437; Doolittle v. Lavagan, 74 Mich. 13; Lautenschlager v. Lautenschlager, 80 Mich. 291; Wilson v. Wilson's Estate, 80 Mich. 473; Lake v. Nolan, 81 Mich. 115; Barker v. Hebbard, 81 Mich. 269; Jackson v. Cole, 81 Mich. 441; Fenton v. Miller, 94 Mich. 212; McHugh v. Fitzgerald, 103 Mich. 24; Farnsworth v. Fraser, 137 Mich. 298; Lamb v. Lamb, 139 Mich. 169; Rix v. Smith, 145 Mich. 211; Root v. Beymer, 146 Mich. 696; Grand Lodge A. O. U. W. v. Brown, 160 Mich. 447; In re DuBois Estate, 176 Mich. 412; VanScelver v. King, 176 Mich. 607; Helmer v. VanWormer, 187 Mich. 1.

See also Cook v. Stevenson, 30 Mich. 242; Lee v. Wisner, 38 Mich. 82; McKeown v. Harvey, 40 Mich. 226; Mower's Appeal, 48 Mich. 441; Seligman v. TenEyck's Estate, 49 Mich. 104; Id. 53 Mich. 285; Campau v. Lafferty, 50 Mich. 114; Bassett v. Shepardson, 52 Mich. 3; Chadwick v. Chadwick, 52 Mich. 545; Youngs v. Cunningham, 57 Mich. 153; Cotherman v. Cotherman, 58 Mich. 465; Pendill v. Neuberger, 67 Mich. 562; Schuffert v. Grote, 88 Mich. 651; Smith v. Smith's Estate, 91 Mich. 9; Letts v. Letts, 91 Mich. 597; Connolly v. Keating, 102 Mich. 1; Ladd v. Brown, 108 Mich. 108; Harris v. Cable, 113 Mich. 193; Wilcox v. Wilcox, 139 Mich. 370; Union Trust Co. v. Morgan's, 140 Mich. 138; Franken v. Supreme Court I. O. F., 152 Mich. 503; Goebel v. Look, 153 Mich. 205; Bigelow v. Sheehan, 166 Mich. 89; Broffee v. LeFils, 183 Mich. 100.

**THE STATUTORY RULES:** The rules may be stated as follows:

(1) When an heir, assignee, devisee, legatee, or personal representative of a deceased person is a party, the other party cannot testify as to matters equally within the knowledge of the deceased person. (2) If a surviving partner is a party, the other party cannot testify as to matters which were within the knowledge of the deceased partner and not within the knowledge of the surviving partner. (3) If a corporation is a party, the other party cannot testify to matters which must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent. (4) If the action is by persons representing a deceased person against a corporation, no officer or agent of the corporation can testify to matters which must have been equally within the knowledge of the deceased person. (5) No person who has acted as an agent in the making or continuing of a contract with any person who may have died, is a competent witness in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representative or heirs of such decedent, unless he is called by such heirs or legal representatives.

**EXCEPTIONS TO THE RULES:** The exceptions to the rules are as follows: (1) Whenever the deposition, affidavit or testimony of such deceased party taken in his lifetime is read in evidence in such suit or proceeding, the affidavit or testimony of the surviving party is admitted in his own behalf in all matters mentioned or covered in such deposition, affidavit or testimony. (2) When the testimony or deposition of any witness has once been taken and used upon the

trial of any cause, and the same was, when so taken and used, competent and admissible under the law, the subsequent death of such witness or of any other person does not render under such testimony incompetent under the law, but such testimony is to be received upon any subsequent trial of such cause.

**THE OBJECT OF THE STATUTE:** The policy of the law is, if death has stopped the mouth of one of the parties to the transaction, to stop the mouth of the other party, for the main purpose of the prohibition, is to prevent an unequal advantage to be taken from his own testimony, upon matters known only to himself and deceased. In *Brown v. Bell*, 58 Mich. 58, the court said: "The object of the statute is to prevent fraud and false swearing whereby estates become unjustly depleted in cases where no person on the part of the estate, except the deceased, has any knowledge of the facts necessary to sustain the claim in favor of the estate, or to make good the defense of the estate when unjust claims are attempted to be enforced against it, and we see no occasion for extending the scope of the statute by judicial construction."

**THE SCOPE OF THE STATUTE:** The statute resolves itself into main questions:

First, the question of competency of parties;

Second, the question of the competency of the contents of the subject-matter to which they give testimony.

**TESTIMONY OF OPPOSITE PARTY:** The competency of parties may be divided into two classes, as follows:

(a) Those parties and persons whose testimony must be excluded;

(b) Those parties and persons against whom testimony must be excluded.

**THE COMPETENCY OF PARTIES:** In general it may be said that the statute does not cover proponents, but parties to the record, i. e., the statute only applies to cases where the estate is in some way one of the parties, and the heirs, assigns, devisees, or legatees, are the other. Thus, the statute is limited to contests on litigation upon claims between other persons and the deceased, existing prior to his death, as well as to suits and proceedings to which the deceased, if living, would be a necessary party, and since which his heirs, devisees and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place. *Brown v. Bell*, 58 Mich. 58. A proponent of a will claiming under it was asked the question, did you have any conversation with her upon the subject of her making a will? Objection was made to the question on the ground that the witness was made incompetent and disqualified as a witness in his own behalf, being a person for whose benefit the suit or proceeding was prosecuted, and a party in interest, for the reason that the statute was a bar to the admission of the testimony in that the matter, if true, must have been equally within the knowledge of the deceased. The objection was overruled and witness allowed to answer. In *Schofield v. Walker*, 58 Mich. 96, Justice Champlin said: "The ruling of the court was correct. The contestant had introduced testimony tending to prove that witness had exerted undue influence over the testatrix in making her will, and she was introduced for the purpose of rebutting this evidence. She was not a party to the proceeding to establish a will. She may be interested, but such interest is remote and contingent. The debts must first be paid and these may

consume the whole estate. Under our statute or practice where interested persons are disqualified, she would be a competent witness. *Freeman v. Spaulding*, 12 N. Y. 373; *Lawyer v. Smith*, 8 Mich. 411. But our statutes have removed the disqualification of a witness on the ground of interest, and there appears to be no reason why she is not a competent witness." The proponents were called as witnesses for the purpose of establishing the testamentary character of instruments in the form of deeds, and they were allowed, under objection, to testify that after the instruments were executed deceased took them to his room, and placed them in his bureau, where they remained till after his death; that on the day the papers were executed, he communicated the fact that they were executed to them, and stated to them that he should retain them and the control of his property while he lived, and that they could not have them till after his death. This testimony was objected to on the ground that what decedent told proponents must have been equally within his knowledge and their knowledge, and therefore incompetent under the statute. However, the court decided that such testimony was competent and the statute did not apply. *Lautenshlager v. Lautenshlager*, 80 Mich. 285, following *Schofield v. Walker*, 58 Mich. 96; *Brown v. Bell*, 58 Mich. 58.

But where complainant, mother of decedent, brought suit against administratrix of his estate who was the wife of the son, on a transaction in which complainant, the party of record, alleges that her son and husband acted as her agent by making a loan for her to a third party in which transaction the son took title to the land and land contract in his name, and the purpose for bringing the suit was to subject this land held by the estate of the deceased son to a trust in favor of the mother, complainant as well as her husband were prohibited from giving testimony under the statute. Thus, the real question involved in the case was, did the money loaned belong to the mother or son? But the question was barred. *Brown v. Brown*, 163 Mich. 341. In another case, *Bachelder v. Brown*, 47 Mich. 367, where the representative of an estate sued on a note which was given for the purchase of a mare and the defense was that the husband of the decedent was the owner of the note and counsel called him as a witness, and put this question to him, whose horse was it you sold to Martin Gross? This question was objected to on the ground that he was an adverse party and therefore was not competent under the statute relating to matters equally within the knowledge of the decedent.

Heirs are not excluded as adversely interested to the representative of the testator's estate where they testify as to advancements in a proceeding to determine their rights as distributees under a will. In this case, *McClinpock's Appeal*, 58 Mich. 155, the court said: "A question was made whether the various heirs are competent witnesses in this proceeding. In our opinion this is not a proceeding in which the estate is on one side and appellant on the other, as it must be in order to require exclusion under How. Stat. § 7545. If there are any parties in opposition each legatee is opposed to every other legatee, but it can make no difference to the executor, as such, into whose hands the assets fall. It is rather analogous to a suit in partition than on adverse proceeding against the representative

of the estate, who, among these parties is a mere stakeholder. We see no reason why they may not all be allowed or compelled, as the case may be, to testify concerning the advances, which are not treated as debts, but on the contrary as gifts to apply on legacies."

A third party or outsider, when present, may testify to any transaction between the opposite party and decedent where the opposite party would be prohibited from giving testimony to matters which, if true, are equally within the knowledge of the deceased, *McKeown v. Harvey*, 40 Mich. 226; but the fact that other persons were present when a conversation was had between the opposite party and decedent does not qualify the opposite party to testify to such matters. *Taylor v. Bunker*, 68 Mich. 258.

(a) Those Parties and Persons Whose Testimony Must Be Excluded.

Parties of record are excluded from giving testimony upon matters, if true, are equally within the knowledge of the deceased. Thus, one who is suing as heir to set aside a deed made by his mother, or to enforce a trust concerning the land conveyed, is excluded as to statements made by the grandmother concerning the consideration of the deed, *Sheldon v. Carr*, 139 Mich. 654; so in case of ejectment where plaintiff makes claims against the defendant's estate as wife, although the marriage is in dispute, his testimony is excluded, *Lorimer v. Lorimer*, 124 Mich. 631; and plaintiff's grantor is excluded where the defendants in ejectment claim title to the land through a decedent. *Young v. Cunningham*, 57 Mich. 153. Again, the party of record is excluded where a bill was filed declaring that the title to land conveyed to the decedent in his lifetime to be in the complainant. *Connolly v. Keating*, 102 Mich. 1. In a foreclosure proceeding brought by the executors of the mortgagee, the defendant mortgagor was excluded from giving testimony. *Yerkes v. Blodgett*, 48 Mich. 211.

In a suit by the successor in interest of a deceased mortgagee to foreclose a mortgage, the mortgagor cannot testify as to matters equally within the knowledge of the deceased. *Van Schiever v. King*, 176 Mich. 605.

A party who has a direct interest to the subject-matter of the suit is excluded. Thus, in a bill for specific performance of a paid contract to devise realty, the wife of complainant is excluded. *Laird v. Laird*, 115 Mich. 352; so the heiress, the widow, was excluded as being interested in the outcome of the case where an executor was sued in his individual capacity by the administrator of the estate of the widow of the testator for the conversion of certain bonds received from her after the death of the testator, but before the will was probated. *Penny v. Croul*, 87 Mich. 15.

The testimony of the wife of complainant is excluded where a suit was brought for specific performance on a contract between complainant and a decedent for the conveyance of land, *Ayers v. Short*, 142 Mich. 512; *Chadock v. Chadock*, 134 Mich. 48, so is the husband excluded from giving testimony. *Finn v. Sowders' Estate*, 139 Mich. 623.

The survivor or survivors are excluded from testifying in matters between themselves and decedents. Thus, the surviving party is precluded in a suit against executors upon transaction with their decedent. *Eccard v. Brush*, 48 Mich. 3; *Letts v. Letts*, 91 Mich. 576; *Seligman v. Ten Eyck Estate*, 60 Mich. 267.

Grantees and assignors are excluded from testifying. Thus, where on the trial of a claim for the board of the deceased, it appeared that the husband of the claimant was the head of the house, but he claimed to have given the money for the board to his wife, and that it was understood she should receive the amount for it, he was the assignor and therefore precluded from giving testimony, *Stackable v. Stackable's Estate*, 65 Mich. 515, so one is an assignor who is entitled to have property devised to her, but yields it up to consent to have it devised to her children. *Berry v. Adams*, 122 Mich. 17. In a suit to wind up partnership affairs, the testimony of the surviving partner and of his wife who is directly interested in the subject-matter of the litigation, as to matters equally within the knowledge of the deceased partner, must be excluded. *Abbott v. Jones*, 164 Mich. 598. So the testimony of the widow, suing sisters-in-law and a brother-in-law, must be excluded. *Grand Lodge v. Brown*, 160 Mich. 437.

(b) Those Parties and Persons Against Whom Testimony Must Be Excluded.

The statute precludes testimony by opposite parties against certain persons, such as grantees, assignees, devisees, heirs, distributees, etc. Thus, in a suit by an heir of decedent, the opposite party cannot testify against him as to matters, if true, are equally within the knowledge of decedent, *Olin v. Henderson*, 120 Mich. 150; so can not an opposite party testify when a beneficiary under the will of the heir is the party on one side and the administrator of the estate on the other. *Appeal of Mower*, 48 Mich. 441; *Hoskin v. Rochester Savings and Loan Association*, 133 Mich. 505; *Bauman v. Manistee Salt and Lumber Co.*, 94 Mich. 363; *M'Cutcheon v. Loud*, 71 Mich. 433; *Doolittle v. Gavagan*, 74 Mich. 11; *Hood v. Olin*, 68 Mich. 165. Neither can a borrowing member of a loan association testify in a suit to cancel a mortgage, *Hoskins v. Rochester Savings and Loan Association*, 133 Mich. 505; nor where one comes into possession of personal property through the owner and is called upon to defend such possession, the plaintiff is barred from giving testimony because the defendant is rendered by virtue of his position a representative of the deceased, *Burke v. Dunn*, 117 Mich. 430; but in case of replevin against a firm by a mortgage of chattels bought by the mortgagor from the partnership on a conditional sale it was decided that the mortgagor was competent in spite of the fact that the partner with whom the contract was made had died during the pendency of the suit. *Hood v. Olin*, 68 Mich. 165. Again it may be said that in suits conducted by the heirs, assigns, devisees, legatees or personal representatives of a deceased person, the testimony against the opposite party by an heir who sued as administratrix of another estate must be excluded, but where an heir and distributee who has assigned her claim and is not interested in the result of the case, she can testify, *Howard v. Patrick*, 38 Mich. 795; so where the beneficiary under the will of the heir is the party on one side and the administratrix on the other side, the party cannot testify. *Appeal of Mower*, 48 Mich. 141. Neither can one claiming under a deed testify against those claiming under a second deed. *Bailey v. Holden*, 113 Mich. 402.

**THE COMPETENCY OF THE CONTENTS OF THE SUBJECT-MATTER:** The statute was designed to protect estates by exclud-



ing the testimony of the subject relating to matters, if true, are equally within the knowledge of the deceased. Thus, in a case where a will was filed to impeach and set aside a decree, rendered by the circuit court, on the ground that it had been obtained by fraud and collusion, and whose representatives are the principal defendants in this cause—was complainant, and the complainants in this cause were defendants, and where by his own testimony, he undertook to excuse his delay during D.'s lifetime by some vague assurance of D., to do right by him, it is decided that such testimony is incompetent under the statute, *Campau v. Van Dyke*, 15 Mich. 380, so in a case of a claim by the son against the estate of his father where the circuit court decided that the statute did not forbid a party from testifying to transactions within the knowledge of the deceased, provided his own knowledge respecting the transaction was superior in degree or extended to particulars, the deceased may not have known, this construction is incorrect, for the reason that the word "equally" used in the statute does not relate to the degree of knowledge possessed by the parties, but is used in the sense of alike, i. e., the respective parties alike, and knowledge of the facts. *Kimball v. Kimball*, 16 Mich. 277. In a case of ejectment, it was decided to be competent for the plaintiff to testify as to defendant's going into possession and those staying, although defendants were husband and wife, one of whom was dead, the facts in question must have been equally within the knowledge of the deceased. In *Wright v. Wilson*, 17 Mich. 201, the court said: "Without undertaking to decide whether the third section of the act of '61, prohibiting a party from testifying 'in relation to matters which, if true, must have been equally within the knowledge of such deceased person,' was intended to apply to facts of this character, which in their nature, must be open and notorious and easy proof from any source, it is sufficient for the present case to say that, as the defendant, Austin Wright, one of the parties to whom the testimony referred, was still living and defending in his own right, as well as that of his deceased wife, we do not think that testimony falls within the object of the prohibition of this statute. Had the testimony referred merely to a conversation with the deceased alone, or to some fact the knowledge of which had been confined to the plaintiff and the deceased, the result might have been different. But the principal object of this prohibition, we think, was to prevent a living party from obtaining an unequal advantage from his own testimony, upon matters known only to himself and the deceased, or better known to them than to others, and of which the deceased party can, of course, no longer speak. Whether the prohibition was intended to go beyond this in any case, it is not necessary here to decide, as it is quite apparent from the evidence and the nature of the case that this matter of taking and holding possession of this land, by the defendant and his wife together, must have been equally within the knowledge of the surviving party, Austin Wright, as in that of his deceased wife; and he was entirely competent to testify in relation to it." But in case where the administratrix sued to recover for goods alleged to have been sold by decedent and the plaintiff gave evidence that the parties made an inventory which was recorded in the handwriting of the defendant, and that shortly before his

death decedent procured a copy of it, and informed the defendant of his reasons for so doing—the copy was properly ratified, evidence was offered and that the paper produced by the plaintiff was not a copy of any inventory of goods ever bought by defendant of the decedent, or of any inventory ever made by him at all, or which he ever assisted in making, and moreover that he never had in his possession any book containing an inventory of which there was a copy. This evidence was excluded on the ground that while the essential facts were within the knowledge of decedent and defendant, they were also within the knowledge of others and provable by them, and it did not appear that the copying was done in the presence of either, *Moulton v. Mason*, 21 Mich. 364; so the court sustained an objection to an offer made by the defendant that the oral contract between him and decedent was not like the one set up in the declaration. *Cook v. Stevenson*, 30 Mich. 242. But in a case where the facts related to what had been done in the absence of decedent and to some matters relating to value, and of the resulting costs of certain items of transportation of which the decedent had no personal knowledge, the evidence was not excluded. *Wheeler v. Arnold*, 30 Mich. 304. On the other hand, in a case where complainant sought to have his deed declared a mortgage, and the record gave the history of the oral transaction between complainant and decedent, much of the evidence was competent under the statute especially concerning such matters which are equally within the knowledge of the deceased. *Wert v. Chidester*, 31 Mich. 207. So in a case where the complainant assumed to testify to a verbal agreement made between himself and wife, deceased, he deeded his property to her and she in return agreed to will all her property to him, but subsequently changed her mind by revoking the will, and making a secret and prejudicial disposition of her property by a trust deed, under which complainant received benefits, such testimony, if not literally within the terms of the statute against allowing a surviving party to a transaction to testify in certain cases, was clearly within its policy, and he was not a proper witness to prove the making of the contract. *Mundy v. Foster*, 31 Mich. 313. Neither did the statute preclude evidence of interviews between L. and W. concerning their respective interests whether before or after the date of the bond where W. was a surety on a bond given by D. as collector, and subsequently D. and L. gave W. their bond to indemnify him, and the government recovered against W. on the first bond, and D. died, when W. sued L. on the second bond of indemnity. *Lee v. Wisner*, 38 Mich. 72.

But where the administrator sued the surviving partner of a law firm for the proceeds of securities alleged to have been lodged by decedent in his lifetime with the firm, and it was set up by the defense that the securities were left under an agreement between decedent and the firm that the latter should have half of the sum they should collect, and should have a further allowance on account of another matter, and that the amount to be paid over had been rendered, the lower court allowed the surviving partner to swear to the arrangement between his firm and decedent, *Harmon v. Dart*, 37 Mich. 53; but this ruling was error, for this testimony was incompetent under the statute, but it was not error to permit de-

fendant to testify what was said by plaintiff, to the conversations, as to his arrangements with the deceased landlord. *Ladd v. Brown*, 108 Mich. 105.

Questions concerning the circumstances surrounding the execution of an instrument propounded by proponents for probate cannot be excluded, *Lautenschlager v. Lautenschlager*, 80 Mich. 285; but questions relating to the ownership of property, *Bachelder v. Brown*, 47 Mich. 366, or money, *Brown v. Brown*, 163 Mich. 341, is excluded where they are matters which, if true, are equally within the knowledge of the deceased. Thus, a claim for money received by plaintiff for deceased where it is shown that a check was given to plaintiff who gave it to the deceased, it was decided to exclude the testimony that the money received on the check was plaintiff's, *Shouldice v. McLeod's Estate*, 130 Mich. 444, i. d., 135 Mich. 337; so where the defendant claimed a settlement and payment in full by introducing a check in evidence, reciting on its face that it was in full payment, testimony to show that the writing was on the check before it was delivered to deceased was excluded, but testimony to show that such recital was written after the check was stamped "paid" by the bank was not excluded. *Blodgett v. Vogel*, 130 Mich. 479. Neither was the testimony of a party excluded which related to the finding by him, after the death of the alleged debtor certain receipts bearing the signature of the claimant and that they were made at the time of their date where he was prosecuting a claim against the estate. *Tolsma v. Tolsma's Estate*, 183 Mich. 314.

In illustration of the distinction of the nature of the evidence to be excluded and that not to be excluded, it may be said that the testimony of the husband, in so far as it relates to or is corroborative of the alleged contract, should be excluded. *Finn v. Sowder's Estate*, 139 Mich. 623; *Stackable v. Stackable's Estate*, 65 Mich. 515. Thus where the testimony of the husband amounts to the statement that deceased said she was going to pay claimant well for the work she was doing for her, and would leave the money with a certain party to pay her all in one lump sum after death, such testimony was properly excluded. In *re Van Dyke's Estate*, 171 Mich. 195. But in a case, *Weesles v. Van Dyke's Estate*, 159 Mich. 180, for a claim for board and care where the wife of the claimant overheard the conversations between the parties, and she carried money and a message from her father to her husband, and returned the money and a message to her father, and she testified to these occurrences, such testimony is not excluded or incompetent. Furthermore the fact that she may have cooked some or all of the food furnished by her husband and delivered some or all of it to her father does not constitute her the agent of her husband within the meaning of this statute.

Again where the wife was permitted to keep board and furnish the provisions—the husband apparently having nothing to do with the business—he was a competent witness to show that this was the wife's business and not his own, *Slack v. Norton*, 111 Mich. 213, but where the husband was the head of the household and furnished the family supplies and there was no agreement on his part with his wife that she should receive the pay for the board, he was not a competent witness in relation to the items for board. *Stackable v.*

*Stackable's Estate*, 65 Mich. 518. On the other hand, a husband may testify to contract made between his wife and decedent to compensate her for services to be rendered in spite of the fact that the husband's consent to her performing the services was not given until after, yet contemporaneous with, the making of the contract. *Bolthouse v. De Spelder*, 181 Mich. 153; 147 N. W. 589.

A husband may testify as to transactions concerning gifts causa mortis where a wife brings action against the estate of her husband for the purpose of recovering for these alleged gifts, *Caldwell v. Goodenough*, 170 Mich. 114; but testimony of the legatees under will of decedent in behalf of the administrator is not competent where an administrator brings action to recover for the conversion of certificates of deposit which defendant claimed to hold as gift causa mortis. *Pease v. Jennings*, 180 Mich. 682; 146 N. W. 260.

Statements made by deceased to third parties concerning his property then in his possession must be excluded, *Freda v. Tischbein*, 174 Mich. 391; but in a suit to determine who had the right to the possession of certain goods a few weeks after the death of the decedent, whether the administrator or the defendants, it was competent for the plaintiff, the special administratrix, to testify to any fact in connection with the possession of decedent. *Freda v. Tischbein*, 174 Mich. 391.

The statute precludes parol testimony being given by a party as to the contents of letters that have passed between himself and a decedent adversely interested, which letters have not been destroyed, *Schratz v. Schratz*, 35 Mich. 485; so a claimant cannot testify to the contents of a letter written by deceased which cannot be produced, *In re Roehrig*, 176 Mich. 467, 20 D. L. N. 604; likewise in a suit to restrain the foreclosure of a mortgage by the heirs of the mortgagor, the defendant cannot testify that he had received a payment within fifteen years in a letter from the mortgagor. *Carr v. Carr*, 138 Mich. 396. But where a letter written by a maker of a note to the deceased in his lifetime, acknowledging an indebtedness to the deceased, he may testify that the letter had no reference to the note in question, *Schratz v. Schratz*, 35 Mich. 485; yet in a case of a claim against an estate where the executrix was served with notice to produce a letter claimed to have been written by claimant to the deceased, and referred to in a letter of a certain date, she testified that she was unable to find such a letter and while claimant was on the witness stand he was asked to state the contents of the letter. This testimony was properly excluded under the statute, for the claimant is testifying in support of his claim, and the cause is being defended by the personal representative of the deceased. *In re Dubois' Estate*, 176 Mich. 407.

Admissions are not excluded under certain circumstances. Thus where certain admissions of a husband were made while testifying in another case, his whole testimony in that case was competent as a witness to the entire transaction with decedent, *Cady v. Burgess*, 144 Mich. 523; so, where on the trial of a suit brought by an administrator for the conversion of certain property belonging to the estate and the examination of defendant taken in probate court was introduced to show admissions of the defendant, it was decided that the entire examination or such part as be deemed material were not

excluded, although it contained matters equally within the knowledge of the deceased. *Beardsley v. Reeves*, 76 Mich. 661. Nor is the testimony of a daughter of a claimant against the estate of a deceased person, as to admissions made by a deceased person, incompetent under the statute. *Wilson v. Wilson's Estate*, 8 Mich. 472.

Testimony by the surviving party relating to an arrangement made by decedent is excluded, and so is the testimony as to what he intended. Thus where a line fence was built under some arrangement between defendant and plaintiff's remote grantor, since deceased and plaintiff claimed that that arrangement was to remove it to the true line when ascertained, which defendant denied, it must be conceded that defendant could not under the statute testify to the arrangement, nor to the intent at that time, nor to his subsequent intent, for if the subsequent intent is the same as the intent with which the fence was erected, it is subject to the same objection as testimony respecting that intent, and therefore, if such testimony were not excluded it would be an evasion of the statute. *Miller v. Shumway*, 135 Mich. 659.

Acts and conversation with decedent by the opposite party cannot be testified to by him. Thus the dispute being as to the boundary between the respective holdings, defendant cannot testify as to acts and conversation of the grantor at the time of measuring the land where plaintiff and defendant in ejectment both claim under the same grantor, who is dead. *Rix v. Smith*, 145 Mich. 203. It is clear that neither the mortgagor nor the managing officers of the execution creditor could testify to conversations with a deceased officer of the bank, not in the presence of any surviving officer, having a tendency to impair the validity of the mortgage, when a suit by a bank to foreclose a mortgage, brought against the mortgagor alone, was heard in connection with a suit by another corporation against the mortgagor and the bank to postpone the mortgage to complainant's execution levy. *People's National Bank of Jackson v. Wilcox*, 136 Mich. 557; *Seymour v. Wallace*, 121 Mich. 402; *Berry v. Adams*, 122 Mich. 17; so, where an heir sued to set aside a deed made by his grandmother or to enforce a trust on the property granted by it, he cannot testify to conversation held with her concerning the deed and the consideration which moved her to execute the same. *Sheldon v. Carr*, 139 Mich. 654. But it is permissible under the circumstances for the defendant to state what he said to the plaintiff, in the course of conversation, as to terms of the arrangement with the deceased landlord. *Ladd v. Brown*, 108 Mich. 105.

The delivery of a contract to a third person may be shown under certain circumstances. Thus, where in an action involving a contract made with a deceased person, there were facts brought out relating to a delivery to a third person before decedent received it, these facts were admissible by the testimony of the other party, provided they were not known to decedent. *Seligman v. Ten Eyck Estate*, 49 Mich. 104.

This state does not exclude testimony of documentary evidence accessible to both parties, as, for instance, the dates or contents of written instruments of a public character, where such testimony is not excluded under other rules governing the admission of testimony. *Ripley v. Seligman*, 88 Mich. 177.

Testimony relating to certain facts is not excluded under certain circumstances. Thus where claimant was permitted to give testimony as to stating her acquaintance with the deceased, and as to who composed her family as well as the fact that her husband was the tenant of decedent, although the testimony was equally within the knowledge of the deceased, yet it was not error to admit it, for the reason that the testimony given upon the subject was relating to matters in no way in dispute in the case, and whether there would be a technical objection to receiving this testimony from claimant herself is wholly immaterial, as no possible injury could have resulted from receiving the testimony. In *re Johnson's Estate*, 160 Mich. 586; so it was not in contravention of the statute that the testimony of the claimant that she did not have the notes in her possession, that they were lost while owned by her and in her possession and that she made search for them, *Taylor v. Taylor's Estate*, 138 Mich. 658, and where testimony was given by complainant concerning a destroyed deed by a decedent, it cannot affect the relief afforded where the character of the deed and all that is essential to be proved sufficiently appear from the testimony of others and from the circumstances of the case. *Wallace v. Wallace*, 63 Mich. 326. Evidence as to what occurred during the absence of decedent, such as the forwarding of property from one state to another to be used by himself, and as to the value of the property and transportation, and as to matters which it is not made to appear especial, or at all known to him, is not excluded, as relating to matters equally within the knowledge of the deceased, *Wheeler v. Arnold*, 30 Mich. 304; so an opposite party can testify that he had purchased warrants and scrips to enter lands for the deceased and that he selected the lands for the reason that these acts were not done in the presence of the deceased, *Ripley v. Seligman*, 88 Mich. 177; nor should the evidence be excluded given by a superintendent of a factory who was a passive spectator to the circumstances of the accidental death of an employee, *Storrie v. Grand Trunk Elevator Co.*, 143 Mich. 297; but all evidence given by him relating to warnings and direction to the employee who was killed should be excluded. *Storrie v. Grand Trunk Elevator Co.*, 134 Mich. 297. In an action of a claimant against the estate of a decedent for money expended in his behalf, he may testify as to facts relating expenditures about which decedent had no knowledge, but not about those which were within decedent's knowledge, *Knight v. Hartman*, 93 Mich. 62; so was evidence excluded given by a defendant in which he claimed that he had made payments to the decedent in his lifetime. *Wilcox v. Wilcox*, 139 Mich. 365.

Statements made by deceased to complainant or by her to deceased, or by him to others in her presence, they were properly excluded, *Beadle v. Anderson*, 158 Mich. 483; *Lloyd v. Hallenbeck*, 98 Mich. 203; *Bailey v. Holden*, 113 Mich. 402; *Great Camp K. O. T. M. v. Savage*, 135 Mich. 459, so it cannot be shown by statement made by deceased to his children what disposition he made of his property. *O'Neill v. Greenwood*, 106 Mich. 572.

**THE OPPOSITE PARTY:** The opposite party means the surviving party to the transaction or communication with the decedent and such party is excluded when he is a party to a cause. Thus where one of the parties to the transaction dies, the opposite party

in a cause cannot testify to matters which, if true, have been equally within the knowledge of the deceased, *Kimball v. Kimball*, 16 Mich. 211; but where the circumstances of the execution of a contract were not equally within the knowledge of the deceased, who was not present, the opposite party is not prevented from testifying. For instance, one of two tenants in common who are sued for breach of a land contract by representatives of a deceased vendee may testify that he never had dealings with the deceased, but that the contract was brought to him by his co-defendant and was signed at the latter's request, and that the latter was not authorized to deliver it to vendee until payment of the sum specified. *Schmitz v. Beals*, 115 Mich. 112.

Parties to the record are opposite parties, while proponents are not. However, in a case, *Bachelder v. Brown*, 47 Mich. 366, the court said: "The case, as is obvious at a glance, is peculiar. The question ruled upon was, whether Brown was the personal representative of Mary Thorp, and Warren Thorp is not named in the record, and does not in any manner appear in connection with the meaning of the statute. Technically it is admitted that they are not opposite parties; for Warren Thorp is not named in the record, and does not in any manner appear in connection with the litigation until the defense is entered upon, and evidence is given tending to show that he, and not his wife, was the owner of the note previous to her decease. It was after this evidence was put in for the defense that he was offered as a witness. But the fact that Warren Thorp was not named in the record cannot be conclusive; for it often happens that the name of the real party does not appear. Negotiable paper may always be sued by the party having the legal title in the name of another, and so perhaps under the statutes of this state may be any claim which is the subject of assignment, and which the owner has assigned for the purpose of a suit. And when trustees sue for the benefit of *cetui que trustent*, the latter are the substantial parties to the litigation. It has been held under statutes similar to this in their general purpose, that the substantial party is within the intent. *Morris v. Grubb*, 30 Gratt. 286. In a suit to determine who had the right to the possession of certain goods for a short period after the death of the decedent, whether the administratrix or the defendants, it was competent for the plaintiff to testify to any fact in connection with the possession of decedent, for the estate is in no sense an opposite party, and the plaintiff represents the estate. *Freda v. Tishbein*, 174 Mich. 395.

Proponents of wills are not opposite parties, *Schofield v. Walker*, 58 Mich. 96, neither, on the contest of a will, is an executor, who was not a proponent, nor interested in the estate, an opposite party. *Dalley v. McCarthy*, 180 Mich. 473.

The opposite party may also be the adverse party, for it seems that the statutory rule excluding the testimony of a party where the facts known only to one who, if living, would be the adverse party, does not prevent the wife of a claimant against an estate from testifying as to her husband's claim. *Cotherman v. Cotherman's Estate*, 58 Mich. 465. It is manifest that facts known equally to a decedent and to one adversely interested cannot be shown by him, where he is the responsible grantor of plaintiff in ejectment

and decedent is defendant's ancestor in title. *Youngs v. Cunningham*, 57 Mich. 153.

Again, where one of the defendants, an heir, whose interest as an heir lies with complainant who is also an heir, is not an opposite party, *Tabor v. Tabor*, 136 Mich. 255; following *Pandell v. Newberger*, 64 Mich. 220; neither did the contingent liability of the bondsmen render them opposite parties within the meaning of the statutory rule. *Marquette v. Wilkinson*, 119 Mich. 413.

The general rule is that where plaintiff or complainant is in the language of the statute, the opposite party, to another, who is an assignee of the deceased, the testimony of complainant or plaintiff, who is the real party in interest, is incompetent. *Bachelder v. Brown*, 47 Mich. 386. Thus where a maker of a note is sued by a transferee or an assignee of the administrator of the deceased payee, he stands as an opposite party. *Molby v. Murray*, 173 Mich. 143; 138 N. W. 1069; 19 D. L. N. 1177. In a case, *Shepard v. Shepard*, 164 Mich. 197, where both parties were prohibited from testifying in a suit to procure an accounting, the court said: "We have here a complainant claiming to be the assignee of his deceased father, prosecuting, and a defendant claiming by a later assignment from, and as sole legatee of, his deceased father, defending. It seems clear to us that this suit cannot be maintained against the defendant, if it could not have been maintained against the father. The defendant therefore stands in his father's shoes, in so far as this statute is concerned. So we have here a case not only within the very letter, but within the whole spirit of this statute. The true test of every transaction in issue is the intent of David Shepard in the particular transaction. Alfred Shepard may have intended a full and completed gift. Freedom G. Shepard may have intended a full and completed gift, but that will not avail complainant, unless David Shepard intended to party with dominion and control over the property." *Union Trust and Sav. Bank v. Tyler*, 161 Mich. 561; *Beadle v. Anderson*, 158 Mich. 483; *Campbell v. Sech*, 155 Mich. 634; *Great Camp K. O. T. M. v. Savage*, 135 Mich. 459; *Sparling v. Smeltzer*, 133 Mich. 454; *Michols v. Underwriters' Ass'n.*, 129 Mich. 417; *Bailey v. Holden*, 113 Mich. 402; *Harris v. Cable*, 113 Mich. 192; *O'Neil v. Greenwood*, 106 Mich. 572; *Lloyd v. Hollenbeck*, 98 Mich. 203; *Repley v. Seligman*, 88 Mich. 177; *Schuffert v. Grote*, 88 Mich. 650; *Taylor v. Bunker*, 68 Mich. 650.

A husband who permits his wife to perform services for another is not such an assignor of her claim for compensation as to be withunder statutes similar to this in their general purpose, that the subin the statute, *Bolthouse v. De Spelder*, 181 Mich. 153; 147 N. W. 589; 21 D. L. N. 454; but a wife is not disqualified under the statute from testifying that a claim in which she brings suit after the death of her husband was assigned to her by him during his lifetime. *Jackson v. Cole*, 81 Mich. 440. Again where a wife seeks to enforce a claim against the estate of a decedent, the husband is competent to testify to the arrangement made with the deceased, because he is a witness to the transaction between the parties and not the assignee of the wife's claim which does not bring him within the statutory rule. *Slack v. Norton*, 111 Mich. 213.

A claim brought against decedent's estate cannot be established by testimony that deceased paid a certain sum in claims against a



partnership of which he was a member, *In re Meekin's Estate*, 169 Mich. 303; so where complainant, surviving partner, and his wife, were permitted to testify at great length relative to matters affecting an equitable interest in real estate purchased by decedent in his own name, the testimony was incompetent. *Downey v. Andrus*, 43 Mich. 65. Again where a mortgagee sued on replevin claiming title through a mortgagor who received possession of the property under a contract with one member of a partnership of which defendant is the surviving partner. *Hood v. Olin*, 68 Mich. 165.

The general rule is that a suit against a corporation, the opposite party is not allowed, if examined as a witness in his own behalf, to give testimony as to matters which, if true, must have been equally within the knowledge of the deceased officer or agent of the corporation and not within the knowledge of a surviving officer or agent. *Sheldon v. Michigan Millers' Mutual Fire Insurance Co.*, 124 Mich. 303. Thus in an action on a benefit certificate, the officers of the defendant are disqualified from testifying, *Wallace v. Fraternal Mystic Circle*, 127 Mich. 387; so the testimony of the officers of a corporation as to their personal dealings with a deceased defendant in creating a contract for the sale of real estate on commission is excluded under the statute, but it is not excluded to show all the services rendered in making such sale. *Waterman Real Estate Exch. v. Stephens*, 71 Mich. 104. Again the agent of a corporation cannot testify, even after he ceases to be an agent, as to the facts of a transaction in dispute between the corporation and the representative of a deceased party adversely interested, if knowledge of such transaction was confined to the parties, *Singer Manuf. Co. v. Benjamin*, 55 Mich. 330; and testimony of a party is excluded as to admissions or statements made by one who had been, while living, an officer of a company which is the adverse party in interest, or who was a member of a firm which had assigned to the company. *Rayburn v. Mason Lumber Co.*, 57 Mich. 273. But testimony of stockholders and officers of the corporation in which the decedent had stock, the corporation not being a party does not come within the rule, *McCain v. Smith*, 173 Mich. 13. See *De Mary v. Burtenshaw's Estate*, 131 Mich. 326; and where it was stipulated, in a proceeding in equity by the receiver of an insolvent bank to enforce an assessment against the estate of a stockholder, that the testimony of the cashier should stand as the testimony of the bank commissioner, such testimony was competent, although the cashier, as an officer of the bank, is prevented from testifying to those facts which are equally within the knowledge of the deceased. *May v. Ullrich*, 132 Mich. 8. Again, a corporation is distinct from the incorporators, and they are not precluded from testifying to matters known to the deceased in a suit brought by the estate of a deceased person against a private corporation, *Rust v. Bennett*, 39 Mich. 251; so can persons testify who were clearly not corporation agents. *Waterman Real Estate Exchange v. Stephen*, 71 Mich. 104, and where in an action against a corporation a party testified to matter equally within the knowledge of the deceased agent of the corporation, such testimony not within the statute, for it did not appear that such matter was not within the knowledge of the surviving officers or agents. *Stetson v. Mackinac Ransp. Co.*, 182 Mich. 355; 148 N. W. 759.

The general rule is that in a suit prosecuted or defended by the heirs of the deceased person, the opposite party or the party opposed to the heirs is excluded from testifying, but the testimony of the heir is not excluded, where the complainant is not an opposite party. *Pendell v. Neuberger*, 64 Mich. 220. Thus when a son of an intestate was sued by an administrator for converting personal property belonging to the estate, he cannot testify to conversations between the intestate and himself, *Chambers v. Hill*, 34 Mich. 523; neither can a son give an account of his oral transactions with his deceased father where he seeks, against his father's estate, to have a deed conveying land to the father declared a mortgage. *Van Wert v. Chidester*, 31 Mich. 207. Again, a suit presented by the assigns of a deceased person against the personal representatives of the estate, an heir at law of the decedent is disqualified, *O'Neil v. Greenwood*, 106 Mich. 592; but heirs can testify as to advancements in a proceeding to determine their rights as distributees under a will, and they are not excluded as adversely interested to the representative of the testator's estate. *McClintock's Appeal*, 58 Mich. 152.

Testimony of the opposite party, who was a beneficiary, in a suit in chancery for an interpleader, is excluded as to the beneficiaries under an executed alteration in a policy of insurance from the witness to the new beneficiaries who are parties to the suit. *Grand Lodge Ancient Order of United Workmen v. Brown*, 160 Mich. 437.

The general rule is that a suit between two estates, the administrator or executor of either, unless interested as heir or legatee, is not precluded from testifying as to transactions with the intestate of the one or the testator of the other. *Duryea v. Granger's Estate*, 66 Mich. 593. But where the administratrix and heir of A.'s estate presents a claim against B.'s estate prior to his decease, *Howard v. Patrick*, 33 Mich. 796; so is the defendant incompetent to testify in a suit by an administrator against a grantee of decedent to set aside a deed which, upon its face, purported to be made in consideration of the payment of the grantor's debts. *Seymour v. Wallace*, 121 Mich. 402.

**AGENT AS WITNESS OR PARTY:** The general rule is that where there is no evidence which in any way indicates that a witness is an agent in the making or continuing of any contract with the deceased, the state, P. A. '03, No. 30, is not applicable, for the reason that to render the agent incompetent, it must be shown that the agency had reference to the contract. *McCain v. Smith*, 172 Mich. 13; *Locklund v. Burman's Estate*, 146 Mich. 233; *Detroit United Railway v. Smith*, 144 Mich. 235; *Gustafson v. Eger*, 132 Mich. 387; *Blodgett v. Vogel*, 130 Mich. 479. Testimony by agent as to what occurred at the time when they were negotiating the contract with decedent, was incompetent, *Detroit United Railway v. Smith*, 144 Mich. 235; so where the wife as agent of her husband in making the alleged contract for services gave testimony, such testimony was incompetent, *In re Reidy's Estate*, 162 Mich. 155; likewise the agent of a payee of a note who received and endorsed a payment thereon, *Locklund v. Burman's Estate*, 146 Mich. 233. This case is controlled by the principle stated in *Finn v. Sower's Estate*, 139 Mich. 523; *Albring v. Ward*, 137 Mich. 353; *Wood v. Kaufman*, 135 Mich. 6; *Gustafson v. Eger*, 132 Mich. 388; *De Mary v. Burtenshaw's Estate*, 131 Mich. 328; *Michels v. Underwriter's*

Ass'n., 129 Mich. 422; or where a bill by a railroad company against certain heirs sought to enforce specific performance of a contract, by which ancestor agreed to convey certain lands for a right of way, testimony of the agents of complainant as to what occurred at the time when they negotiated the contract is incompetent. *Detroit United Railway v. Smith*, 144 Mich. 235. It is also incompetent for complainant's natural father to testify to an agreement made between him and the foster father of complainant for her benefit when she was a child only two years of age. *Albring v. Ward*, 137 Mich. 352. Neither can a husband testify to conversation between himself and decedent relating to a contract made between deceased and the wife of the former. *Finn v. Sowder's Estate*, 139 Mich. 623. But where an action was brought by the mother of insured on a benefit certificate testimony by a bookkeeper of an agent is not excluded by the statute, *Rousseau v. Brotherhood of American Yeomen*, 177 Mich. 568, and a claimant's wife is not an agent of the claimant in making or continuing a contract for services, although she cooked food for her father and assisted in caring for him. *Weesies v. Van Dyke's Estate*, 159 Mich. 180. A trust of land which he previously held in trust for a third party before he conveyed it to decedent with the consent of the third party, was allowed to testify that decedent took the land subject to the trust impressed upon the property by his agreeing to fulfill the provisions as to the beneficiary. This testimony was incompetent for the reason that the trustee acted as agent and attorney of the grantee, *Lange v. Kinney*, 171 Mich. 312; *Bigelow v. Sheehan*, 166 Mich. 89; *In re Reidy's Estate*, 164 Mich. 167; *Locklund v. Burman's Estate*, 146 Mich. 233; *Detroit United Railway v. Smith*, 144 Mich. 235; *Gustafson v. Eger*, 132 Mich. 387; so cannot an attorney testify who acted as the testator's confidential advisor in the matter, and who also represented the grantee, *Chapaton v. Prentiss*, 144 Mich. 283; neither can a broker testify where he claims commission under an agreement with the decedent. *Bigelow v. Sheehan*, 166 Mich. 89.

**GRANTEE:** The testimony of a grantee claiming under a deed executed by a person since deceased is excluded under the statute, *Broffee v. Le Fils*, 183 Mich. 100, 21 D. L. N. 1062, 149 N. W. 1028, so is a grantee excluded from testifying to the want of consideration in the deed or to an agreement to recovery, who seeks as against the grantor of the heir of a deceased person to have an absolute conveyance by him to such decedent declared a deed of trust. *Seymour v. Wallace*, 14 Mich. 402; *Buffum v. Porter*, 70 Mich. 623.

**SURETY:** The rule that a party cannot testify to matters equaly within the knowledge of a deceased opponent does not apply where the action is against a surety on the decedent's bond. *Lee v. Wisner*, 38 Mich. 82.

**LESSEE:** A defendant is prohibited from testifying to a verbal modification of a written lease made by himself and decedent where summary proceedings by the trustee of an estate were brought against a tenant holding under written lease made by plaintiff's decedent *Goebel v. Look*, 153 Mich. 204.

**INDORSEE OF DECEASED PAYEE:** It may be said that a plaintiff may testify as to the purchase of a note from the payee, and as to the date of indorsement, although as matter of fact the

defense to the suit is in the interest of a legatee of the payee, where plaintiff, as indorsee of the deceased payee of a note sues the maker and the payee's executor is not a party to the suit, and has not taken upon himself the burden of the defense. *Hillman v. Schwenk*, 68 Mich. 293.

**MORTGAGOR:** The general rule is that the testimony of a defendant, mortgagor, is excluded in a foreclosure proceeding by the executors of the mortgagee. *Yerkes v. Blodgett*, 48 Mich. 211.

**PERSONAL REPRESENTATIVE:** The general rule is that in a suit prosecuted or defended by the personal representatives of a deceased person, the statute does not render the personal representative incompetent to testify. *Moore v. Machem*, 124 Mich. 216.

**MENTAL INCOMPETENT PARTY:** The fact that a party to an action is mentally incompetent does not make him an opposite party within the meaning of the statute. *Stevens v. Stevens*, 181 Mich. 438.

**THE MEANING OF ASSIGNS:** It is declared that whenever the words "the opposite party" occur in the statute it is deemed to include assignors or assignees of the claim or any part thereof. P. A. '03, No. 30, C. L. '97, (10212). In a case, *Ripley v. Seligman*, 88 Mich. 177, Justice Champin said: "The word 'assigns' is used here in the legal sense, and signifies a person to whom any property or right is transferred by a deceased in his lifetime. The statute is broad enough to cover successive transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his lifetime, and any one, who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party through whom he claims, may invoke the protection of the statute to shield his interest from the testimony of the opposite party to matters which, if true, were equally within the knowledge of the deceased person through whom he claims."

**MATTERS, IF TRUE, EQUALLY WITHIN THE KNOWLEDGE OF THE DECEASED:** It is apparent that in order to bring the matters upon which testimony is to be given within the statute, they must be true, P. A. '03, No. 30; C. L. '97, (10212), for the prohibition does not preclude the survivor or opposite party from testifying to extraneous facts or circumstances which tend to show that a witness who has testified affirmatively to such a transaction or communication has testified falsely, or that it is impossible that the statement can be true, as, for instance, that the survivor was at the time absent from the country when the transaction is stated to have occurred. *Ellard v. Dunn*, 108 Mich. 301. The word "equally" in the phrase "equally within the knowledge of the deceased" has been interpreted by the court as meaning "alike." *Kimball v. Kimball*, 16 Mich. 211.

**DEGREE OF KNOWLEDGE:** The statute does not make the admissibility of the testimony of the party depend upon the degree of knowledge; but it prohibits his testifying at all upon matters which were within the knowledge of himself and the deceased alike. *Kimball v. Kimball*, 16 Mich. 211. In other words "equally" does not relate to the degree of knowledge possessed by the parties.

**THE GENERAL RULE:** The strict rule relative to the opposite party being incompetent to testify to any facts, which, if true, are

equally within the knowledge of the deceased, is that the mere fact of knowledge, as distinguished from matters within decedent's information, *Ripley v. Seligman*, 88 Mich. 177; however, slight that knowledge may be on the part of the deceased person, is sufficient for exclusion, *Kimball v. Kimball*, 16 Mich. 211, for only those transactions and communications are excluded which were strictly personal with the deceased concerning which he, if alive, could testify, *Wheeler v. Arnold*, 30 Mich. 304; and furthermore, such testimony cannot be received, even if his representative does not object to it when offered, *McHugh v. Dowd's Estate*, 86 Mich. 812; but if the estate is not affected by the action, such testimony is competent and may be received, even if it relates to transactions or communications with deceased persons, *Latourette v. McKeon*, 104 Mich. 156, and so, is testimony competent, where one of two witnesses is still living and possessed of the same means of knowledge as the deceased defendant and that the transactions instead of being conversations between the parties consisted of personal acts which were open and manifest to everybody. *Wright v. Wilson*, 17 Mich. 201.

**TESTIMONY OF OUTSIDERS:** The testimony of an outsider is not excluded under the statute to establish dealings with decedent where the opposite party is prohibited from giving testimony to matters which, if true, are equally within the knowledge of the deceased, *McKeown v. Harvey*, 40 Mich. 226, but the fact that other persons were present when a conversation between the plaintiff and defendant's intestate took place does not render defendant qualified to give testimony as to matters equally within the knowledge of deceased. *Taylor v. Bunker*, 68 Mich. 258.

**THE COURT IS THE SOLE JUDGE:** It is within the province of the judge and not the witness, to decide what evidence is to be excluded under the statute. *Kimball v. Kimball*, 16 Mich. 211.

**LEGAL CONCLUSION:** A party cannot testify that he did not act under the terms of the contract where the other party had acted under its terms before he died, for if the former party so testified he would be stating either a legal conclusion or a fact within decedent's knowledge. *Seligman v. Ten Eyck Estate*, 53 Mich. 285.

**WAIVER OF STATUTORY RULE:** The general rule is that a party waives the inhibition of the statute where in a cause he gives testimony, which, if objected to, would be excluded under the statute and the opposite party calls out facts equally within the knowledge of the deceased, and afterwards seeks to prove the statements so made under oath in a controversy between the same parties, as admissions. *Harper v. Corcoran*, 166 Mich. 474; In re *Smith's Appeal*, 52 Mich. 419. In other words, the rule forbidding the survivor of two persons adversely interested to testify to facts known equally to both parties does not apply where the opposing party has introduced as admissions the statements drawn from the survivor in a preliminary proceeding in which he did not have the aid of counsel. In such a case the survivor is entitled to testify fully as to the subject matter of such admissions, and his opponent must be presumed to have waived the benefit of the statutory rule. In re *Smith's Appeal*, 52 Mich. 419. Thus by introducing testimony given by a witness against his objection in another case the opposite party was

held to have waived the provisions of the statute which would have rendered such witness incompetent to testify in his own behalf touching matters equally within knowledge of the deceased, *Lilley v. Mutual Benefit Life Insurance Co.*, 92 Mich. 153, so the objection, in a suit against decedent's estate, that testimony drawn out on the re-direct examination of one of plaintiff's witnesses is not admissible, because the facts testified to must have been equally within the knowledge of decedent, cannot be sustained where counsel for defendant in cross-examining the witness, opened the subject covered by such testimony. *Michigan Savings Bank v. Butler's Estate*, 98 Mich. 11; *Fox v. Barrett's Estate*, 117 Mich. 162, and where an administrator accounting with the estate has been interrogated by the heirs as to matters equally within decedent's knowledge, the prohibition of the statute is waived, and she may testify to explanation of what had been drawn out by the heirs. In *re Dunlap's Estate*, 94 Mich. 11. But an administrator cannot waive the provisions of the statute prohibiting a party from testifying in support of a claim to facts tending to establish it which are equally within the knowledge of deceased. *McHugh v. Dowd's Estate*, 86 Mich. 412, so the representative of an estate did not waive the effect of the statute where, in a suit for an accounting, testimony of admissions made in the presence of a witness by the husband of decedent concerning her property in his hands was introduced. *Harper v. Corcoran*, 166 Mich. 474. But it may be said that though decedent's representative cannot waive the provisions of the statute, his assigns may do so. *Repley v. Seligman*, 88 Mich. 172.

In a suit to foreclose a mortgage, where one of the mortgagees was deceased, defendant's testimony as to an agreement by deceased, relative to giving them a receipt, for a past consideration of the mortgage, that being a matter equally within his knowledge, was incompetent under this statute. *Helmer v. Van Wormer*, 187 Mich. 1; 22 D. L. N. 581; 153 N. W. 1. The statute applies to a contract which was made in a foreign state, in that no testimony was given as to the statute applicable in the foreign state. *Rockford Malleable Iron Works v. Tilden*, 188 Mich. 80; 22 D. L. N. 782; 154 N. W. 35. Evidence of one of the grantees as to delivery of the deed by the grantor in her lifetime to such grantee was properly excluded. *Broffee v. LeFills*, 183 Mich. 100; 21 D. L. N. 1062; 149 N. W. 1028. Does not apply to husband who consented to contract of his wife with deceased. *Bolthouse v. De Spelder*, 181 Mich. 153; 21 D. L. N. 454; 147 N. W. 589. Insane person is not deceased person within the meaning of the statute (now included within the Judicature Act). *Stevens v. Stevens*, 181 Mich. 449; 21 D. L. N. 607; 148 N. W. 229.

The testimony of an officer of a mutual benefit society as to the statements made before death by an insured regarding her reasons for dropping out of the society is inadmissible. *Ederly v. Ladies of the Modern Maccabees*, 185 Mich. 148; 22 D. L. N. 51; 151 N. W. 692. The statute was waived where, in an action by an administrator on a promissory note, the plaintiff called the defendant for cross-examination under the statute and went into the facts surrounding the giving of the note. *Judd v. Judd*, 187 Mich. 612; 22 D. L. N. 838; 154 N. W. 31.

**WITNESS INCOMPETENT:** Testimony of foreman that deceased was disobeying instructions at the time he was hurt was inadmissible, being equally within the knowledge of deceased. *Zoldatz v. Detroit Auto Specialty Co.*, 206 Mich. 349; see *Davis v. Buttars*, 201 Mich. 248; *Brown v. Gay*, 199 Mich. 363; *Luce v. Luce*, 197 Mich. 468; *Guntz-viller v. Gitri*, 195 Mich. 699; *Pomeroy v. Everett*, 195 Mich. 154; *John Schwyer & Co. v. Mellow*, 196 Mich. 593; *Maginn v. Cashin*, 196 Mich. 226; *McDaniels v. Crosby*, 192 Mich. 21; *Jonescu v. Orlich*, 208 Mich. 89.

**WITNESS COMPETENT:** A husband is a competent witness in behalf of his wife, a claimant against the estate of a deceased person for services performed, but as to the item of "board" he is regarded as an "assignor" and prohibited by the statute. In *re Day's Estate*, 197 Mich. 605. See *Wilcox v. Hubbell*, 197 Mich. 29; *Noble v. Hunter*, 195 Mich. 721.

**(12554). Right to Cross-Examine Opposite Party or Agent.**

**SEC. 66.** Hereafter in any suit or proceeding in any court of law or equity in this state, either party, if he shall call as a witness in his behalf, the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employe or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true.

**HISTORY:** Re-enacts and supersedes Act 307 of '09, p. 753, Eff. Sept. 1, though such act was not expressly repealed by this act. Unchanged.

**CONSTITUTIONALITY:** No one has a vested right in a rule of evidence. By this act the legislature creates no class and no preferences. *Maki v. Mohawk Mining Co.*, 176 Mich. 503; See *Rauhala v. Maki*, 172 Mich. 115.

**CONSTRUED:** The purpose of this section is to do away with a technical rule of evidence, and to facilitate getting at the facts. *Maki v. Mohawk Mining Co.*, 176 Mich. 503. This act does not compel a suitor to attend the trial when he has not been served with a subpoena by the opposite party. *Bauer v. Bauer*, 177 Mich. 171. While the litigant is not bound by the answers of witnesses called by him under this section, such testimony is not eliminated but is to be weighed and considered by the jury with the other testimony. *City of Kalamazoo v. Standard Paper Co.*, 182 Mich. 487. When the party calling the witness does not at the time announce his intention of using this statute. *Malby v. Excelsior Wrapper Co.*, 181 Mich. 574. As to who is an agent under this act, see *Saginaw Medicine Co. v. Batey*, 179 Mich. 658.

**WITNESSES:** This section does not give the right to make the parties called the witnesses of the adversary of the party calling them. *Jones v. Railroad Co.*, 168 Mich. 14. The opposite party can himself cross examine and ask leading questions of the witness called and cross-examined under this act. *Johnson v. Union Carbide Co.*, 169 Mich. 659; *Seebach v. Railway Co.*, 177 Mich. 5.

**CITED:** *Antosik v. Mich. Alkali Co.*, 166 Mich. 420; *National Coal Co. v. Gas Coke, Etc., Co.*, 168 Mich. 206; See *Davis v. Buss Machine Works*, 175 Mich. 72.

A witness may be called for cross-examination under the statute who was an employee of defendant at the time of the accident—thought not at the time of trial—and whose employment had nothing to do with the operation of the car which caused the accident. *Walter v. Detroit, Jackson & Chicago Railway Co.*, 191 Mich. 181, 667; 23 D. L. N. 228 (357); 157 N. W. 414; 158 N. W. 154. The rule as to transaction with decedent is that where an administratrix and her counsel sit by without making the proper objection, or any objection, to the admission of incompetent evidence, they should not be permitted afterward to successfully urge the inhibition of the statute. *Atkin v. Van Sickle*, 187 Mich. 35; 22 D. L. N. 793; 153 N. W. 1071. Where plaintiff called defendant for cross-examination and his testimony was not contradicted, its effect could not be destroyed or put aside by plaintiff's assertion that he would not be bound thereby, because defendant's testimony so developed stood in no different position in the case than if it had been called out by cross-examination after defendant had taken the stand in his own behalf. *Aphoresmenos v. McIntosh*, 189 Mich. 680; 22 D. L. N. 1233; 155 N. W. 715. Where plaintiff's counsel called for cross-examination one of the defendants, and the other defendant, claiming that it was not, and that he was, liable, later, in putting in its defense, recalled him without claiming the right of cross-examination as an adverse party under this act, the court did not commit error in refusing to permit the said joint defendant to impeach him. *Mally v. Excelsior Wrapper Co.*, 181 Mich., 569; 21 D. L. N. 753; 148 N. W. 443. The plaintiff was entitled to contradict a witness who was an employee of the opposite party, either by himself or by other witnesses. *Cook v. Michigan Cent. Ry. Co.*, 189 Mich. 456; 22 D. L. N. 1224; 155 N. W. 541; *Houseman v. Karicofe*, 201 Mich. 423; *Grouchiski v. Porath*, 196 Mich. 271; see *Barras v. Barras*, 192 Mich. 586; *Steele v. City of Ionia*, 209 Mich. 600; *Jonescu v. Orlich*, 208 Mich. 89.

#### (12555). Husband and Wife as Witnesses.

**SEC. 67.** A husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent, except in suits for divorce and in cases of prosecution for bigamy, and where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support, and except in cases of desertion or abandonment, and cases arising under act one hundred thirty-six of the Public Acts of nineteen



hundred five, relating to marriage, and cases where the husband or wife shall be a party to the record in a suit, action, or proceeding, where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through or under the husband or wife so called or offered as a witness, shall be the subject matter in controversy or litigation in such suit, action or proceeding, in opposition to the claim or interest of the other of said married persons, who is a party to the record in such suit, action or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto without the consent of said husband or wife, who is a party to the record in such suit, action or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage, but in any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify.

**HISTORY:** New section. This section merges and re-enacts in substance Sec. 102, R. S. '46, Ch. 102, being C. L. '57, (4342); As Am. '61, p. 169, Act 126, Imd. Eff. Mar. 11; As Am. '69, p. 150, Act 84, Eff. July 5; C. L. '71, 5969; How. 7546; As Am. '85, p. 288, Act 211, Eff. Sept. 19; C. L. '97 (10213); and Sec. 1 of Act 212 of '97, being C. L. '97, (10214). Modified.

Act 136, '05, above referred to, is Compiler's Section (11367).

**FORMER LAWS:** C. L. '97 (10208), from which this section is taken in part, expressly excepted from its provisions Compilers' Sections (7774-7780), commonly referred to as the "disorderly act." See *People v. Malsch*, 119 Mich. 113.

**BIGAMY:** Prior to Act 212, '97, C. L. '97 (10214) (see history above), husband or wife could not testify against each other in prosecutions for bigamy. See *People v. Quanstrom*, 93 Mich. 254.

**CONSTRUED:** This section confers no new rights on either husband or wife. *Bauer v. Bauer*, 177 Mich. 171.

It is the policy of the law to extend the right of the wife to bear testimony against her husband in case of violation of her personal rights, rather than to restrict it. *People v. Sebring*, 66 Mich. 707.

In *People v. Quanstrom*, 93 Mich. 254, the subject of husband and wife's testimony against one another is discussed in general, but the rule there laid down has been superseded by C. L. '97 (10214), which is merged in this section. A wife can make a complaint against her husband for an assault upon her person with intent to

do great bodily harm less than the crime of murder. *People v. Sebring*, 66 Mich. 705.

**HUSBAND AND WIFE AS WITNESSES:** Prior to amendment of '61, *Pullen v. People*, 1 Doug. 48; *Grimm v. People*, 14 Mich. 305. Since then, *Morrissey v. People*, 11 Mich. 327; *Knowles v. People*, 15 Mich. 408; *Dixon v. People*, 18 Mich. 91; *McDade v. People*, 29 Mich. 49; *People v. Marble*, 38 Mich. 117, 122; *Hunt v. Eaton*, 55 Mich. 362; *Maynard v. Vinton*, 56 Mich. 139; *Eaton v. Knowles*, 61 Mich. 633; *Blanchard v. Moors*, 85 Mich. 384; *People v. Gordon*, 100 Mich. 520; *Berles v. Adsit*, 102 Mich. 495.

It is prejudicial error for the prosecution in a criminal case to compel the accused to make objection before the jury to the testimony of his wife. *People v. Trine*, 164 Mich. 6. Counsel cannot make an argument on the fact that the opposite party has not allowed her husband to testify. *Gornetzky v. Gornetzky*, 174 Mich. 497. See also *Zimmerman v. Whitley*, 134 Mich. 44.

When the husband's consent to the wife's testifying will be presumed. *Benson v. Morgan*, 50 Mich. 79. See, also, *Hagerman v. Wigent*, 108 Mich. 192; and a summary of legislation and decisions on this subject, in the 104th Mich., pp. 382-90. The wife may testify in relation to her business transactions with her husband. *Dowling v. Dowling*, 116 Mich. 346.

In an action between husband and wife, the wife can testify to the issues in the case. *Stevens v. Stevens*, 181 Mich. 453. Neither husband or wife can be a witness against the other without the other's consent. *Rathbone v. Maltz*, 155 Mich. 307. The deposition of the husband taken in another proceeding, cannot be used against the wife. *Id.* In an action for support furnished defendant's wife, the wife's testimony for plaintiff over objection, is inadmissible. *Travis v. Stevens*, 127 Mich. 687. A wife, whose husband is not a party to the suit, can testify to an affray between her husband and respondent. *People v. Upton*, 169 Mich. 35. Where the wife in a previous trial permitted her husband, since deceased, to testify against her, his former testimony, over objection, could not be used. *Whelpley v. Stoughton*, 119 Mich. 315. In an action by the wife against a saloon-keeper for furnishing the husband with liquor, the husband cannot testify. *Wood v. Lentz*, 116 Mich. 276. A married woman can testify that she and not her husband owned certain property, that the management of a farm was turned over to her by the husband, and that the proceeds of the farm was hers. *Leonard v. Piggott*, 152 Mich. 439.

**WHERE ADULTERY IS CHARGED:** The wife is not a competent witness for her husband, under this statute, in an action brought by him for criminal conversation. *Mathews v. Yerex*, 48 Mich. 361; *Reynolds v. Schaffer*, 91 Mich. 494; *Hanselman v. Dovel*, 102 Mich. 507. Nor can the husband, in such a suit, testify to the adultery of the wife. *Gleason v. Knapp*, 56 Mich. 291; *Carter v. Hill*, 81 Mich. 275; *Hanselman v. Dovel*, 102 Mich. 505.

In the prosecution of a husband for adultery, the wife cannot testify to their marriage and cohabitation. *People v. Imes*, 10 Mich. 250; *People v. Isham*, 109 Mich. 77. The wife, though willing to do so and with her husband's consent, cannot testify in denial of charges against her of adulterous relations with another. *Knickerbocker v.*

Worthing, 138 Mich. 225. But in an action for merely enticing the wife away, she may testify with her husband's consent. *Perry v. Lovejoy*, 49 Mich. 529. A wife cannot testify in a criminal prosecution against the husband for the rape of the wife before marriage. *People v. Schoonmaker*, 117 Mich. 191. Nor can a wife make complaint against her husband for an indecent assault upon the person of his daughter, nor be a witness against him on his trial, for such offense. *People v. Westbrook*, 94 Mich. 629. In an action for alienation of the wife's affections, testimony of the husband is admissible, if no inference of adultery can be drawn from the facts. *Barnes v. Tibbits*, 164 Mich. 220. In divorce proceedings the husband cannot testify to admissions of the wife of acts of incontinence. *Elstadt v. Elstadt*, 187 Mich. 371.

**COMMUNICATIONS:** The language, "as to any communications made by one to the other during marriage," relates only to such communications as were recognized as "confidential communications" at the common law. *Thayer v. Thayer*, Sept. 28, 1915, 188 Mich. 261.

Confidential communications between husband and wife stand on the same plane as those confidential communications which are made to a person's confidential adviser—an attorney, priest or physician—who, after the death of the party, is not permitted to disclose such communications. The privilege is the privilege of the person making the communication and can be waived by him only personally; and the personal representative has no right to waive it, even in the interest of the estate. This statute rests upon public policy and the seal which the law has fixed upon these communications remains forever, unless removed by the consent of both. *Maynard v. Vinton*, 59 Mich. 152; *Hitchcock v. Moore*, 70 Mich. 116; *Carter v. Hill*, 81 Mich. 279; *Hagerman v. Wigent*, 108 Mich. 192; *McKenzie v. Lautenschlager*, 113 Mich. 171; *Rice v. Rice*, 104 Mich. 371; See *Elstadt v. Elstadt*, 187 Mich. 371. After the death of the wife, the husband cannot testify to communications between them. *People v. Bowen*, 165 Mich. 231. In a suit to set aside a deed to defendant's wife, claimed to be in a fraud of creditors, the defendant was allowed to testify to conversations with his wife, since deceased. *Ward v. Oliver*, 129 Mich. 301. Where respondent makes a confession, he is entitled to have the entire confession introduced, even if it includes statements as to conversations with his wife. *People v. Bowen*, 170 Mich. 129. A divorced wife cannot testify regarding diseases of her former husband of which she learned by communications during their marriage relation. *Pierson v. Railroad*, 159 Mich. 112. Where a communication, oral or written, has escaped the custody and control of the parties or their agent, it is not privileged. *O'Toole v. Insurance Co.*, 159 Mich. 190. A letter written by a prisoner to his wife and procured by artifice, may be admissible. *People v. Dunnigan*, 163 Mich. 350. See further as to letters between husband and wife. *White v. Ross*, 47 Mich. 172; *Perry v. Lovejoy*, 49 Mich. 531.

**IN DIVORCE CASES:** Except on the ground of adultery, husband or wife may testify. See Compiler's Section (11428) and notes. But they must testify in open court. *Id.* And the court may call upon the parties to testify. See Compiler's Section (12034).

**WAIVER OF STATUTE:** The statutory rule that a husband may not testify against his wife, without her consent, cannot be waived in her absence by the mere omission of her attorney to object to the testimony. *Hubbell v. Grant*, 39 Mich. 641. Where a husband has testified to what his wife has said, he waives the privilege of the statute. *Zimmerman v. Whitely*, 134 Mich. 44. See *Whelpley v. Stoughton*, 119 Mich. 315.

**FORMER LAW CITED:** *Merrill v. Leisenring*, 149 Mich. 425; *In re Mansbach's Estate*, 150 Mich. 350; *Snyder v. Judge*, 176 Mich. 548.

See also *Derham v. Derham*, 125 Mich. 109; *West v. Parkinson*, 130 Mich. 403; *Merrill v. Leisenring*, 166 Mich. 221.

**THE STATUTORY RULE:** The general rule is that neither husband nor wife can be examined for or against the other without the consent of the other. C. L. '97, (10213); *Riggs v. Whitaker*, 130 Mich. 327; *Whelpley v. Stoughton*, 119 Mich. 314; *Wood v. Lentz*, 116 Mich. 275; *Michigan Beef & Provision Co. v. Coll*, 116 Mich. 261; *Berries v. Kent Circuit Judge*, 102 Mich. 495; *Blanchard v. Moore*, 85 Mich. 380; *Jenne v. Marble*, 37 Mich. 319; *Dawson v. Hall*, 2 Mich. 396. Thus, the testimony of the husband is incompetent as against the wife without her consent where a judgment creditor of the husband against the wife, attacks the conveyance made by the debtor to a third person, and from him to the wife of the debtor. *Rathbone v. Maltz*, 155 Mich. 306.

**THE FOUNDATION FOR THE RULE:** The rule by which husband and wife is excluded from giving evidence for or against each other is founded partly on the identity of their legal rights and interests, and partly on principles of public policy in that the happiness of social life depends upon the sacred protection and maintenance of the confidential relations subsisting between husband and wife. Thus the statute seals the mouth of both spouses unless opened by their consent. *Sweilhart v. Hanrahan*, 184 Mich. 201; 150 N. W. 833; 21 D. L. N. 1275.

**EXCEPTIONS TO THE RULE:** The rule holds good except in suits for divorce and in cases for prosecution of bigamy, and where the cause of action grows out of the personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support, and except in cases of desertion and abandonment, and cases arising under an act, relating to marriages, and cases where the husband or wife shall be a party to the record in a suit, action, or proceeding, where the title to the separate property of the husband or wife so-called or offered as a witness or where the title to property derived from, through or under the husband or wife so-called or offered as a witness, shall be the subject-matter in controversy or litigation in such suit, action or proceeding, in opposition to the claim or interest of the other of the married persons, who is a party to the record in such suit, action or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to the separate property and the title thereto without the consent of the husband or wife, who is a party to the record of such suits, action or proceeding, as though such marriage relation did not exist; nor shall

either, during the marriage or afterwards without the consent of both, be examined as to any communication made by one to the other during the marriage, but in any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify.

**INTERPRETATION OF THE RULE:** Under the statutory rule, it is decided that when the litigation is between husband and wife, and relating to title or to their separate property, they can testify without the consent of either, even as to communications made confidentially during the existence of the marriage relation, *Hunt v. Eaton*, 55 Mich. 362; *Blanchard v. Moors*, 85 Mich. 380; but such matters are limited to such disclosure of confidential matters as pertain to the property rights and interests in question. *Stevens v. Stevens*, 181 Mich. 438. Again, where a woman testified that she owned the property; that her husband turned over the management of the farm to her; that she managed it, and that the proceeds belonged to her, such testimony was competent without the consent of either. *Leonard v. Piggott*, 152 Mich. 436. But it may be said that except in such cases as relate to their separate property rights, neither death nor divorce can render either of them competent to testify as to such confidential communications. *Hitchcock v. Moore*, 70 Mich. 112; *Maynard v. Vinton*, 59 Mich. 139. Thus the statute applies only to evidence relating to title of separate property in litigation between husband and wife. *Stevens v. Stevens*, 181 Mich. 438; 148 N. W. 229.

Under this section a wife is a competent witness to testify as to what was said and done upon the occasion of an assault upon her husband who is not a party to the proceeding. *People v. Upton*, 169 Mich. 31, 135 N. W. 108. Where the consent of a former husband has not been obtained, it will be error to examine his divorced wife as to his physical condition during coverture. *Pierson v. Illinois Cent. R. Co.*, 159 Mich. 110.

The privilege secured by this statute which makes communication between husband and wife undisclosed except upon the consent of both, survives separation, divorce and death. Further, that it extends to evidence in criminal cases generally admits of no doubt. Conversation between husband and wife and third parties are not privileged. *People v. Bowen*, 165 Mich. 231. A communication between husband and wife, no other being present, will be regarded as confidential until the contrary appears. *People v. Bowen*, 165 Mich. 231. It is not error to refuse to permit a husband to testify to the contents of letters sent by his wife to him, or given or shown to him by her, whether written by her or others, but he has the right to testify as to the contents of letters from others addressed to her but received and read by him, provided this was not done with her permission. *People v. Bowen*, 165 Mich. 231. In an action for alienation of affection, it is not error to refuse to permit defendant's counsel to argue to the jury on plaintiff's refusal to consent that her husband may testify. *Gornetzky v. Gornetzky*, 174 Mich. 492. Where defendant asked for a continuance for absent witnesses, the affidavit making out a prima facie case, the filing of a cross-affidavit that the absent witness was plaintiff's husband, and that he could not be examined against her, will not authorize the denial of a con-

tinuance, it not appearing on what subject the witness would testify, and this section of the statutes containing many exceptions which were not negatived. *Snyder v. Berrien* Circuit Judge, 176 Mich. 546. This section does not apply to testimony by wife, of rape committed by means of intoxicating liquor. *Hirdes v. Ottawa* Circuit Judge, 180 Mich. 321.

The power of chancery courts to call the parties as witnesses is not abrogated by this statute. Thus, where the court called on the parties in a divorce suit to testify in open court, this testimony was competent. *Hamilton v. Hamilton*, 37 Mich. 605.

**THE RULE WHEN THE CONSENT OF BOTH IS REQUIRED:** The rule is that neither can, at any time, without the consent of both, be examined as to any confidential communications. C. L. '97, (10213).

**THE RULE WHEN NEITHER CAN TESTIFY:** The rule is that neither the husband nor wife shall be competent to testify in any action by either in consequence of adultery. C. L. '97, (10213). Thus a wife cannot testify, even by consent of the husband, in an action charging the defendant with the alienation of his wife's affection and with adultery, although the evidence was restricted solely to the question of alienation. *Knickerbocker v. Worthington*, 138 Mich. 224.

**CONSENT WHEN PRESUMED:** Consent is presumed when a husband is present in court and does not object to the testimony of his wife, *Benson v. Morgan*, 50 Mich. 77; distinguished from *Hubbel v. Grant*, 39 Mich. 641, or, from the fact that he gave similar testimony as his wife did relating to confidential communications. *Sweikhart v. Hanrahan*, 184 Mich. 201.

**AGENCY FOR HUSBAND OR WIFE:** The husband is incompetent to be a witness without the consent of his wife where she brought suit to foreclose a mortgage which she had bought through the agency of her husband and where the defendant had set forth a settlement of the mortgage with the husband whom he called as a witness to establish the agency. *Eaton v. Knowles*, 61 Mich. 625.

In a prosecution for murder, where the names of several witnesses, among them defendant's wife, who could not be a witness against him under this section, had been placed on the information at the request of defendant's counsel, and were subpoenaed at the expense of the people, and the prosecutor asked one of the people's witnesses whether defendant's wife was in the court room, which the witness did not answer, and on objection by defendant's attorney that she could not be a witness, the prosecutor responded that she could be for him, held, that the misconduct of the prosecutor was cured by the court's informing the jury that the incident should have no influence upon their minds whatever. *People v. Osborn*, 205 Mich. 531; 171 N. W. 471.

On a bill by a daughter against her father to reform a deed conveying an estate by the entireties to himself and wife to conform to an oral contract between the parents, whereby they agreed that, on condition the mother release her dower and homestead rights in a farm, the deed to the premises to be received therefor should convey to them a life estate with remainder over to the daughter, held, that the situation presented rendered inapplicable the provisions

of this section, providing that a wife shall not be examined as a witness for or against her husband without his consent, and that the testimony of the daughter and others as to the conversation between the husband and wife, the latter being dead at the time of the hearing, was properly received to establish the contract. *Preston v. Preston*, 205 Mich. 646, 172 N. W. 371.

An objection that the mother was incompetent to testify under Section (12555) C. L. '15, to an admission made by the father during the marriage, that he was indebted to the son for services, raised for the first time on appeal, will not be considered. *Fishell v. Fishell*, 206 Mich. 308; *People v. Osborn*, 205 Mich. 536.

It was held that a divorced wife could testify to acts of violence by her husband towards her, and her feeling toward and affection for him, in an action brought by him for the alienation of her affections, where the action was not instituted in consequence of adultery. *Hendrickson v. Harry*, 200 Mich. 41. See *Jaddatz v. Grace Harbor Lumber Co.*, 194 Mich. 275; *Barras v. Barras*, 192 Mich. 591.

Evidence by testator's widow that he never accused her of infidelity was not foreclosed, as such evidence was to show the absence of communications instead of communications, as prohibited by the statute. *Thayer v. Thayer*, 188 Mich. 261; 22 D. L. N. 789; 154 N. W. 32. Testimony of complainant as to admissions by defendant wife was incompetent under the statute to sustain allegations of a bill for divorce. *Elstedt v. Elstedt*, 187 Mich. 371; 22 D. L. N. 649; 153 N. W. 676. The wife was a competent witness in behalf of her husband, with the consent of both, in a suit for alienation of her affections. *Sweikhart v. Hanrahan*, 184 Mich. 201; 21 D. L. N. 1275; 150 N. W. 833. Applies only to evidence relating to title of separate property in litigation between husband and wife. *Stevens v. Stevens*, 181 Mich. 449; 21 D. L. N. 607; 148 N. W. 229. Does not apply to testimony by wife of rape committed by means of intoxicating liquor. *Hirdes v. Ottawa Circuit Judge*, 180 Mich. 321; 21 D. L. N. 389; 146 N. W. 646.

This statute applies only to confidential communications between husband and wife during marriage. *Barras v. Barras*, 192 Mich. 584; 159 N. W. 147.

#### (12556). Testimony of Child Under Ten Years.

SEC. 68. Whenever a child under the age of ten years is produced as a witness, the court shall by an examination made by itself publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify; and in such case such testimony may be given on a promise to tell the truth instead of upon oath or statutory affirmation, and shall be given such credit as to the court or jury, if there be a jury, it may appear to deserve.

HISTORY: This section re-enacts Sec. 1 of Act 82 of '87, being How. 7546a; C. L. '97, (10215). Unchanged.

TESTIMONY OF CHILDREN: Before the enactment of this sta-

tute it was held that the testimony of a child seven years old was admissible where the judge was satisfied. *McGuire v. People*, 44 Mich. 287; *Washburn v. People*, 10 Mich. 372. The fact that a child is under seven years does not create an absolute disability to testify. But the authorities all agree that a child cannot testify, unless capable of appreciating the obligation of his oath, or affirmation. This is upon the ground that a witness must be under some pressure arising out of the solemnity of the occasion, beyond the ordinary obligation of truth-telling. *Hughes v. D., G. H. & M. Ry. Co.*, 65 Mich. 14. This case suggested legislation on the subject, and this act followed. See *People v. Walker*, 113 Mich. 367; *People v. Beech*, 129 Mich. 623; *People v. Kemmis*, 153 Mich. 117.

The reception of the testimony of an unsworn witness, over ten years of age, cannot be first objected to on appeal to the supreme court. *People v. Kemmis*, 153 Mich. 554.

The competency of a child to testify as a witness was fully established when she was examined by the presiding judge privately and in open court, after being asked six times whether she would promise to tell the truth and she answered by nodding her head. *People v. Beech*, 129 Mich. 624.

Where a child of six years of age was allowed to testify upon its promise to tell the truth, elicited after a private examination in the judge's office, the testimony is competent and it will not be interfered with unless an abuse of discretion is shown. *People v. Walker*, 113 Mich. 367. In *Hughes v. D., G. H. & M. Ry. Co.*, 65 Mich. 15, the court said: "It has been held by this court, as well as courts generally, that the fact that a child is under seven years does not create an absolute disability to testify. This was held in *McGuire v. People*, 44 Mich. 286, and is the doctrine of the text books. But the authorities all agree that a child cannot testify unless capable of appreciating the obligation of his oath, if he takes an oath, or of his affirmation, if that is substituted. And this is upon the ground that a witness must be under some pressure, arising out of the solemnity of the occasion, beyond the ordinary obligation of truth-telling. 1 *Greenl. Ev.* § 367; 1 *Phil. c. 2* (C. & H), and notes. One or the other of these methods of attestation is required of all witnesses, children or adults, and persons unsworn cannot testify unless they prefer the other form, which in this state is under the pains and penalties of perjury.

The fact that this child was to be put under oath or affirmation was not brought to his attention at all, so as to show whether he did or did not understand the bearing or effect of it. He merely said he must tell the truth, or he would go to hell; but, when asked about any other consequences, he showed entire ignorance, and only said that his mother told him the day before that he would go to hell if he did not speak the truth. That is all that he said bearing on his veracity. He was examined by counsel, and not particularly tested by the court, and the court, without making any personal examination, or certifying or in any way giving an opinion that the boy understood the nature or obligation of an oath or affirmation, left it all to the jury, to be tested by the ordinary questioning and cross-questioning by counsel.

This is what might, no doubt, be safe with many other persons be-



sides children who usually tell the truth, and may have their truth substantially tested, whether sworn or not. But the law entitles parties to insist that all witnesses shall be put under some solemn obligation before testifying, and exclude witnesses who are incapable of understanding its sanction. As Mr. Starkie very well explains it, this is not done because the law imputes guilt or blame to those who do not appreciate it, but because it requires the highest attainable sanction for testimony. 1 Starkie, Ev. 22. It is not left to courts to let in everybody which, in their general opinion, or in the case of the particular witness, might be safe. Neither does it rest on any particular belief. Any one may take the oath or obligation that accords with his own opinions, but he must do the one or the other. And he must be able to comprehend it. Upon this there is no conflict in the cases. It is necessarily to be left very much to the discretion of the trial judge if he undertakes to exercise that discretion, and acts upon such an examination as satisfies his own mind. He should conduct this examination as in his judgment will be effectual. It cannot safely be left to counsel to make the examination. In McGuire's case, before referred to, the judge gave a careful personal examination to the child, and formed a distinct opinion of his own, founded on that examination. As the preliminary inquiry cannot be and is not under oath, there is the strongest reason for very careful action by the judge himself on his official responsibility. The cases and text-books recognize this distinctly. See 1 Greenl. Ev. §§ 367, 368, and notes; 1 Edw. Phil. Ev. 11, and notes. In England it has been held that recent teaching for the occasion is not in itself sufficient because the knowledge thus received may not be comprehended. 1 Edw. Phil. Ev. 12; Rex. v. Williams, 7 Car. & P. 320. A careful judicial examination is much more satisfactory than answers which may or may not be really intelligent. The child's capacity and disposition to answer correctly and candidly such questioning as may be given is of the utmost consequence, because even among mature witnesses it is not always easy to discriminate between actual knowledge and what is accepted on hearsay and inference. It is obviously necessary for the court to be satisfied that the child will be disposed to tell the truth under some sense of obligation.

It is said that a child between six and seven years of age may be properly examined as a witness to sustain a prosecution for a robbery, if the trial judge fully satisfies himself that the child is conscious of the duty of speaking the truth. McGuire v. People, 44 Mich. 287.

#### (12557). Compensation of Expert Witness.

SEC. 69. No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, *which may be taxed as a part of the taxable costs in the case*. Any such witness who shall directly or indirectly receive a larger amount than such

award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly.

**HISTORY:** Re-enacts Sec. 1 of Act 175, '05, p. 242, Eff. Sept. 16, making the offense however a contempt instead of a misdemeanor. Sec. 69 of Chap. 17 of Act No. 314, P. A. '15, as amended by Act No. 404, P. A. '19, and therefore, modified.

**CITED:** This statute is unconstitutional for the reason that the power of selecting and appointing witnesses who shall, after appointment, acquaint themselves with the matter in controversy and testify concerning the same, is in no sense a judicial act. *People v. Dickerson*, 164 Mich. 153. See *Joy v. Ingham* Circuit Judge, 204 Mich. 41, construing this section.

**(12558). Number of Experts.**

**SEC. 70.** No more than three experts shall be allowed to testify on either side as to the same issue in any given case: *Provided*, The court trying such case, may, in its discretion, permit an additional number of witnesses to testify as experts.

**HISTORY:** Re-enacts Sec. 4 of Act 175 of '05, p. 242, Eff. Sept. 16, 16, omitting, however, "except in criminal prosecution for homicide." Modified.

**CITED:** *People v. Dickerson*, 164 Mich. 148; *Joy v. Ingham* Circuit Judge, 204 Mich. 41.

**(12559). Application of Last Two Sections.**

**SEC. 71.** The provisions of the two preceding sections shall not be applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion.

**HISTORY:** Re-enacts Sec. 4 of Act 175 of '05, p. 242, Eff. Sept. 16, with a slight change in phraseology. Changed.

**CITED:** *People v. Dickerson*, 164 Mich. 148.

**Of Compelling the Attendance and Testimony of Witnesses.**

**(12560). Refusal of Plaintiff to Testify.**

**SEC. 72.** If the plaintiff in any action refuse to appear as a witness on being personally subpoenaed, or being present refuse to swear or to testify, except where he is privileged from answering, the case shall be dismissed. If the defendant refuse to appear on being personally subpoenaed, or being present refuse to swear or to testify, except where he is privileged from answering, the plaintiff's demand shall be taken as confessed, no set-off allowed, and judgment entered

accordingly: *Provided*, That provisions of this section shall not be construed as to in any way abrogate or modify the provisions of law with reference to the punishment of witnesses for contempt of court in refusing to testify or otherwise.

**HISTORY:** Re-enacts a part of Sec. 113 of Act 173 of '55, being C. L. '57, (3765); C. L. '71, (5361); How. 6926; C. L. '97, (824); omitting, however, that part of the section which conflicted with C. L. '97, (10210) and (10213). See Compilers' Sections (12551) and (12555). Modified.

**FORMER LAW CONSTRUED:** *Goodrich v. Allen*, 19 Mich. 250.

(12561). **Service of Subpoena.**

**SEC. 73.** The service of a subpoena to compel the attendance of any witness shall be made as follows:

1. The original writ under the seal of the court, or of the officer issuing the same, shall be exhibited to the witness;

2. A copy of such writ, or a ticket containing its substance, shall be delivered to the witness;

3. The fees allowed by law to such witness for traveling to, and returning from the place where he is required to attend, and the fees allowed for one day's attendance, shall be paid or tendered to such witness.

**HISTORY:** This section re-enacts and merges Sec. 53, R. S. '46, Ch. 102, being C. L. '57, (4290); C. L. '71, (5910); How. 7483; C. L. '97, (10148), and Sec. 55, R. S. '46, Ch. 102, being C. L. '57, (4292); C. L. '71, (5912); How. 7485; C. L. '97, (10150). Unchanged.

**FORMER LAW CITED:** Where the refusal of witnesses to answer questions asked of them before a notary public, acting under lawful authority of a foreign court, notary was authorized to present in his own name a petition to compel the witnesses to answer the interrogatories. *Van Dyke v. Doughty*, 174 Mich. 353.

(12562). **Duty of Witness to Attend.**

**SEC. 74.** Every person who shall be duly subpoenaed to attend as a witness in any court within this state, or to attend any officer of a court of record, empowered to receive evidence, or any commissioner appointed by such court to take testimony, or any referees or auditors appointed according to law to hear any cause or matter, or any notary public or commissioner before whom any affidavit or deposition is to be taken, shall be bound to attend according to the command of such subpoena and testify; and for every failure so to attend and testify, without a reasonable excuse, shall

be deemed guilty of a contempt of the court out of which such subpoena issued, shall be responsible to the aggrieved party for the loss and hindrance sustained by such failure, and for all other damages sustained thereby; and shall be further liable to the aggrieved party in the sum of fifty dollars as additional damages, to be recovered in the same action.

**HISTORY:** This section re-enacts and merges Sec. 54, R. S. '46, Ch. 102, being C. L. '57, (4291); C. L. '71, (5911); How. 7484; C. L. '97, (10149) and Sec. 56, R. S. '46, Ch. 102, being C. L. '57, (4293); C. L. '71, (5913); How. 7486; C. L. '97, (10151) inserting however the above clause relating to a notary public. Modified.

**CONSTRUED:** Prentiss v. Webster, 2 Doug. 7; See Underwood v. McDuffee, 15 Mich. 361.

**(12563). Warrant for Apprehension.**

**Sec. 75.** In case of the failure of any witness so to attend as above provided, the court, judge or officer issuing the subpoena, upon due proof of the service thereof, and of the failure of such witness, shall issue his warrant to the sheriff of the county, to apprehend such witness and bring him before such judge or officer to be examined, or to bring him before any person named in a commission issued by a court of any other state or country to take testimony for the like purpose.

**HISTORY:** Re-enacts Sec. 57, R. S. '46, Ch. 102, being C. L. '57, (4294); C. L. '71, (5914); How. 7487; C. L. '97, (10152); inserting however the word "court." Modified.

**(12564). Refusal to Answer.**

**Sec. 76.** If any witness attending before any court, judge, officer or commissioner, pursuant to a subpoena, or brought before them, or either of them, shall, without reasonable cause refuse to be examined, or to answer any legal and pertinent question, or to subscribe his deposition after the same has been reduced to writing, the officer issuing such subpoena shall, by warrant, commit such witness to the common jail of the county in which he resides, there to remain until he submits to be examined, or to answer, or to subscribe his deposition, as the case may be, or until he be discharged according to law.

**HISTORY:** Re-enacts Sec. 58, R. S. '46, Ch. 102, being C. L. '57, (4295); C. L. '71 (5915); How. 7488; C. L. '97, (10153), inserting however the word "court." Modified.

**CONSTRUED:** A party to a suit in another state cannot be committed under this section, for refusing to give his evidence under a commission issued in said state to take it here. *Matter of Adams*, 7 Mich. 452. Under this section, as construed in connection with 10138, 10139, a witness giving testimony before commissioners can only be compelled to answer legal and pertinent questions. *Van Dyke v. Doughty*, 174 Mich. 351.

**(12565). Commitment to Specify Cause.**

**Sec. 77.** Every warrant of commitment issued by any court, judge or officer, pursuant to the provisions of this chapter, shall specify therein particularly the cause of such commitment, and if such commitment be for refusing to answer any question, such question shall be stated in the warrant.

**HISTORY:** Re-enacts Sec. 59, R. S. '46, Ch. 102, being C. L. '57, (4296); C. L. '71, (5916); How. 7489; C. L. '97, (10154), inserting however the word "court." Modified.

**(12566). How Warrant Executed.**

**Sec. 78.** Every warrant to apprehend or commit any witness, authorized by this chapter, shall be directed to the sheriff of the county where such witness may be and shall be executed by him in the same manner as process issued by courts of record.

**HISTORY:** Re-enacts Sec. 60, R. S. '46, Ch. 102, being C. L. '57, (4297); C. L. '71, (5917); How. 7490; C. L. '97, (10155), unchanged.

**(12567). Application of Provisions.**

**Sec. 79.** The preceding provisions in relation to the apprehension and commitment of witnesses, shall not apply to any case where other special provision is made by law for compelling the attendance of witnesses.

**HISTORY:** Re-enacts Sec. 61, R. S. '46, Ch. 102, being C. L. '57, (4298); C. L. '71, (5918); How. 7491; C. L. '97, (10156), unchanged.

**(12568). Mode of Administering Oaths.**

**Sec. 80.** The usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except in the cases herein otherwise provided.

**HISTORY:** Re-enacts Sec. 93, R. S. '46, Ch. 102, being C. L. '57, (4333); C. L. '71, (5960); How. 7537; C. L. '97, (10204); unchanged.

**(12569). Affirmation.**

**Sec. 81.** Every person conscientiously opposed to taking an oath, shall, when called on to take an oath, be permitted instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury.

**HISTORY:** Re-enacts Sec. 95, R. S. '46, Ch. 102, being C. L. '57, (4335); C. L. '71, (5962); How. 7539; C. L. '97, (10206); unchanged.

**(12570). No Incompetency on Account of Religion.**

**Sec. 82.** No person shall be deemed incompetent as a witness, in any court, matter or proceeding, on account of his opinions on the subject of religion; nor shall any witness be questioned in relation to his opinions thereon; either before or after he shall be sworn.

**HISTORY:** Re-enacts Sec. 96, R. S. '46, Ch. 102, being C. L. '57, (4336); C. L. '71, (5963); How. 7540; C. L. '97, (10207); unchanged.

**CONSTITUTIONALITY:** See Const. II, 17.

**CONSTRUED:** Where questions were asked witnesses as to their religious beliefs and practices, it was decided that it was not prejudicial where an answer was given before an objection was interposed. In re Morse's Estate, 146 Mich. 469. See People v. Jenness, 5 Mich. 319.

**(12571). Who Authorized to Take Oaths.**

**Sec. 83.** Whenever any oath or affidavit is or may be required or authorized by law in any cause, matter or proceeding, except oaths to witnesses and jurors in the trial of a cause, and such other oaths as are or may be required by law to be taken before particular officers, the same may be taken before any justice, judge or clerk of any court of record, circuit court commissioner, notary public, or justice of the peace.

**HISTORY:** Re-enacts Sec. 97, R. S. '46, Ch. 102, being C. L. '57, (4337); C. L. '71, (5964); How. 7541; C. L. '97, (10208), omitting however, the last clause in such section reading "or any register or master in chancery." Unchanged materially.

**CONSTRUED:** As to the power of clerks to administer oaths, see Greenvault v. F. & M. Bank, 2 Doug. 498; Dorr v. Clark, 7 Mich. 310.

**(12572). Commissioner to Take Oaths.**

**Sec. 84.** Oaths, affidavits and depositions, in any cause,

matter or proceeding in any court of record, may also be taken before any commissioner appointed by such court for that purpose.

**HISTORY:** Re-enacts Sec. 98, R. S. '46, Ch. 102, being C. L. '57, (4338); C. L. '71, (5965); How. 7542; C. L. '97, (10209); unchanged.

**CONSTRUED:** It is very questionable whether a common order, entered by consent of parties and without the intervention or knowledge of the court, can be regarded as such an appointment. *Crone v. Angell*, 14 Mich. 346.

## CHAPTER XVIII.

### TRIALS IN ACTIONS AT LAW AND IN EQUITY AND PROCEEDINGS INCIDENT THERETO.

#### Term Calendar.

#### (12573). When Cause to be Placed on Calendar.

**SECTION 1.** Whenever any cause at law or in chancery pending in the circuit court of any county of this state shall be at issue as to all the parties, or when a default shall have been entered or filed or when a return to any appeal shall be filed in said court, on or before the fourteenth day before the first day of any term of court, it shall be the duty of the clerk of said court to place the same upon the calendar for the next ensuing term of said court in its appropriate place, and unless sooner tried thereafter, to place said cause on the calendar for each succeeding term, until disposed of. Hereafter no notice of trial, or note of issue shall be necessary in any cause pending in said circuit courts. Causes shall be placed upon the calendar in the order in which issue was joined, or appeal filed.

**HISTORY:** This section supersedes Sec's. 201 and 202 of Act 153 of '55, being C. L. '57, (3853)-(3854); C. L. '71, (5449)-(5450); How. 7016-7; C. L. '97, (920)-(921); and Sec's. 5 and 6, R. S. '46, Ch. 103, being C. L. '57, (4347)-(4348); (As Am. '67, p. 373, Act 197, Eff. June 27), C. L. '71, (5973); (As Am. '83, p. 86, Act 90, Eff. Sept. 8)-74; How. 7551-2; C. L. '97, (10220)-(10221); and Sec. 27, R. S. '46, Ch. 124, being C. L. '57, (5031); C. L. '71, (6752); How. 8340; C. L. '97, (10673); and Sec. 1 of Act 8 of '61, being C. L. '57, (5616); C. L. '71, (7406); How. 8983; C. L. '97, (11276), and Act 271 of '07, p. 343, Imd. Eff. June 27. This act relates to the placing of cases upon the docket of the circuit court for the county of St. Clair, and is modified as shown in the next paragraph.

**TERM CALENDAR:** Notices of trial and notes of issue are abolished. All causes at issue or in which a default shall have been filed, or appeal cases in which the return shall have been filed on or before the 14th day before the first day of any term of court are placed upon the term calendar by the clerk of the court without notice so to do, and are to be placed on the calendar at each succeeding term until disposed of.

Causes in which no progress has been made for more than one year,



unless the failure to make progress has been occasioned by reason of the business of the court, shall be placed upon the calendar under a separate heading as follows: "Causes in which no progress has been made for more than one year" and on the first day of each term all such causes will be dismissed for want of prosecution, but without prejudice, at the cost of the plaintiff, unless cause be then and there shown to the contrary.

At least five days before the first day of each term, a copy of the term calendar is required to be mailed or delivered to each attorney or firm of attorneys representing any party in any action that is upon the calendar.

Cases in which issue is joined or appeal filed after the 14th day before the first day of any term of court, may be placed upon the calendar at any time before or during the term at the request of the attorney for either party. Notice must be forthwith given in writing of the fact of placing such cause upon the calendar and upon the giving of such notice after the lapse of fourteen days the cause shall stand for trial the same as other cases. See *Detroit Lumber Co. v. Oakland Circuit Judge*, 207 Mich. 66, in which the court construes the operation of this rule.

**NOTICE OF TRIAL:** The following cases illustrate the former rule requiring notice of trial. *Storey v. Child*, 2 Mich. 108; *People v. Bacon*, 18 Mich. 247; *Brushaber v. Stegeman*, 22 Mich. 199; *Arnold v. Nye*, 23 Mich. 293; *Worth v. Hand*, 30 Mich. 264; *Sch. Dist. v. Judge*, 41 Mich. 549; *Peterson v. Tilden*, 44 Mich. 168; *Sinnock v. Judge*, 97 Mich. 476; *Landyskowski v. Lark*, 108 Mich. 500; *Schattler v. Judge*, 109 Mich. 567; *Hatchway v. Judge*, 117 Mich. 323. Where the case was appealed from Justice Court, *Hoyt v. Mapes*, 3 Mich. 522; *People v. Judge*, 18 Mich. 248; *Galbraith v. McCollum*, 98 Mich. 221.

**NOTE OF ISSUE:** Former Rule. *Abe Stein Co. v. Wood*, 151 Mich. 658.

**WAYNE COUNTY:** See Compilers' Sections (12578-9) and (14624-5).

#### (12574). Dismissal for Want of Prosecution.

**Sec. 2.** All causes in which no action has been taken or progress made for more than one year unless by reason of the business of the court the same shall not have been reached, shall be placed upon said calendar separate and apart from all other causes, under the following heading: "Causes in which no progress has been made for more than one year;" and on the first day of each term, any cause appearing under this heading shall be dismissed by the court for want of prosecution, but without prejudice, at the cost of the party by whom it was brought into court, unless cause be then and there shown to the contrary.

**HISTORY:** New Section.

See note on Term Calendar under (12573).

**DISMISSAL AND NON-SUIT:** Where a plea in a case had been erroneously filed in another case by the clerk or his deputy, and the cause dismissed by the circuit judge for want of prosecution, under this statute, under the impression that no plea had been filed; it

was within his power to correct the error and in the exercise of a sound legal discretion, he should have done so. *Duell v. Oakland Circuit Judge*, 206 Mich. 680. See *Sayre v. Detroit, G. H. & M. R. R.*, 199 Mich. 417; *Detroit Lumber Co. v. Oakland Circuit Judge*, 207 Mich. 62; *Detroit Taxicab & Transfer Co. v. Wayne Circuit Judge*, 203 Mich. 105.

**(12575). Dismissal at End of Further Time.**

**SEC. 3.** If further time for the trial of such issue be allowed by the court, and the plaintiff shall neglect to try the same within the time so allowed, the court shall dismiss the action as above provided.

**HISTORY:** Re-enacts Sec. 71, R. S. '46, Ch. 103, being C. L. '57, (4410); C. L. '71, (6037); How. 7617; C. L. '97, (10253), changing the phraseology, however, from "the court shall give judgment for the defendant as in cases of non-suit" to "the court shall dismiss," as above. Modified.

See note on Term Calendar under (12573).

See cases cited in preceding section.

**(12576). Copies of Calendar.**

**SEC. 4.** The clerk shall cause printed copies of said calendar to be provided at least five days prior to the first day of each term of court, and shall mail or deliver a copy of said calendar to each attorney, or firm of attorneys, representing any party in any action or proceeding that is upon the calendar.

**HISTORY:** New section.

See note on Term Calendar under (12573).

**(12577). Cases at Issue Later Than Fourteen Days Before Term.**

**SEC. 5.** Cases in which issue shall be joined, or appeal filed, after the fourteenth day before the first day of any term of any court, may be placed upon the calendar at any time before or during the term, at the request of the attorney for any party thereto, which said attorney shall forthwith give notice in writing to all of the parties to said cause, or their attorneys, of the fact of placing such cause upon the calendar, and upon the giving of such notice, after the lapse of fourteen days the same shall stand for trial the same as other cases.

**HISTORY:** New section.

See note on Term Calendar under (12573).

**JUDICATURE ACT CONSTRUED:** This Act providing for the revision and consolidation of the general laws, in the practice and procedure in civil cases. Held, that the fourteen-day notice required by Section (12577) does not apply to a criminal case, where the de-

defendant was bound over for trial in the circuit court at the present term, the case not being on the calendar. The defendant may be tried at once under the former practice, unless there are reasons for adjournment. *Haselhuhn v. Macomb* Circuit Judge, 202 Mich. 507.

**(12578). Cases in Counties of 200,000 Population.**

SEC. 6. Whenever a cause, either at law or in chancery, shall be at issue in the circuit court for any county of this state having a population of two hundred thousand or more, either party or the attorney for any party, may request the clerk of said court to place the same upon a list to be by him prepared, of causes ready for trial, and said cause shall then be in position, after the lapse of one week, to be tried as the judges of said court may from time to time direct.

HISTORY: Re-enacts Sec. 1 of Act 240 of '09, p. 422, Eff. Sept. 1, omitting "or solicitor." Unchanged.

TERM FEES: See notes to Compilers' Section (13685).

WAYNE COUNTY: See Compilers' Sections (14624)-(14625). See *Weber v. Wayne* Circuit Judge, 162 Mich. 32; *Hook v. Sloman*, 145 Mich. 19; *Fornia v. Wayne* Circuit Judge, 140 Mich. 631.

**(12579). Printed Lists of Certain Cases Ready for Trial.**

SEC. 7. The clerk of said courts in the counties mentioned in the preceding section, shall monthly prepare printed lists of enough cases ready for trial and at issue, under the direction of the court, as will suffice to keep said court busy for one calendar month, and the causes on said list shall stand for trial before said court without further notice, in their order as directed by said court, except the said court, may assign from day to day, a still smaller number to facilitate its work, said court being hereby authorized at any time it may find its monthly call exhausted to make another call and have the clerk of such court print the same at the expense of the county, in order that said work may be expedited in said courts.

HISTORY: Re-enacts Sec. 2 of Act 240 of '09, p. 423, Eff. Sept. 1, without material change except as to phraseology. Unchanged.

**Oral Evidence on Hearing of Motions.**

**(12580). Witnesses at Hearing of Motions.**

SEC. 8. Upon the hearing of any motion or petition where any question of fact is involved, the court hearing such mo-

tion or petition, may in its discretion, if it deems it necessary in order to reach a just conclusion as to such facts, require the production of all, or any of the witnesses having knowledge of the matters of fact involved on such motion or petition for examination before him in open court.

**HISTORY:** New section.

**ORAL EVIDENCE ON HEARING OF MOTIONS:** On hearing of motions or petitions involving questions of fact, the court may in its discretion require the production of all or any witnesses for oral examination in open court.

#### OF SUMMARY JUDGMENTS.

##### (12581). In What Causes Rendered.

**SEC. 9.** At any time after any cause arising upon contract or judgment, or statute, shall be at issue, upon motion of the plaintiff, after the usual notice to the defendant, supported by the affidavit of the plaintiff, or any one in his behalf having knowledge of the facts, verifying the plaintiff's cause of action, and stating the amount claimed, and his belief that there is no defense to the action, the court shall enter a judgment in favor of the plaintiff, unless the defendant shall prior to, or at the time of hearing said motion, make and file an affidavit of merits. Said affidavit of merits shall state whether or not the defense claimed therein applies to the whole of the plaintiff's claim, and if not, it shall state definitely what item or items of the plaintiff's claim and the amount thereof, is admitted.

**HISTORY:** New section.

**SUMMARY JUDGMENTS:** The practice of noticing causes for inquest at a term of court has been done away with. After any cause arising upon contract, judgment or statute is at issue, the plaintiff may make a motion supported by his affidavit or that of anyone having knowledge of the facts, verifying his cause of action, stating the amount claimed and his belief that there is no defense to the action. Whereupon a judgment shall be entered in favor of the plaintiff unless the defendant shall prior to or at the time of hearing said motion make and file an affidavit of merits. In addition to the usual averments this affidavit of merits shall state whether or not the defense claimed therein applies to the whole of the plaintiff's claim and, if not, it shall state definitely what item or items of the plaintiff's claim and the amount thereof is admitted.

At the trial, if it appears that any affidavit of merits was not made in good faith, but was made solely for the purpose of delay, the court shall award the plaintiff double the amount of taxable costs.

**AFFIDAVIT OF MERITS:** See Circuit Court Rule 34, '16.

**(12582). Affidavit Not Made in Good Faith.**

SEC. 10. If in any case it appear upon the trial thereof to the satisfaction of the court, than any affidavit of merits made therein, for the purpose of preventing a summary judgment, or for the purpose of procuring a continuance, was not made in good faith, but was made solely for the purpose of delay, the court shall award to the plaintiff in the judgment rendered therein, double the amount of the costs taxable in the cause.

HISTORY: New section.

See note on Summary Judgments under (12581).

**(12583). Variances Disregarded Unless Calculated to Mislead.**

SEC. 11. Every variance between process, pleadings, or any instrument in writing, recited or referred to in any other process, pleading or record, and every mistake in the name of any officer or other person, or in stating any day, month or year, or in the description of any property, in any pleading or record, shall be disregarded upon the trial of such cause, and after a verdict therein, unless such variance or mistake be calculated to surprise or mislead the adverse party, and to prevent his making due preparation for a full answer on the merits, to the matter concerning which such variance or mistake shall have been made.

New.

HISTORY: Re-enacts Sec. 92, R. S. '46, Ch. 103, being C. L. '57, (4329); C. L. '71, (5949); How. 7522; C. L. '97, (10187). Unchanged.

CONSTRUED: See *St. Joseph Supervisors v. Coffenbury*, 1 Mich. 355; *Harrington v. Worden*, 1 Mich. 487; *Lothrop v. Southworth*, 5 Mich. 446; *McHardy v. Wadsworth*, 8 Mich. 349; *Tillman v. Fuller*, 13 Mich. 113; *Rorabacher v. Lee*, 16 Mich. 169; *People v. Wayne Circuit Judge*, 27 Mich. 87; *Stone v. Covell*, 29 Mich. 359; *Smith v. Brown*, 34 Mich. 455; *Slater v. Breese*, 36 Mich. 77; *Shepard v. Shepard*, 33 Mich. 173.

**(12584). Tried Issues.**

SEC. 12. All issues of law shall be tried by the court, and all the issues and questions of fact, shall be tried by the court, unless a jury be demanded by one of the parties, in a manner prescribed by the rules of the court: *Provided*, That in all actions of tort, and in all other actions, the subject matters whereof are, in the opinion of the court, peculiarly proper for the consideration of a jury, it shall be competent for the court to order the cause to be tried by a jury.

**HISTORY:** Re-enacts Sec. 1 of Act 91 of '53, p. 187, Eff. May 16, being C. L. '57, (3435); as Am. '59, p. 150, Act 72, Imd. Eff. Feb. 7; C. L. '71, (4961); How. 6485; C. L. '97, (10259), and supersedes Sec. 200 of Act 153 of '55, being C. L. '57, (3852); C. L. '71, (5448); How. 7015; C. L. '97, (919). Unchanged.

**CONSTITUTIONALITY:** The provision in the constitution that a jury trial shall be deemed waived unless demanded, relates to the ordinary trial by jury in civil actions. *Pt. Huron & Northwestern Ry. v. Callanan*, 61 Mich. 14. See Const. II, 13. A provision of a city charter that in prosecutions for violations of city ordinances a failure to demand a jury trial shall be deemed a waiver of the right thereto, is not repugnant to the constitution. In *re Cox*, 129 Mich. 635.

**JURY:** As to what a jury is, under the constitution, its guaranties and its waiver in civil and criminal cases, see Const. of '50, VI, 27, 28. Where issue is joined in justice's court and on appeal a demand has been made for a jury, the case cannot thereafter be tried without a jury or referred by order of the court. *Odeh v. Reynolds*, 40 Mich. 21. After interlocutory judgment on default, a jury may be demanded for the assessment; if not demanded, the court may assess the damages without a jury. *O'Flynn v. Holmes*, 8 Mich. 95, 98.

Where a litigant who had not demanded a jury, caused the adjournment of the case, and during the period of adjournment a new term commenced at which he noticed the case for trial and demanded a jury, a jury trial was properly refused by the court. In *re McNamara's Estate*, 166 Mich. 451.

Trial by less than twelve jurors in civil cases, by consent of parties. *Johr v. People*, 26 Mich. 430; *Hill v. People*, 16 Mich. 357. Cannot be waived in criminal cases. *Hill v. People*, 16 Mich. 351; *Ward v. People*, 30 Mich. 116; *Swart v. Kimball*, 43 Mich. 448. See *People v. Smith*, 9 Mich. 193. May be waived in criminal cases in justice's court. *Ward v. People*, 30 Mich. 116; *People v. Steele*, 94 Mich. 437. In civil cases the court may order a jury. *Mabley v. Judge*, 41 Mich. 34; *Grand Rapids v. Bateman*, 93 Mich. 138.

See *McGraw v. Sturgeon*, 29 Mich. 430.

### (12585). Decision to be Given Within 60 Days.

**SEC. 13.** Upon the trial by the court of any question of fact or law, at law or in chancery, or any incidental issue arising therefrom, the decision of the court shall be given within sixty days from the time such issue or cause was submitted to him.

**HISTORY:** This section merges and supersedes Sec. 2 of Act 91 of '53, being C. L. '57, (3436); as Am. '63, p. 183, Act 124, Eff. June 22; C. L. '71, (4962); How. 6486; C. L. '97, (10260), and Sec. 1 of Act 126 of '95, being C. L. '97, (558). Modified.

**CONSTRUED:** Under the former act the trial court had until the first day of the succeeding term in which to decide, the court holding that the provision was directory merely. *Rawson v. Parsons*, 6 Mich. 401.

While it is true that the judge is not imperatively required to make his finding on or before the first day of the succeeding term, still

the judgment to result from such finding cannot regularly be entered until the finding is made. *Stansell v. Corning*, 21 Mich. 245.

Questions of law as well as of fact are intended to be included under the provisions of this section, the last clause of which increases the time within which the filing of such decision should be made over that specified in cases of trial of questions of fact. *Knack v. Judge*, 147 Mich. 488. Where the judge files a written opinion stating that the case may be dismissed, it is equivalent to a determination of the cause. *Id.* As to the waiver of an objection that an opinion in a chancery cause was not rendered within the time provided by law, see *Hoste v. Dalton*, 137 Mich. 522. See also *Barkume v. Phelps, Brace & Co.*, 141 Mich. 645.

**SHALL BE IN WRITING:** *People v. Littlejohn*, 11 Mich. 62. In all cases where the cause is tried before the court without a jury, the decision is required to be in writing and filed with the clerk. If made without specifying the facts found, the decision involves a general finding in the nature of a general verdict. A special finding stands as a special verdict. It is not only competent, but highly proper, for the court, in the written decision, to specify the facts found and the conclusions of law. When so done, it has the same effect as if it had been specially requested under the next section. *Delashman v. Berry*, 20 Mich. 295-6. By a long practical construction, entry of the judgment in term and signing by the trial judge are equivalent to a written finding, except where a special finding is required; but such practice will not be extended beyond cases where the finding is general. *Cleveland v. Stein*, 14 Mich. 338.

**FORMER LAW CITED:** *Pingree v. Court of Mediation*, 130 Mich. 234; *Callie Bros. v. Judge*, 155 Mich. 481; *Assurance Co. v. Judge*, 169 Mich. 242.

#### (12586). Facts and Conclusions of Law.

**SEC. 14.** In giving the decision in actions at law, the court shall specify in writing the facts found and the conclusions of law therein, upon the request of either party. Such findings shall be forthwith filed with the clerk of the court and judgment entered thereon, and notice of the entry of such judgment shall be given to the parties, or their attorneys, by said clerk.

**HISTORY:** This section merges and supersedes Sec. 3 of Act 91 of '53, being C. L. '57, (3437); C. L. '71, (4963); How. 6487; C. L. '97, (10261); and Sec.'s 6 and 7 of Act 91 of '53, being C. L. '57, (3440)-(3441); C. L. '71, (4966)-(4967); How. 6490-1; C. L. '97, (10264)-(10265). Modified.

**NOTICE OF JUDGMENT ENTERED IN VACATION:** The clerk shall give notice to the parties or their attorneys of any judgment entered in vacation, in such manner as the circuit court shall by general or special order direct. *Wisconsin Chair Co. v. Barton*, 189 Mich. 548; 22 D. L. N. 1105; 155 N. W. 405.

**EXCEPTIONS TO FINDINGS:** In a case tried by the court, without a jury and no exceptions taken to the findings of fact—that there

was no evidence to sustain the findings—or that they were opposed to the weight of evidence—or that they do not support the judgment which was entered, and no points of law being presented as upon requests to charge, the judgment must be affirmed. *Engel v. Tate*, 203 Mich. 682; (see in connection with this case, Circuit Court Rule, No. 45); *Couple-Gear Freight Wheel Co. v. Lake Shore & M. S. R. R. Co.*, 196 Mich. 432.

**REQUESTS FOR FINDINGS:** Must be made before judgment and the record must so show; they will not be presumed to have been so made. *Brown v. Haak*, 48 Mich. 229. Must be complied with when made before judgment. *Lee v. Marsh*, 19 Mich. 11. *Stansell v. Corning*, 21 Mich. 242; *Howerter v. Kelley*, 23 Mich. 337. The court is not compelled to make any special findings, unless requested, but may do so. *Delashman v. Berry*, 20 Mich. 295-6.

An oral demand for findings is insufficient. *Northern Assurance Co. v. Judge*, 169 Mich. 242.

Where, in a case tried without a jury, no findings are requested or made, and no exceptions taken to the proceedings, there is nothing to review. *Barnum v. Andrews*, 106 Mich. 81; *Moore v. Lumber Co.*, 171 Mich. 402. After a regular request for findings, no judgment can be entered until such findings are made. *Stansell v. Corning*, 21 Mich. 242; *Ells v. Rector*, 32 Mich. 379. The law contemplates that the findings shall be filed as the foundation of the judgment. *O'Blinskie v. Judge*, 34 Mich. 62; *Ells v. Rector*, 32 Mich. 379; *Stansell v. Corning*, 21 Mich. 242.

When cases are tried by the court without a jury and findings are requested, it is contemplated by the statute and court rules that the court will find and state ultimate facts material to the issue, and, separately, conclusions of law based thereon. *Edgerly v. Ladies of the Maccabees*, 175 Mich. 43.

If, by inadvertence, judgment is prematurely entered, such entry will be regarded as provisional, which becomes perfected only when the findings are completed. *O'Blinskie v. Judge*, 34 Mich. 62. In such case, it would not be error for the court to vacate the judgment and enter a new one after the findings are filed. *Hunt v. Patterson*, 38 Mich. 95. A demand for special findings necessitates such a finding of facts as will properly present the law points. *Lee v. Marsh*, 19 Mich. 12. See *Willey v. Insurance Co.*, 49 Mich. 264. Where the record shows a proper demand for findings and none have been made, the judgment will be reversed. *Lee v. Marsh*, 19 Mich. 13; *Howerter v. Kelley*, 23 Mich. 337. Subsequent findings will not cure the error. *Stansell v. Corning*, 21 Mich. 245.

Findings made by the court upon a trial without a jury are presumed to have been made by request, if no showing to the contrary appears. *Thurber v. Aldrich*, 167 Mich. 658. *White v. Gypsum Co.*, 168 Mich. 240.

A finding made and filed by a judge after resignation is a nullity. *Ells v. Rector*, 32 Mich. 379. Special findings appearing on the record are presumed to have been made by request, but are good if made without. *Delashman v. Berry*, 20 Mich. 292, 296. Unless the record shows a request for special findings, error will not lie for want of them. *Hooper v. Hooper*, 26 Mich. 435. No one but the party requesting them, can complain if special findings are not made. *Cook v. Wiles*, 42 Mich. 439.



Nor can he complain of the judge's omission, when the evidence is such that no findings under it could aid him. *Slocomb v. Thatcher*, 20 Mich. 56; *Wiley v. Lovely*, 46 Mich. 83. Nor can he complain of omission to find upon points of law presented, when the facts found warrant the judgment rendered. *Macomber v. Saxton*, 28 Mich. 516. Nor for refusal to find upon immaterial points. *Sch. Dist. v. Snell*, 24 Mich. 350. Nor when the refusals to find, do not prejudice him. *Id.*

A finding may be construed in connection with the pleadings, if they contain sufficient data to support it. *Edwards v. Nelson*, 51 Mich. 121. See *Hedges v. Hibbard*, 46 Mich. 551; *Chattertan v. Parrott*, 46 Mich. 432. See also notes to next section.

**FORM OF FINDING:** As every finding is one and entire and stands in lieu of a special verdict, we must receive everything evidently intended as facts found, no matter in what part it is set forth. It would be better to place all such matters by themselves, but the separation does not make the document imperfect. *Taylor v. Gladwin*, 40 Mich. 234. The evidence should not be returned with or among the findings; if it is, it will not be considered. *Peabody v. McAvoy*, 23 Mich. 526.

But it is not error, though not a commendable practice, for the finding to embrace some of the evidence and to state the reasons which led to the conclusions; but this will not enable the court of review to weigh the evidence or to pass upon the soundness of the reasoning given. *Tower v. Railroad Co.*, 34 Mich. 328. Evidence of a fact cannot be turned into a finding of a fact by setting it forth as such. *Earle v. Insurance Co.*, 29 Mich. 417.

**FINDING MUST BE COMPLETE:** It is open to the circuit judge to act upon the impressions made upon him by the whole testimony and it is his duty to state those impressions in the form of findings of fact. *Tuxbury v. French*, 41 Mich. 10. All the material facts established should appear in the finding and in a shape to enable the court to award the judgment required by the law. *Adams v. Champion*, 31 Mich. 234-5; *Cooley v. Ashley*, 43 Mich. 458.

A finding that does not decide everything submitted for decision cannot stand. *Danaher v. Ward's Estate*, 40 Mich. 300. When the finding is incomplete and imperfect, the court above has no power to supply the finding; it is a mistrial. *Adams v. Champion*, 31 Mich. 235; *Sayles v. Curtis*, 45 Mich. 280. But a party cannot complain of a defective finding, if it does not prejudice him. *Seeley v. Albrecht*, 41 Mich. 525. The findings must embrace all the facts necessary to support the judgment. *Sheldon v. Dutcher*, 35 Mich. 10; *Gray v. Pike*, 38 Mich. 650; *Danaher v. Ward*, 40 Mich. 300; *Mills v. Van Camp*, 41 Mich. 645. And the finding of facts must be sufficiently specific to show whether the judgment is correct. *Cram v. Stiles*, 47 Mich. 129.

**FINDING AN ENTIRETY:** Every finding is one and entire. *Taylor v. Gladwin*, 40 Mich. 234. A judge's finding of facts must be taken together as a whole; and where it states something which the other facts found show he could not have found literally as a fact, the court above will so construe it, if possible, as to make the finding consistent as a whole. *Nat'l. Bank v. Crowley*, 24 Mich. 492.

**SUBSTANCE OF FINDING:** The law intends that the finding

shall ascertain and comprise only those ultimate propositions of fact, whether few or many, which the evidence proves, and which involve the law of the case that must determine the rights of the parties. *Peabody v. McAvoy*, 23 Mich. 528; *Yelverton v. Steele*, 40 Mich. 540-1. And not those subordinate facts which only help to the establishment of the main ones. *Yelverton v. Steele*, 40 Mich. 541.

If any particular and material part of the finding be without evidence to sustain it so far the finding is not binding and must be held erroneous. *Hubbardston Lumber Co. v. Bates*, 31 Mich. 164. But a mere scintilla of evidence on any essential fact will not support the finding. *Conely v. McDonald*, 40 Mich. 150. A finding of an immaterial fact, unsupported by any evidence, is not prejudicial. *Earle v. Insurance Co.*, 29 Mich. 414.

A finding of facts should set forth the facts found, not merely the evidence tending to prove them. *Trudo v. Anderson*, 10 Mich. 367; *Thomas v. Sprague*, 12 Mich. 123; *Earle v. Insurance Co.*, 29 Mich. 417. It should state a distinct conclusion or at least set forth sufficient facts to lead to one by inevitable inference. *Danaher v. Ward's Estate*, 40 Mich. 300. The evidence should not be returned with or among the findings of fact. *Peabody v. McAvoy*, 23 Mich. 526. A mere statement of evidence, without a finding of facts, cannot enable the court to determine whether the doctrine of estoppel should be applied or should not be. Still less can it present any question to an appellate court when the court reviewed has not declared its opinion. *Maxwell v. Bay City Bridge Co.*, 41 Mich. 468.

**SUFFICIENCY OF FINDING:** The finding should afford the means for its own interpretation and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment due. *Brown v. McHugh*, 36 Mich. 435. If the findings justify the judgment, it will be sustained. *Gillam v. Boynton*, 36 Mich. 237; *Taylor v. Gladwin*, 40 Mich. 234. Unless the findings are so manifestly wrong and so opposed to one another as to be erroneous in law, they must stand. *Mower's Appeal*, 48 Mich. 451. And all reasonable intendments will be made to uphold the judgment. *Peabody v. McAvoy*, 23 Mich. 526; *Neib v. Hinderer*, 42 Mich. 451. And the finding will be so construed as a whole, if possible, as not to defeat the judgment. *Nat'l. Bank v. Crowley*, 24 Mich. 492. The sufficiency of a finding, in the absence of a request for one more complete, is determined by its consistency with the judgment. *Sawyer v. Van Housen*, 39 Mich. 89. See *Moore v. Vrooman*, 32 Mich. 526.

**STANDS AS SPECIAL VERDICT:** A finding of fact is analogous to, and is treated as, a special verdict. *Wood v. La Rue*, 9 Mich. 160; *Trudo v. Anderson*, 10 Mich. 357; *Peabody v. McAvoy*, 23 Mich. 526; *Lovell v. Willard*, 28 Mich. 346; *Adams v. Champion*, 31 Mich. 234; *Burk v. Webb*, 32 Mich. 180; *Sheldon v. Dutcher*, 35 Mich. 10; *Taylor v. Gladwin*, 40 Mich. 234; *O'Connor v. Beckwith*, 41 Mich. 657.

**AMENDMENT OF FINDINGS:** A circuit judge may, after the lapse of one or many terms, amend his findings, and such amendment is not subject to review. *Sweetzer v. Mead*, 5 Mich. 33; *Farrand v. Bentley*, 6 Mich. 283-4. See *Cudney v. Sherrard*, 153 Mich. 239.

**CONCLUSIONS OF LAW:** A mere inference of fact, drawn from evidence, cannot be converted into matter of law by setting it up as such in the finding. *Hogelskamp v. Weeks*, 37 Mich. 425; *Trudo v. Anderson*, 10 Mich. 357. See *Ferris v. Quimby*, 41 Mich. 207. If the judge reaches conclusions involving questions of fact, even though mixed with legal inquiries, they must prevail, unless illegally reached. *Gillam v. Boynton*, 36 Mich. 237.

**IMMATERIAL ERRORS:** If the facts found support the judgment, it is not very important to inquire whether the conclusions of law, apart from the judgment, are correct or not. *Nelson v. Ferris*, 30 Mich. 498; *Gillam v. Boynton*, 36 Mich. 237; *School Dist. v. Snell*, 24 Mich. 355; *Macomber v. Saxton*, 28 Mich. 518. When the facts found are not sufficient to support a judgment, errors in the conclusions of law are immaterial. *Hamblin v. Warner*, 30 Mich. 95. A correct judgment will not be reversed because the trial judge gave an invalid reason for his conclusion. *Wellover v. Soule*, 30 Mich. 483. See *Botsford v. Simmons*, 32 Mich. 352.

The refusal of requests for findings which would not necessarily change the result is not prejudicial. *Buckhout v. Brown*, 160 Mich. 460.

**FILED WITH CLERK:** See *Stansell v. Corning*, 21 Mich. 245; *Steele v. Matteson*, 50 Mich. 314; *Highway Com'r v. Beebe*, 61 Mich. 2.

**NOTICE SHALL BE GIVEN:** A party who knows judgment has been rendered and has acted upon such knowledge cannot object to want of written notice thereof. *Richardson v. Yawkey*, 9 Mich. 139. The time within which his subsequent action must be taken will not begin to run, until written notice has been given. *People v. Wilson*, 12 Mich. 25; *McClung v. McClung*, 39 Mich. 55.

See *Hoffman v. Flint Land Co.*, 144 Mich. 568; *People v. Wilson*, 12 Mich. 25.

**FORMER LAW CITED:** *Knack v. Judge*, 147 Mich. 488; *Caille Bros. Co. v. Judge*, 155 Mich. 481.

**REQUESTS TO FIND THE FACTS AND LAW:** In *Hogle v. Meyer-ing*, 161 Mich. 483, the court said: "While defendants assign error because of the refusal of the court to find the facts as requested, they do not discuss that question, evidently because of the well-known rule that, where a case is tried by the court, it is the exclusive province of the judge to pass upon the testimony, and to draw inferences therefrom; and, when findings of fact proposed by a party are refused, such refusal is not subject to review in this court. *Beal v. Polhemus*, 67 Mich. 130 (34 N. W. 532)." See *Knack v. Wayne Circuit Judge*, 147 Mich. 488. It is for the trial judge to determine the weight of the testimony and his findings will not be disturbed if there is evidence fairly tending to establish them. *Fuller v. Ehle*, 116 Mich. 13. Where in a case tried without a jury, no findings are requested or made, and no exceptions taken to the proceedings, there is nothing to review. *Barnum v. Andrews*, 106 Mich. 81. It is manifest that requests for findings must be made before judgment and the record must so show that they will not be presumed to have been so made. *Brown v. Haak*, 48 Mich. 229. No one but the party requesting them can complain if special findings are not made. *Cook v. Wiles*, 42 Mich. 439. Nor can he complain

of the judge's omission when the evidence is such that no findings under it could aid him. *Wiley v. Lovely*, 46 Mich. 83; *Slocomb v. Thatcher*, 20 Mich. 56. Nor can he complain of omission to find upon points of law presented, when the facts found warrant the judgment rendered. *Macomber v. Saxton*, 28 Mich. 516. No exception can be taken to a judgment upon general findings of facts made by the court, where no special findings were asked for or made. *Hedges v. Hebbard*, 46 Mich. 551. In *O'Blinskie v. Judge of Kent County*, 34 Mich. 63, the court said: When a cause is tried by the circuit judge without a jury and written findings are requested, the law contemplates that these shall be filed as the foundation of judgment. If for any reason of inadvertence or otherwise the judgment is entered up before the findings are filed, or if the findings are defective and are afterwards corrected, we are of opinion that the judgment so entered up previously is to be regarded as in the nature of provisional action, which only becomes perfected when the findings are completed, and that the time for taking a new trial as a matter of right should date from the day when judgment could have been taken on the completed finding. See *Stansell v. Corning*, 21 Mich. 242."

See *Hunt v. Patterson*, 38 Mich. 95; *Ells v. Rector*, 32 Mich. 379; *Howerter v. Kelley*, 23 Mich. 337; *Stansell v. Corning*, 21 Mich. 342; *Delashman v. Berry*, 20 Mich. 296; *Lee v. Marsh*, 19 Mich. 11.

**FINDINGS:** In *Taylor v. Gladwin*, 40 Mich. 234, the court said: "As every finding is one and entire, and stands in lieu of a special verdict, we must receive everything evidently intended as facts found, no matter in what part it is set forth. It would have been better to place all such matters by themselves, but the separation does not make the document imperfect." Although the evidence should not be returned with the findings, for, if it is, it will not be considered, yet, it is not error, though not a commendable practice for the finding to embrace some of the evidence and to state the reasons which led to the conclusions. But this will not enable the court of review to weigh the evidence or to pass upon the soundness of the reasoning given. *Peabody v. McAvoy*, 23 Mich. 526. *Tower v. Railroad Co.*, 34 Mich. 328. It is evident that evidence of a fact cannot be turned into a finding of fact by setting it forth as such. *Earle v. Insurance Co.*, 29 Mich. 417. In *Tuxbury v. French*, 41 Mich. 11, the court said: "This court cannot consider evidence to find facts or adjudge upon them. It was open to the circuit judge to act upon the impressions made upon him by the whole testimony, and it was his duty at the same time to state these impressions in the form of findings of fact. His impressions, however well sustained by the evidence, unless embodied in findings, are of no importance. This court is deprived of them. The testimony is not available. Any facts which might have been found upon it, and are not, may have a potential existence; but for the purpose of this review the consequence is the same as though they could not." A finding is incomplete that does not state a distinct conclusion or at least set forth sufficient facts to lead to one by inevitable inference. *Danaher v. Ward's Estate*, 40 Mich. 300. When the finding is incomplete and imperfect, the court above has no power to supply the finding. *Sayles v. Curtis*, 45 Mich. 280; *Adams v. Champion*, 31 Mich.

235. All the material facts established should appear in the finding and in a shape to enable the court to award the judgment required by law. *Adams v. Champion*, 31 Mich. 235; *Cooley v. Ashley*, 43 Mich. 458. The finding of facts must be sufficiently specific to show whether the judgment is correct. *Cram v. Stiles*, 47 Mich. 129. Furthermore the findings must embrace all the facts necessary to support the judgment. *Mills v. Van Camp*, 41 Mich. 645; *Danaher v. Ward's Estate*, 40 Mich. 300; *Grey v. Pike*, 38 Mich. 650; *Sheldon v. Dutcher*, 35 Mich. 10. A judge's finding of facts must be taken as a whole and where it contained something which the other facts found show he could not have found literally as a fact, the court will not construe it, if possible, as to make the finding inconsistent as a whole. *First National Bank of Marquette v. Crowley*, 24 Mich. 492. It may be said that the law intends that the finding shall ascertain and comprise only those ultimate propositions of fact, whether few or many, which the evidence proves, and which involves the law of the case that must determine the right of the parties. *Peabody v. McAvoy*, 23 Mich. 528; *Yelverton v. Steele*, 40 Mich. 540. A mere statement of evidence without a finding of facts, cannot enable the court to determine whether the doctrine of estoppel should be applied or should not be. Still less can it present any question to an appellate court when the court reviewed has not declared its opinion. *Maxwell v. Bay City Bridge Co.*, 41 Mich. 468. In *Brown v. McHugh*, 36 Mich. 435, the court said: "The finding should afford the means for its own interpretation and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment due. Any clause equally open to two meanings where one would import or indicate lawful conduct or action, and the other unlawful, should be received in the former sense." If the findings justify the judgment, it will be sustained. *Taylor v. Gladwin*, 40 Mich. 234; *Gillam v. Boynton*, 36 Mich. 237. Unless the findings are so manifestly wrong and so opposed to one another as to be erroneous in law, they must stand. *Mower's Appeal*, 48 Mich. 451. All reasonable intendments will be made to uphold the judgment. *National Bank of Crowley*. *Peabody v. McAvoy*, 23 Mich. 526; *Neib v. Hinderer*, 42 Mich. 451.

**FINDING OF FACT AND SPECIAL VERDICT:** A finding of fact is analogous, and is treated as a special verdict.

A special finding is conclusive if there is any evidence to support it. *Tillman v. Fuller*, 13 Mich. 119; *Hanish v. Kennedy*, 106 Mich. 455; *Cook v. Burnett*, 83 Mich. 252; *Newmann v. Cal. & Hec. Mfn. Co.*, 57 Mich. 104; *Moran v. Lezotte*, 54 Mich. 86; *Kundinger v. Railway Co.*, 51 Mich. 185; *Green v. Hill*, 47 Mich. 86; *Hyler v. Nolan*, 45 Mich. 357; *Farrington v. Sexton*, 43 Mich. 454; *Johnson v. Crispell*, 43 Mich. 261; *Mitchell v. Chambers*, 43 Mich. 150; *O'Connor v. Beckwith*, 41 Mich. 657; *Stockle v. Silsbee*, 41 Mich. 615; *Locke v. Tuttle*, 41 Mich. 407; *Clapp v. Born*, 41 Mich. 152; *Tuxbury v. French*, 41 Mich. 10; *Yelverton v. Steele*, 40 Mich. 540; *Conley v. McDonald*, 40 Mich. 150; *Briggs v. Parsons*, 39 Mich. 400; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Gano v. Heath*, 36 Mich. 443; *Brown v. McHugh*, 36 Mich. 433; *Tower v. Railroad Co.*, 34 Mich. 328; *Webber v. Donnelly*, 33 Mich. 470; *Cling v. Fries*, 32 Mich. 275; *Burk v. Webb*, 32 Mich. 173; *Todd v. Davis*, 32 Mich. 160; *Hub-*

bardston Lumber Co. v. Bates, 31 Mich. 164; Earle v. Insurance Co., 29 Mich. 414; Lovell v. Willard, 28 Mich. 346; Compton v. Blair, 27 Mich. 399; Feller v. Green, 26 Mich. 70; Peabody v. McAvoy, 23 Mich. 526; Ortman v. Wilson, 23 Mich. 269; Schmidt v. Miller, 22 Mich. 278.

REVIEW OF EVIDENCE: In Tillman v. Fuller, 13 Mich. 119, the court said: "We can look to the testimony only so far as to see its tendency, and whether there was evidence tending to support the finding, and we can review the finding only so far as to see whether his legal conclusions are warranted by the facts found, or what judgment was warranted by such facts. We have not the aid usually afforded upon the question of construction, by the very language in which the agreement was expressed. The judge has not stated it in his finding, which would, probably, have been impracticable; and if he had stated the whole conversation between the parties, the intent of the parties which constitutes the contract, would, probably, be but a mere question of fact, or an inference of fact to be drawn from such conversation. But, at all events, to warrant us in pronouncing the agreement an actual demise, the judge should either have expressly found it to be a lease or demise, or that such was the intention of the parties, or should have stated such facts as would lead to such a conclusion, as one of law. If he has only found such an agreement, or such facts, as leave the question open, whether it was a lease or a mere agreement for a future letting, then, as the burden of proof was upon the plaintiff, we are not authorized to pronounce it a lease, and the plaintiff must fail. Now, it seems to me the judge has purposely and carefully avoided finding the agreement to be a lease, or present demise. His finding of the contract is in these words: 'That an agreement was made some time in the month of April, 1860, and before the twentieth day thereof, for the letting, on the part of the plaintiff, and the hiring on the part of defendant, for one year, from May 1st, 1860, of a certain house and premises, in the declaration described, at and for the annual sum of three hundred and fifty dollars, payable quarterly; and that said agreement was not in writing, but was made by parol.' Now, this statement would be equally true, and the language quite as appropriate, if the agreement intended to be found was only an agreement for a future letting, and not a present demise.

Has the judge stated any other fact, from which we are authorized to find a present demise? The only other statement in the finding, which can be claimed to have any bearing upon the point, is the subsequent statement, 'that, by said agreement, said defendant had a right to take possession on May 1st, 1860, and that said premises were ready for his occupancy on that day, and thenceforth for a year.' Now, so far as this statement relates to the right of entry, it is, in form at least, but a statement of a legal conclusion; and no facts are given as the foundation for such a conclusion, except the contract previously stated, and the further fact that the premises were ready for his occupancy. But whether this be stated as a fact, or a conclusion of law, the right of entry, and the fact that the premises were ready for defendant's occupancy, are quite as consistent with a mere contract for a future letting, as with an actual demise. In fact, the right of entry is so general an incident of a

contract for a lease, that it is sometimes stated generally, without qualification, that such agreement will operate as a license to enter upon the premises agreed to be demised. Taylor's Landlord and Tenant, Sec. 37."

See *Wertin v. Crocker*, 47 Mich. 642; *Locke v. Tuttle*, 41 Mich. 407; *Webber v. Donnelly*, 33 Mich. 470; *Todd v. Davis*, 32 Mich. 160; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 164; *Earle v. Westchester Insurance Co.*, 29 Mich. 417; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Yelverton v. Steele*, 40 Mich. 540; *Johnson v. Crispell*, 43 Mich. 261; *Tower v. D. L. & L. M. R. R. Co.*, 34 Mich. 338; *Compton v. Blair*, 27 Mich. 399; *Schmidt v. Miller*, 22 Mich. 278. The evidence will not be reviewed, unless all the evidence is all sent up on an exception that there is no evidence to support the finding. *Scotten v. Sutter*, 37 Mich. 530; *Randall v. Randall*, 37 Mich. 530. If any particular and material part of the finding be without evidence to sustain it, so far as the finding is not binding and must be held erroneous. *Hubbardston Lumber Co. v. Bates*, 31 Mich. 164. But a mere scintilla of evidence on any essential fact will not support the finding. *Connelly v. McDonald*, 40 Mich. 150. A finding of an immaterial fact, unsupported by any evidence, is not prejudicial. *Earle v. Insurance Co.*, 29 Mich. 414. If the evidence is not all sent up, the findings of facts are presumed to have been supported by evidence; and the court of review is not at liberty to draw inferences of fact in cases at law. *Scotten v. Sutter*, 37 Mich. 530; *Sayles v. Curtis*, 45 Mich. 280; *Johnson v. Crispell*, 43 Mich. 262; *Mitchell v. Chambers*, 43 Mich. 158; *Neib v. Hinderer*, 42 Mich. 453; *O'Connor v. Beckwith*, 41 Mich. 659; *Mills v. Camp*, 41 Mich. 647; *Stockle v. Sillsbee*, 41 Mich. 622; *Yelverton v. Steele*, 40 Mich. 540; *Briggs v. Parsons*, 39 Mich. 404; *Welrich v. Cook*, 39 Mich. 135; *Brown v. McHugh*, 36 Mich. 435; *Sheldon v. Dutcher*, 35 Mich. 12; *Burk v. Webb*, 32 Mich. 180; *Capell v. Stevens*, 29 Mich. 503; *Feller v. Green*, 26 Mich. 72; *Peabody v. McAvoy*, 23 Mich. 529; *Trudo v. Anderson*, 10 Mich. 365. A special exception to the conclusions of law, where a case is tried without a jury, and the judge makes a special finding, is sufficient, on case made, to raise the point that the facts do not support the judgment. *Perkins v. Nugent*, 45 Mich. 157.

**CONCLUSIONS OF LAW:** It is manifest that conclusions of law can be reviewed only to ascertain whether they are supported by the facts found. *Tillman v. Fuller*, 13 Mich. 119.

See *Cook v. Burnett*, 83 Mich. 252; *Gillem v. Boynton*, 36 Mich. 336; *Nelson v. Ferris*, 30 Mich. 497; *Wellover v. Soule*, 30 Mich. 481; *Macomber v. Saxton*, 28 Mich. 516; *School District v. Snell*, 24 Mich. 350; *Peabody v. McAvoy*, 23 Mich. 526; *Green v. Bennett*, 23 Mich. 464.

#### (12587). Exceptions and Assignment of Error.

**SEC. 15.** In such cases, either party may file exceptions to the findings of facts, that such findings are against the clear weight of evidence, and may assign error upon such exceptions, and if an appeal be taken, the same shall be reviewed by the supreme court.

**HISTORY:** New section.

**FINDINGS OF FACTS:** In cases tried by the court, exceptions may be filed to the findings of the facts, that such findings are against the clear weight of evidence, and error may be assigned on such exceptions. In such cases the findings of facts will be reviewed by the supreme court to the same extent that findings of juries are reviewed when error is assigned that the verdict is against the clear weight of the evidence.

**FORMER RULE:** This section appears similar to Sec. 4 of Act 91 of '53, C. L. '57, (3438); Compilers' Section (12633) prior to its amendment in '67, when the supreme court was allowed to review questions of fact. See *Helmbach v. Weinberg*, 18 Mich. 49. Since '67 and prior to the enactment of this section, the findings of the circuit court upon questions of fact, where there was a conflict in the testimony was conclusive if there was any evidence to support the findings. *Ortman v. Wilson*, 23 Mich. 269; *Peabody v. McAvoy*, 23 Mich. 526; *Feller v. Green*, 26 Mich. 70; *Lovell v. Willard*, 28 Mich. 346; *Earle v. Insurance Co.*, 29 Mich. 414; *Shotwell v. Harrison*, 30 Mich. 179; *Burk v. Webb*, 32 Mich. 173; *Kling v. Fries*, 33 Mich. 275; *Webber v. Donnelly*, 33 Mich. 470; *Tower v. Railroad Co.*, 34 Mich. 328; *Brown v. McHugh*, 32 Mich. 173; *Kling v. Fries*, 33 Mich. 275; *Webber v. Donnelly*, 33 Mich. 470; *Tower v. Railroad Co.*, 34 Mich. 328; *Brown v. McHugh*, 36 Mich. 433; *Gano v. Heath*, 36 Mich. 443; *Thatcher v. St. Andrews Church*, 37 Mich. 264; *Briggs v. Parsons*, 39 Mich. 400; *Conley v. McDonald*, 40 Mich. 150; *Yelverton v. Steele*, 40 Mich. 540; *Tuxbury v. French*, 41 Mich. 10; *Clapp v. Born*, 41 Mich. 152; *Locke v. Tuttle*, 41 Mich. 407; *Stockie v. Silsbee*, 41 Mich. 615; *O'Connor v. Beckwith*, 41 Mich. 657; *Mitchell v. Chambers*, 43 Mich. 150; *Johnson v. Crispell*, 43 Mich. 261; *Farrington v. Sexton*, 43 Mich. 454; *Green v. Gill*, 47 Mich. 86; *Kundinger v. Railway Co.*, 51 Mich. 185; *Moran v. Lezotte*, 54 Mich. 86; *Neumann v. Cal. & Hec. Min. Co.*, 57 Mich. 104; *Hanish v. Kennedy*, 106 Mich. 455; *Cook v. Burnett*, 83 Mich. 252; *Fuller v. Ehle*, 116 Mich. 13; *Childs v. Elliott*, 116 Mich. 511. The credibility of the witnesses and the effect of their evidence was for the trial judge to determine. *Hyler v. Nolan*, 45 Mich. 357; *Edwards v. Nelson*, 51 Mich. 121. The evidence could be reviewed only to determine whether it supported the findings of fact. *Schmidt v. Miller*, 22 Mich. 278; *Compton v. Blair*, 27 Mich. 397; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 164; *Todd v. Davis*, 32 Mich. 160; *Wertin v. Crocker*, 47 Mich. 642. And it would not be so reviewed unless all of the evidence was sent upon an exception that there was no evidence to support the finding. *Scotten v. Sutter*, 37 Mich. 530; *Randall v. Randall*, 37 Mich. 570-1. In cases tried without a jury the supreme court on error will not find any of the facts; it may reject such findings of the trial judge as are unsupported by the evidence; the ultimate facts are to be found by the trial court whether the testimony is disputed or not. *Wilson v. Sauble*, 181 Mich. 407.

**ORIGINAL RULE:** The following cases construe the rule as laid down previous to '67, and which apparently is revived by the enactment of this section. *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *Barman v. Carhartt*, 10 Mich. 338; *Rose v. Lewis*, 10 Mich. 483; *King v. Moore*, 10 Mich. 538; *Brown v. Cady*, 11 Mich. 535; *Gray v. Howard*, 12 Mich. 171; *Peck v. Synder*, 13 Mich. 21. The above cases however seem to be in conflict with *Tillman v. Fuller*, 13 Mich. 119, in which the



court held that where there was a finding of facts by the circuit court and the case was brought up on exceptions by a writ of error, the evidence could only be examined so far as to see whether it tended to support the finding, and the finding could be reviewed only so far as to see whether the legal conclusions were warranted by the facts found, or what judgment was authorized. See also dissenting opinion of Martin, C. J., in *Boullion v. Litchfield*, 14 Mich. 299.

**REVIEW OF FINDINGS:** When none of the special findings are excepted to, the only point to be considered is whether the facts support the judgment. *Green v. Bennett*, 23 Mich. 469; *Feller v. Green*, 26 Mich. 71; *Kling v. Fries*, 33 Mich. 277. Where no exceptions are taken in a case tried without a jury, the only question on error is whether the findings of facts supports the judgment. *Leitlet v. Parker*, 48 Mich. 297. A special exception to the conclusions of law, where a case is tried without a jury and the judge makes a special finding, is sufficient, on case made, to raise the point that the facts do not support the judgment. *Perkins v. Nugent*, 45 Mich. 157-8. Refusal of the trial court to make a requested finding of facts and law is not reviewable on appeal where the evidence tends to support the ruling. *Hogle v. Meyering*, 161 Mich. 483; *Buckhout v. Brown*, 160 Mich. 460.

**MUST BE SPECIAL FINDING:** No exception can be taken to a Judgment upon a general finding of facts made by the court, where no special findings were asked for or made. *Hedges v. Hibbard*, 46 Mich. 551, citing *Chatterton v. Parrott*, 46 Mich. 432; See also *Boullion v. Litchfield*, 14 Mich. 299.

**WHAT RECORD MUST CONTAIN:** A party who desires to review a judgment rendered in a trial without a jury must have written findings, both of fact and law, and must take exception thereto, otherwise there is nothing for the court to review. *Haines v. Saviers*, 93 Mich. 440; *Barnum v. Andrews*, 106 Mich. 81; *Rice v. Muskegon*, 150 v. 680; *Moore v. Lumber Co.*, 171 Mich. 402. The testimony need not be printed at all unless it is claimed that there is none to support a finding or that the court refused to find an undisputed fact considered to be material. *Edgerly v. Ladies of Maccabees*, 175 Mich. 43. If the evidence is not all sent up, the findings of fact are presumed to have been supported by evidence; and the court of review is not at liberty to draw inferences of fact in cases at law. *Scotten v. Sutter*, 37 Mich. 530; *Gillam v. Boynton*, 36 Mich. 236; *Randall v. Randall*, 37 Mich. 570-71; *Trudo v. Anderson*, 10 Mich. 365; *Peabody v. McAvoy*, 23 Mich. 529; *Feller v. Green*, 26 Mich. 72-3; *Capen v. Stevens*, 29 Mich. 503; *Burk v. Webb*, 32 Mich. 180; *Shelden v. Dutcher*, 35 Mich. 12; *Brown v. McHugh*, 36 Mich. 435; *Weirich v. Cook*, 39 Mich. 135; *Briggs v. Parsons*, 39 Mich. 404; *Yelverton v. Steele*, 40 Mich. 540; *Stockle v. Sillisbee*, 41 Mich. 622; *Mills v. Camp*, 41 Mich. 647; *O'Connor v. Beckwith*, 41 Mich. 659; *Neib v. Hinderer*, 42 Mich. 453; *Mitchell v. Chambers*, 43 Mich. 158; *Johnson v. Crispell*, 43 Mich. 262; *Sayles v. Curtis*, 45 Mich. 280.

**IMPROPER EVIDENCE DISREGARDED:** In a trial by the court without a jury if proper evidence was excluded a new trial would be necessary, but any improper evidence may, as in chancery causes, be disregarded, if not controlling or necessary to the conclusions arrived at. *Rose v. Lewis*, 10 Mich. 485.

**REVIEW OF CONCLUSIONS:** Can be reviewed only so far as to see whether they are warranted by the facts found.—*Tillman v. Fuller*,

13 Mich. 119. And all the facts necessary to support the conclusions must appear. *People v. Wells*, 8 Mich. 107; *Wood v. La Rue*, 9 Mich. 161; *Stansell v. Corning*, 21 Mich. 244-5; *Burk v. Webb*, 32 Mich. 180; *Burdick v. Chamberlain*, 38 Mich. 611; *Gray v. Pike*, 38 Mich. 650. Exceptions to conclusions of law must stand or fall by the finding of facts. *Upton v. Kennedy*, 36 Mich. 218. See *Brown v. McHugh*, 36 Mich. 434. Conclusions of law will not be reviewed unless excepted to. *Peabody v. McAvooy*, 23 Mich. 527; *Green v. Bennett*, 23 Mich. 469; *Feller v. Green*, 26 Mich. 71; *McMillan v. Cheese Factory*, 23 Mich. 544; *Cook v. Burnett*, 83 Mich. 251; *Weist v. Morlock*, 116 Mich. 606.

**REVIEW—FINDINGS OF COURT:** The supreme court will review only the questions, of whether the findings of facts of the trial judge are against the clear weight of the evidence. *Dows v. Schuh*, 206 Mich. 133; *American Ins. Co. of N. J. v. Martinek*, 203 Mich. 198; *Woodward v. Huron Implement Co.*, 200 Mich. 523; *Reese v. Dyer*, 199 Mich. 210; *Plankinton Packing Co. v. Berry*, 199 Mich. 216; *Warren v. Federal Life Ins. Co.*, 198 Mich. 356; *Couple-Gear Freight Wheel Co. v. Lake Shore & M. S. R. R.*, 196 Mich. 432; *Oudersluys v. Carstens*, 194 Mich. 523; *In re Cutter's Estate*, 194 Mich. 38.

### Of Tender and Offer of Judgment.

#### (12588). Tender—How and When May be Made.

**SEC. 16.** When any action at law shall be commenced, for the recovery of a sum certain, or which may be reduced to a certainty by calculation, or for a casual or involuntary trespass or injury, the defendant, in any stage of the proceedings before trial in such causes, or before such damages shall have been assessed, may tender to the plaintiff, or his attorney, any sum of money which such defendant shall conceive sufficient amends for the injury done, for which such action or proceeding was instituted, or sufficient to pay the plaintiff's demand, together with the costs of such action or proceeding, to the time of making such tender.

**HISTORY:** Re-enacts Sec. 35, R. S. '46, Ch. 107, being C. L. '57, (4536); C. L. '71, (6180); How. 7765; C. L. '97, (10405). Unchanged, however, "or before judgment rendered in an action of debt." Under this section and Sec. 10406, in a proceeding against an attorney for failure to pay over money collected, plaintiff is not required to accept or recognize an additional tender made after the pleadings in the suit are concluded. Modified.

See note to following section.

#### (12589). Interest and Cost not to be Recovered.

**SEC. 17.** If it shall appear upon the trial of the cause, or upon the assessment of damages, that the amount so tendered was sufficient to pay the plaintiff's demand, or was a sufficient

amends for the injury done, and the costs of the suit or proceeding up to the time of such tender, the plaintiff shall not be entitled to recover or collect any interest on such demand from the time of such tender, or any costs incurred subsequent to that time, but shall be liable to the defendants for the costs incurred by him subsequent to such time.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 107, being C. L. '57, (4537); C. L. '71, (6181); How. 7765; C. L. '97, (10406). Unchanged.

**TENDER:** Tender after suit must conform to the provisions of this and the preceding section. It is not allowed to bar further prosecution, but only to stop interest and costs and subject the plaintiff to subsequent costs. It may be shown on the trial. *Snyder v. Quarton*, 47 Mich. 211. See *McKercher v. Curtis*, 35 Mich. 478; *Hollister v. Brown*, 19 Mich. 163. In a case where a full tender is made, subsequent costs must go to the defendant. *Willcox v. L. & R. Powder Co.*, 44 Mich. 35. A tender to be effective must be without qualification or condition. *Zells v. Stockwell*, 171 Mich. 270. A tender may be applied in part payment where the judgment is for a larger amount. *Thompson v. Loyal Protective Assn.*, 167 Mich. 41. See *Knapp v. Hubbard*, 176 Mich. 265.

#### (12590). Offer of Judgment.

**SEC. 18.** In any action at law, founded upon contract for the payment of money in a court of record, the defendant may at any time before the trial, serve upon the plaintiff an offer, in writing, to allow judgment to be taken against him for the sum in said notice specified, with costs incurred up to the time of serving such offer; if the plaintiff accept the offer, and give notice thereof, in writing, within ten days, he may file the offer, with an affidavit of service of notice of acceptance. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but must pay the defendant's costs from the time of the offer.

**HISTORY:** Re-enacts Sec. 1 of Act 79 of '67, being C. L. '71, (5803); How. 7372; C. L. '97, (10084), changing time of acceptance from twenty to ten days. Modified.

**CONSTRUED:** *Walbridge v. Barrett*, 118 Mich. 436; *Baars v. Twp of Laketon*, 163 Mich. 665.

**OFFER OF JUDGMENT:** The time within which an offer of judgment can be accepted is reduced to ten days.

#### (12591). Offer of Damages at Specified Sum.

**SEC. 19.** In any such action at law, the defendant may, with

his plea, serve upon the plaintiff an offer, in writing, that if he fail in his defense, the damage may be assessed at a specified sum; and if the plaintiff signify his acceptance thereof, in writing, within ten days, the issue upon the trial shall be whether the defendant is indebted to the plaintiff for the causes stated in the plaintiff's declaration, and the finding of the court or verdict of the jury shall be "for the plaintiff," or "for the defendant;" if such finding or verdict shall be for the plaintiff, he shall be entitled to judgment for the sum mentioned in the said offer and acceptance.

**HISTORY:** Re-enacts Sec. 2 of Act 79 of '67, being C. L. '71, (5804); How. 7373; C. L. '97, (10085), changing the time for acceptance. Modified.

**(12592). Offer not Accepted.**

**SEC. 20.** If the plaintiff does not accept the offer, he shall prove his damages as if it had not been made, and shall not be permitted to give it in evidence; and if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages; such expense shall be ascertained at the trial.

**HISTORY:** Re-enacts Sec. 3 of Act 79 of '67, being C. L. '71, (5805); How. 7374; C. L. '97, (10086), without material change except in phraseology. Unchanged.

**Of Jury Trials.**

**(12593). When May be Impaneled in Chancery.**

**SEC. 21.** In chancery cases if there be an issue of fact which, in the opinion of the court, shall render the intervention of a jury necessary or proper, said court shall, on request of either party, order a jury impaneled for the trial thereof, and the verdict of such jury may be used upon the hearing of the cause.

**HISTORY:** Re-enacts Sec. 56, R. S. '46, Ch. 90, being C. L. '57, (3510); C. L. '71, (5092); How. 6646; C. L. '97, (462), inserting the words "in chancery cases." Substantially unchanged.

**JURY TRIAL:** No change has been made in the practice with reference to demanding a jury trial. It having been customary to include the demand for a jury trial in the notice of trial or note of issue and these having been abolished it seems well to include herein a reminder that it will still be necessary to file a demand for a jury

trial. Of course, the court in its discretion can order a jury trial, even, if the same has not been demanded.

**ISSUE OF FACT:** Procedure in case of. *Dunn v. Dunn*, 11 Mich. 284. However much entitled to respect and credence in a case of doubt or difficulty on the facts, or upon a point specially appropriate for decision by jury, and when no questionable rulings appear to detract from it, yet it must, after all, be held as not absolutely decisive and binding. *Willard v. Magoon*, 30 Mich. 278; *Dunn v. Dunn*, 11 Mich. 284; See *Hoffman v. Beard*, 22 Mich. 69; *Maier v. Judge*, 112 Mich. 491; *Fidelity Mutual Life Ins. Co. v. Blain*, 144 Mich. 218, 219; *Cole v. Cole*, 169 Mich. 347, 350. The verdict of a jury in chancery causes is merely advisory. *Detroit United Railway v. Smith*, 144 Mich. 238.

Issues of fact in equity cases are triable by the chancellor, unless the chancellor sees fit to submit the issues to a jury. *Cole v. Cole Realty Co.*, 169 Mich. 350. 135 N. W. 321, 19 D. L. N. 175.

**JURY:** The provisions in act 267 of '87, p. 358, giving the verdict of a jury in a chancery suit the same force and effect as the verdict of a jury "in an action at law," was held unconstitutional. *Brown v. Judge*, 75 Mich. 274. See also *Tabor v. Cook*, 15 Mich. 325.

**JURY TRIAL IN CHANCERY:** It is within the power of a circuit judge, in the exercise of a legal discretion, to order a jury for the trial of an issue of fact in a chancery case, under this section, before any testimony has been taken as well as after the testimony has been taken in whole or in part, since the verdict of the jury is not binding upon the court but is advisory merely. *Gray v. Berrien Circuit Judge*, 205 Mich. 205, 171 N. W. 431.

#### (12594). Fee Payable to Clerk.

**SEC. 22.** In every case where a trial by jury may be demanded, the party making the demand shall pay to the clerk of the court the sum of three dollars before the impaneling of said jury shall be begun. Such sum shall be taxed in favor of the party paying the same, in case he recovers a judgment for his costs.

**HISTORY:** Supersedes part of Sec. 17 of Act 157 of '51, being C. L. '57, (3427); C. L. '71, (4953); How. 6474; C. L. '97, (315). Changed.

**ENTRANCE FEE:** *Chaffee v. Soldan*, 5 Mich. 242; *People v. Treadway*, 17 Mich. 480. The county clerk is only responsible for the entry and jury fees actually paid to him. *People v. Treadway*, 17 Mich. 480. The entry of a cause of action upon the calendar shows payment prima facie, but if it is made to appear that no such payment was made, the presumption of payment may be overcome. *People v. Treadway*, 17 Mich. 485.

**JURY FEE:** In *Odell v. Reynolds*, 40 Mich. 33, the court said: "It is suggested that under Sec. 4953 the jury fee should have been paid, and it not having been in this case, the demand was not made in the manner prescribed by law. This payment need not be made at the time the jury is demanded. The most that could be insisted upon would be to require payment before the jury should be called

in the case or sworn; but whether this is so or not, a failure to pay at the time the demand is made cannot be considered as nullifying the demand."

**(12595). Trials of Fact.**

SEC. 23. Trials of fact, by jury, in every court of record of common law jurisdiction, shall be had by jurors drawn or ordered summoned and returned, in the manner hereinbefore directed, except as otherwise provided by law; and no alien shall be entitled to a jury of part aliens or strangers, in any case whatever.

HISTORY: Re-enacts Sec. 43, R. S. '46, Ch. 103, being C. L. '57, (4385); C. L. '71, (6012); How. 7592; C. L. '97, (10223). Unchanged. See *People v. MacGregor*, 178 Mich. 436.

**(12596). Interest of Clerk.**

SEC. 24. It shall not be a cause of challenge to any panel or array of jurors, in any cause, that the clerk of the county who drew them was a party or interested in such cause, or was counsel or attorney for, or related to either party therein.

HISTORY: Re-enacts Sec. 44, R. S. '46, Ch. 103, being C. L. '57, (4386); C. L. '71, (6013); How. 7593; C. L. '97, (10224). Unchanged.

CHALLENGES: Challenges to the array must be in writing. *People v. Doe*, 1 Mich. 453; *Ryder v. People*, 38 Mich. 269. See *People v. MacGregor*, 178 Mich. 436.

**(12597). Interest of Sheriff.**

SEC. 25. It shall not be a good cause of challenge to the panel or array of jurors in any cause, if such jurors shall have been drawn in the manner hereinbefore provided, that they were summoned by the sheriff who was a party, or interested in such cause, or related to either party therein, unless it be alleged in such challenge, and be satisfactorily shown, that some of the jurors drawn by the clerk were not summoned, and that such omission was intentional.

HISTORY: Re-enacts Sec. 45, R. S. '46, Ch. 103, being C. L. 57, (4387); C. L. '71, (6014); How. 7594; C. L. '97, (10225). Unchanged.

**(12598). Liability to Pay Taxes.**

SEC. 26. In penal actions, for the recovery of any sum, it shall not be a good cause of challenge to the jurors summoned, or to any officer summoning them, that such juror or officer

is liable to pay taxes in any county, city, village, township or district, which may be benefited by such recovery.

**HISTORY:** Re-enacts Sec. 46, R. S. '46, Ch. 103, being C. L. '57, (4388); C. L. '71, (6015); How. 7595; C. L. '97, (10226). Unchanged.  
**CONSTRUED:** City of Detroit v. Railway, 134 Mich. 13.

**(12599). Electors are Competent Jurors.**

**SEC. 27.** On the trial of every action in which a county, city or village, shall be interested, the electors and the inhabitants of such county, city or village, shall be competent jurors.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 13, being C. L. '57, (328); C. L. '71, (460); How. 466; C. L. '97, (2468); changing the phraseology, however, to make the section apply to cities and villages as well as counties. Modified.

**CONSTRUED:** This section does not deprive a party of the right of a trial by an impartial jury, since the interest of the elector and the inhabitant is so remote, indirect and insignificant. *Smith v. German Ins. Co.*, 107 Mich. 270. See also, *Detroit v. Detroit Ry.*,

**(12602). Names of Jurors Drawn Deposited in Another Box.**

SEC. 30. When an issue shall be brought on for trial, the clerk of the court, under its direction, shall openly draw out of the box in which they were deposited, so many of the ballots containing the names of the petit jurors returned, one after another, as shall be sufficient to form a jury.

HISTORY: Re-enacts Sec. 49, R. S. '46, Ch. 103, being C. L. '57, (4391); C. L. '71, (6018); How. 7598; C. L. '97, (10229). Unchanged.

**(12603). Persons First Drawn to be Jury.**

SEC. 31. The first twelve persons who shall appear as their names are drawn and called, and shall be approved as impartial between the parties, shall be sworn, and shall be the jury to try the cause.

HISTORY: Re-enacts Sec. 50, R. S. '46, Ch. 103, being C. L. '57, (4392); C. L. '71, (6019); How. 7599; C. L. '97, (10230), without material change except in phraseology. Unchanged.

SHALL BE THE JURY: As to the discretionary power of the judge to excuse a juror, see subd. 5 of Compiler's Section (12208), and note. It is no ground of error for the court to be more cautious and strict in securing an impartial jury than the law actually requires. *Atlas Min. Co. v. Johnston*, 23 Mich. 39. And for that purpose the court may properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause. *Id.* 39-40. See notes to Compiler's Sections (12189), (12190) and (12614).

Compiler's Sections (12189) and (12190) providing that the panel of jurors shall be drawn from persons whose names appear on the assessment rolls for that year, contemplate that only such persons shall be competent as jurors; and any juror called in a case whose name does not so appear may be challenged for cause. *People v. Thacker*, 108 Mich. 652.

And a challenge for cause to a juror who has served on the regular panel in the same court within a year must be sustained. *Id.* The trial judge must be allowed to place some limit upon the examination of jurors. *Ford v. Cheever*, 113 Mich. 440.

Courts should protect the rights of parties in selecting jurors and may properly exclude any incompetent or drunken person, even against objection. *Torrent v. Yager*, 52 Mich. 506. After the parties have announced themselves satisfied with the jury and they are sworn, neither party can peremptorily challenge a juror, against the objection of the opposite party. *Ayers v. Hubbard*, 88 Mich. 155; *Thorp v. Deming*, 78 Mich. 124; *People v. Dolan*, 51 Mich. 610.

See also *People v. Quimby*, 134 Mich. 626.

In *Ayres v. Hubbard*, 88 Mich. 157, the court said: "The statute provides that in all civil cases each party may challenge peremptorily four jurors. How. State. Sec. 7607. The right to peremptorily challenge in civil cases was unknown to the common law, and is purely statutory, and neither party can be deprived of his right until the jury is sworn. When the jury has been impaneled and duly sworn



to try the cause, this right to peremptory challenge must end. It was not within the discretion of the trial court, after the jury had been sworn to try the cause, to permit this peremptory challenge. The law provides that the first 12 persons who shall be approved as indifferent between the parties shall be sworn, and shall be the jury to try the cause. These 12 jurors were sworn, and the question could not, therefore, be opened, except by consent of the parties, that jury set aside, and a new jury impaneled, simply for the purpose of permitting one of the parties to exercise a right which should have been exercised before the jury was sworn.

This exact question has never been presented to this court, but in *Thorp v. Deming*, 78 Mich. 124, error was assigned upon the ruling of the court in refusing to permit the plaintiff a peremptory challenge after the jury was sworn. It was said by Mr. Justice Campbell, in speaking on that subject:

'No authority has been shown to us for allowing a peremptory challenge after the jury is sworn, and there was no error in so holding.'

Some period must be fixed during the impaneling of the jury and the actual commencement of the trial when the right to peremptory challenge must end, and we are satisfied that when the parties announce themselves satisfied, and the panel of jurors is sworn to try the cause, the right ends. The court was in error, therefore, in the ruling made." Before a juror has been sworn in the case, the judge may excuse him for any reason personal to the juror which seems sufficient to the judge. *People v. Carrier*, 46 Mich. 444; *Atlas Mining Co. v. Johnston*, 23 Mich. 36. The rejection upon a challenge of a salesman as a juror, against the objection of the opposite party, will not be considered as error. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

#### (12604). Names of Jurors Drawn Deposited in Another Box.

SEC. 32. The ballots containing the names of the jurors so sworn, shall then be deposited in another box, and there kept apart from the ballots containing the names of the other jurors until such jury be discharged.

HISTORY: Re-enacts Sec. 51, R. S. '46, Ch. 103, being C. L. '57, (4393); C. L. '71, (6020); How. 7600; C. L. '97, (10231). Unchanged.

CONSTRUED: It is not necessary to return these names to the slip-box, as provided in the next section, before drawing another jury for another cause. *People v. Craig*, 48 Mich. 502.

#### (12605). When Returned to First Box.

SEC. 33. After such jury shall have been discharged, the ballots containing their names shall be again rolled or folded up in the same manner as hereinbefore directed, and shall be returned to the box from which they were first taken; and the same course shall be pursued, as often as any issue shall be brought on to be tried.

**HISTORY:** Re-enacts Sec. 52, R. S. 46, Ch. 103, being C. L. '57, (4394); C. L. '71, (6021); How. 7601; C. L. '97, (10232). Unchanged. See *People v. Craig*, 48 Mich. 502.

**(12606). When Jury Drawn From Names Remaining in Box.**

**SEC. 34.** If any issue shall be brought on to be tried, while there shall be a jury impaneled in another cause in the same court, and not then discharged, the court may order a jury to be drawn in the manner above directed, out of the box containing the ballots then undrawn; but in all other cases the ballots containing all the names of jurors returned, and appearing at such court, and not discharged or excused from serving, shall be placed together in the same box, before any jury shall be drawn therefrom.

**HISTORY:** Re-enacts Sec. 53, R. S. '46, Ch. 103, being C. L. '57, (4395); C. L. '71, (6022); How. 7602; C. L. '97, (10233). Unchanged. See *Compilers' Section* 12610.

**(12607). Jury of Bystanders.**

**SEC. 35.** If by any reason of there being one or more juries impaneled, or for any other reason, there shall not remain any ballots undrawn, or if in consequence of jurors being set aside, no jury can be obtained from the list of those returned by the sheriff, for the trial of any issue, the court may, as in other cases, order the sheriff, or if he be a party or interested in the cause, some other person to be appointed by the court, to summon jurors from the bystanders, or other persons, who shall be returned and sworn as hereinbefore directed, and shall be a competent jury for the trial of such issue, notwithstanding there may be none of the panel of jurors returned by the sheriff upon such jury: *Provided*, That the court may, in its discretion, instead of drawing talesmen from the bystanders, or others, order that such number of jurors as he may deem necessary be drawn, in accordance with law, from the regular list of jurors.

**HISTORY:** Re-enacts Sec. 54, R. S. '46, Ch. 103, being C. L. '57, (4396); C. L. '71, (6023); How. 7603; C. L. '97, (10234). See also Sec. 145 of Ch. 2, of this Act. *Compilers' Section* (12214). Modified.

**CONSTRUED:** *People v. Summers*, 115 Mich. 537. A sheriff whose name is indorsed upon an information as a witness against respondent is not thereby disqualified to draw talesmen for the jury. *People v. Lalonde*, 171 Mich. 287. This provision brings the substance of a provision in C. L. '97 (344) into this section, except that it is not made mandatory.

**(12608). Ballots to be Shaken Before Drawing.**

SEC. 36. Before any jury shall be drawn, the box containing the ballots of the names of the jurors shall be closed, and shall be well shaken, so as to intermingle such ballots; and the clerk shall draw such ballots without seeing the names written on them, through a hole in the top or lid of such box, so large only as conveniently to admit his hand.

HISTORY: Re-enacts Sec. 55, R. S. '46, Ch. 103, being C. L. '57, (4397); C. L. '71, (6024); How. 7604; C. L. '97, (10235). Unchanged.

**(12609). Excuse of Juror for Absence.**

SEC. 37. If any juror be absent at the time his name is drawn, or be set aside, or excused from serving on the trial of any issue, the ballot containing his name shall be rolled up or folded again, in the same manner as before, and returned to the box containing the undrawn ballots, so soon as the jury shall be sworn to try such cause.

HISTORY: Re-enacts Sec. 56, R. S. '46, Ch. 103, being C. L. '57, (4398); C. L. '71, (6025); How. 7605; C. L. '97, (10236). Unchanged.

**(12610). When More Than One Judge is Trying Cases.**

SEC. 38. In any judicial circuit in this state wherein more than one judge is trying jury cases at the same time, it shall be lawful to impanel a jury in one room from jurors drawn in the usual manner by a judge in charge of a case in another room where a jury may at the same time be in the process of being impaneled, and the different courts are authorized to make appropriate rules to properly guide and govern this practice.

HISTORY: Re-enacts and supersedes Act 75 of '09, p. 118, Eff. Sept. 1, although such act was not expressly repealed by this Act. Unchanged.

**(12611). Findings Upon Particular Questions.**

SEC. 39. In all cases where an issue of facts is tried before any court of record, the court shall at the request in writing, of the counsel of either party, instruct the jury if they return a general verdict, also to find upon particular questions of facts, respecting which the issue is joined, to be stated in writing, and shall direct a written finding thereon: *Provided*, Such special questions shall not exceed five in number, and

shall be each in single, short sentences, readily answered by yes or no. The special verdict, or finding, shall be filed with the clerk, and entered upon the minutes, and when any special finding of fact shall be inconsistent with a general verdict, the former shall control the latter, and the court give judgment accordingly.

**HISTORY:** This section re-enacts part of Sec. 57, R. S. '46, Ch. 103, being C. L. '57, (4399); As Am. '71, p. 66, Act 54, Imd. Eff. Mar. 29; C. L. '71, (6026); How. 7606; As Am. '85, p. 12, Act 15, Eff. Sept. 19; C. L. '97, (10237). Unchanged.

**APPLICATION OF SECTION:** This section does not apply to condemnation cases. *Grand Rapids v. Luce*, 92 Mich. 97; *Toledo, etc., R. R. Co. v. Campau*, 83 Mich. 31, 33. Whether this section applies to the trial of an issue of fact, framed in the supreme court in a mandamus case and sent down to the circuit for trial, is doubtful. *Miner v. Vedder*, 66 Mich. 104.

Does not apply to criminal cases. *People v. Tessmer*, 171 Mich. 529; *People v. Marion*, 29 Mich. 40-1.

**VERDICT:** The jury may render either a general or a special verdict, according to the exigencies of the case, but cannot be required to do either one or to give reasons for a general finding. *Peck v. Snyder*, 13 Mich. 21. The power to render special verdicts is not taken away by the provision for special questions. That provision is intended only to explain a general verdict. *Hendrickson v. Walker*, 32 Mich. 68. Where the jury find the facts, they find for the party who should prevail on those facts and he is entitled to judgment. *Id.* See *Thorsen v. Babcock*, 68 Mich. 523. The court can add nothing to a special finding, but can draw only the legal conclusions from the facts found. *People v. Wells*, 8 Mich. 104. The jury in rendering a special verdict should confine themselves to the facts; they have nothing to do with the application of the law. *Erwin v. Clark*, 13 Mich. 10. A verdict may be amended, even after one or more terms, and made to apply to the proper counts, in the furtherance of justice. *Sweetzer v. Mead*, 5 Mich. 33. See notes to Compilers' Section (12586).

As to the judge's finding of facts being equivalent to a special verdict. See also *Prowell v. Nevendorf*, 141 Mich. 272.

**SPECIAL QUESTIONS:** This provision does not take away the power to render special verdicts, but is intended only to explain or aid a general verdict. *Hendrickson v. Walker*, 32 Mich. 68. Counsel are not obliged to furnish special questions until after the arguments are closed. *Zucker v. Karpeles*, 88 Mich. 413, 425. Withdrawal of special questions, after submission to jury. *Cook v. Clinton*, 64 Mich. 316. In actions of negligence. *Peer v. Ryan*, 54 Mich. 224. In libel cases. *People v. Post & Tribune Co.*, 54 Mich. 457. In garnishment cases. *Bethel v. Linn*, 63 Mich. 464.

**PURPOSE OF SPECIAL QUESTIONS:** The purpose is to enable the court to know what view the jury take of the material issues and to correct their possibly wrong inferences from the facts which they find to exist. *Cole v. Boyd*, 47 Mich. 100; *Mechanics' Bank v. Barnes*, 86 Mich. 646. See, also, *Maclean v. Scripps*, 52 Mich. 520; *Beecher*

v. Galvin, 71 Mich. 396; Wrecking, etc., Co. v. McMorran, 73 Mich. 472. The purpose of special findings is to know what the rights of the parties are and to have them spread upon the records. *Prob. Judge v. Abbott*, 50 Mich. 479.

**FORM OF QUESTIONS:** Requests for findings by the jury which do not call for their conclusions on any fact in issue, but only on the truthfulness or accuracy of certain named witnesses on certain facts which were matters of evidence merely, however insignificant they may have seemed, are very objectionable. *Balch v. Railroad Co.*, 78 Mich. 658-9. See *McDonnell v. Drug Co.*, 170 Mich. 295. The questions must be so framed as to call for an answer which may be controlling on the main issue. *Cousins v. Railway Co.*, 96 Mich. 389, citing *Balch v. Railroad Co.*, 78 Mich. 654; *Crane v. Reeder*, 25 Mich. 304; *Chapman v. Strong*, 162 Mich. 631; *Grimme v. Association*, 167 Mich. 249. Complicated questions should not be presented to the jury, *Ward v. Campau*, 161 Mich. 85. Neither should mere questions of evidence be presented. *Id.* When question is inconclusive. *Malkowski v. Ols*, 161 Mich. 304; *Taylor v. Electric Co.*, 184 Mich. 591.

**SUBMISSION OF QUESTIONS:** Special questions can be submitted only in cases where the jury's verdict is conclusive upon the facts found. *Loomis v. Armstrong*, 63 Mich. 367. See *Oliver v. Sanborn*, 60 Mich. 346, 357. It is error to refuse to submit special questions, if proper in form and substance. *Zucker v. Karpeles*, 88 Mich. 413, 426; *Sherwood v. Railway Co.*, 82 Mich. 378; *Harrison v. Railroad Co.*, 79 Mich. 409; *Farnsworth v. Coots*, 46 Mich. 117; *Harbaugh v. Cicotte*, 33 Mich. 241; *Beaudin v. Bay City*, 136 Mich. 340. But it is not error to refuse to submit special questions upon immaterial, inconclusive or admitted matters. *Pigott v. Engle*, 60 Mich. 226, citing *People v. White*, 53 Mich. 537; *Dickerson v. Dickerson*, 50 Mich. 37; *Swift v. Plessner*, 39 Mich. 178; *Crane v. Reeder*, 25 Mich. 303; *Harbaugh v. Cicotte*, 33 Mich. 241; *Johnson v. Insurance Co.*, 39 Mich. 33; *Fowler v. Hoffman*, 31 Mich. 215; *Daniels v. Aldrich*, 42 Mich. 58. See also, *Castner v. Insurance Co.*, 50 Mich. 273; *Foster v. Gaffield*, 34 Mich. 356; *Brooks v. Fairchild*, 36 Mich. 232. Nor when the answer, whatever it may be, cannot affect the general result. *Crane v. Reeder*, 25 Mich. 303; *Sheahan v. Barry*, 27 Mich. 218; *Frankenburg v. Nat'l Bank*, 33 Mich. 46; *Harbaugh v. Cicotte*, 33 Mich. 241; *Mich. Panelling Co. v. Parsell*, 38 Mich. 475; *Johnson v. Cont. Ins. Co.*, 39 Mich. 33; *Swift v. Plessner*, 39 Mich. 178; *Pettibone v. Maclem*, 45 Mich. 382; *Toulman v. Swain*, 47 Mich. 82; *Banner Tobacco Co. v. Jennison*, 48 Mich. 460; *Miner v. Vedder*, 66 Mich. 101. Nor when the court submits a question better adapted to the case. *Chilson v. Wilson*, 38 Mich. 267. Nor when the question is one of law rather than of fact. *Banner Tobacco Co. v. Jennison*, 48 Mich. 460. Nor when the question is a general and sweeping one, instead of a "particular question of fact." *Dubois v. Campau*, 28 Mich. 305-6. Nor when the question involves facts from which no legal conclusion can be drawn. *People v. White*, 53 Mich. 539. But they cannot be refused on the ground that the parties agreed on the facts in the presence of the jury. *Prob. Judge v. Abbott*, 50 Mich. 479.

**ANSWERS TO QUESTIONS:** The jury may retire to consider the special questions or answer without retiring, as they desire. *Bottomley v. Goldsmith*, 36 Mich. 28. The jury cannot be compelled to answer the questions but a failure to answer or find any affirmative fact

essential to sustain the verdict will have the force and effect to nullify the verdict, and result in a mistrial. *Harbaugh v. Cicotte*, 33 Mich. 247. The answer of a jury to a special question is of no account, if based on testimony improperly received. *Peoples v. Post & Tribune Co.*, 54 Mich. 457. Where, under the evidence, there can be but one answer to a special question, it is not error for the court to direct the jury to give that answer. *Van Auken v. Railway Co.*, 96 Mich. 307. But it is error for the court to instruct the jury that they must find the special facts in harmony with a general verdict already rendered. *Cole v. Boyd*, 47 Mich. 98; *Maclean v. Scripps*, 52 Mich. 250; *Beecher v. Galvin*, 71 Mich. 396; *Mechanics' Bank v. Barnes*, 86 Mich. 646; *Brassel v. Railway Co.*, 101 Mich. 11-12. But see *People v. Murray*, 52 Mich. 291; *Germaine v. City of Muskegon*, 105 Mich. 215. If the jury render a special verdict and answer that they cannot agree upon certain special questions containing the material points at issue, the verdict will be set aside. *Cole v. Boyd*, 47 Mich. 98. Also, if they make no reply to material questions. *Crane v. Reeder*, 25 Mich. 320. And a verdict will not be sustained when it is apparent, from the special findings, that it should not be. *Dupont v. Starring*, 42 Mich. 492. Mistrial occurs when the jury say that they do not know, in answer to special questions that, under the charge and evidence, are material to the issue. *Wilson v. Railroad Co.*, 57 Mich. 157; *Maclean v. Scripps*, 52 Mich. 215; *Harbaugh v. Cicotte*, 33 Mich. 242. Where the answers to the special questions negative the case made by the declaration, defendants are entitled to judgment on the special findings. *Thorsen v. Babcock*, 68 Mich. 523. When the answers cannot be considered *res judicatae* in subsequent suit. *Whitney v. Bayer*, 101 Mich. 151.

**SPECIAL FINDINGS GOVERN:** See *Gilbert v. American Ins. Co.*, 30 Mich. 400. The general verdict must yield to the special findings and not the special findings to the general verdict. *Wrecking Co. v. McMorran*, 73 Mich. 472; *Cole v. Boyd*, 47 Mich. 100. And the court shall give judgment accordingly. *Trevor v. Hawley*, 99 Mich. 504. See *Thorsen v. Babcock*, 68 Mich. 523. Special finding inconsistent with general verdict. *Nottingham v. Vincent*, 50 Mich. 461; *People v. Piper*, 50 Mich. 390. See *Hemenway v. Burnham*, 90 Mich. 230.

**STATUTE APPLIED:** The provisions of the statute do not apply to the trial of criminal cases, and any limitation upon the right of the jury to find a general verdict in criminal cases is against the policy of the law. *People v. Tessner*, 171 Mich. 529; *People v. Root*, 117 Mich. 578; *People v. Marion*, 29 Mich. 31. Neither does this statute apply to condemnation proceedings. *Grand Rapids v. Luce*, 92 Mich. 97; *Toledo, etc., R. R. Co. v. Campau*, 83 Mich. 31. In *Minor v. Vedder*, 66 Mich. 104, the Court said: "We doubt whether this statute was intended to or does apply to a case like the present, where the issue of fact is made up in this court, and specific questions are sent down to the circuit for the determination of the jury. The circuit judge cannot certainly restrict the scope of the inquiry ordered by us, and it is not certain that he can enlarge it. But, be that as it may, none of the questions propounded were material to the issue in such sense that their determination by the jury would, either one way or the other, have served any useful or important purpose in arriving at the matter which we desire to have adjudicated by a jury. There was therefore no harmful error in refusing them."

**VERDICT UNDER THE STATUTE:** It may be said that a jury may find a general or special verdict according to the exigencies of the case; but a judge cannot direct or compel them to do either, and more particularly, not to give reasons for a general finding. *Peck v. Snyder*, 13 Mich. 33. It is manifest that the power to render special verdicts is not taken away by the provisions for special questions, for those provisions are intended only to explain a general verdict. *Hendrickson v. Walker*, 32 Mich. 68. The court can add nothing to a special finding but can draw only the legal conclusion from the facts found. *People v. Wells*, 8 Mich. 104. In *Erwin v. Clark*, 13 Mich. 19, the court said: "After finding the facts specially the jury go on to apply the law according to their own judgments, and determine that if the usage is allowed to prevail, the plaintiff cannot recover. This is entirely beyond their province. Having found enough to determine the plaintiff's right to recover, their verdict entitles him to such judgment as the facts so found will justify without regard to their legal opinion on the subject." A verdict may be amended, even after one or more terms, and made to apply to the proper counts in the furtherance of justice. *Sweetzer v. Mead*, 5 Mich. 33.

**SPECIAL QUESTIONS UNDER THE STATUTE:** This statute in conformity with well-settled principles, makes a special finding in all cases control the general verdict, for their purpose is to enable the court to know what view the jury take of the material issues, and to correct their possible wrong inferences from the facts which they find to exist. *Cole v. Boyd*, 47 Mich. 100. It may be said that the purpose of special findings is to know what the rights of the parties are and to have them spread upon the records. *Probate Judge v. Abbott*, 50 Mich. 479. See *Mechanics' Bank v. Barnes*, 86 Mich. 646; *Wrecking, etc., Co. v. McMorran*, 73 Mich. 472; *Beecher v. Galvin*, 71 Mich. 396; *Maclean v. Scripps*, 52 Mich. 250. In *Hendrickson v. Walker*, 32 Mich. 69, the court said: "The power to find special verdicts is as old as the common law, and was always competent. It is a very proper and convenient practice when there is no serious difference between parties on the facts, and in such cases it is not unusual for counsel to agree upon the verdict. This is not so common now as formerly, since our laws have enabled courts to pass upon cases without a jury. But a special verdict is no less competent than before. The statute authorizing special questions contemplates that they shall be put in explanation or aid of a general verdict, but it in no way destroys the former practice." See *Keeler v. Robertson*, 27 Mich. 116. Counsel are not obliged to furnish special questions until after arguments are closed. *Zucker v. Carpeles*, 88 Mich. 413.

**SUBMISSION OF QUESTIONS:** Where both parties consented to the submission of a special question to the jury, not in strict conformance with this section of the statute, they cannot thereafter complain. *McDonald v. Central Drug Co.*, 170 Mich. 291. Under this statute the court may properly refuse to submit questions not within the issue. *Grimme v. General Counsel of Fraternal Aid Ass'n.*, 18 D. L. N. 600, 132 N. W. 497. Furthermore, complicated questions and those presenting mere questions of evidence, answers to which would not be controlling, should not be submitted to the jury. *Ward v. Campau*, 161 Mich. 85. It is not improper to refuse to submit a

special question which does not meet the statutory requirements. *Chapman v. Strong*, 162 Mich. 623. In *Balch v. Railroad Company*, 78 Mich. 658, the court said: "The circuit judge gave the jury very careful instructions on every point in the case. Defendant was allowed to present requests for findings to the jury that were very objectionable, inasmuch as they did not call for the conclusions of the jury on any facts in issue, but only on the truthfulness and accuracy of certain main witnesses on certain facts which were matters of evidence merely, however significant they may have seemed. The jury, after all these precautions, rendered a verdict not excessive in amount, and necessarily deliberate."

**ANSWERS TO QUESTIONS:** It is manifest that the jury may retire to consider the special questions or answer without retiring as they may desire. *Bottomley v. Goldsmith*, 36 Mich. 28. But the jury cannot be compelled to answer the questions. *Harbaugh v. Cicotte*, 33 Mich. 247. Where the jury fails to answer or find any affirmative fact essential to sustain the verdict, it will have the force and effect to nullify the verdict, and result in a mistrial. *Harbaugh v. Cicotte*, 33 Mich. 247. Where the answer of a jury to a special question based upon testimony improperly received, it is without result. *People v. Post and Tribune Co.*, 54 Mich. 457. Where, under the evidence, there can be but one answer to a special question it is not error for the court to direct the jury to give that answer. *Van Auken v. Railroad Co.*, 96 Mich. 307. However, in such a case it is error for the court to instruct the jury that they must find the special fact in harmony with the general verdict already rendered. *Brassel v. Railway Co.*, 101 Mich. 11; *Mechanics' Bank v. Barnes*, 86 Mich. 646; *Beecher v. Galvin*, 71 Mich. 396; *Maclean v. Scripps*, 52 Mich. 250; *Cole v. Boyd*, 47 Mich. 98. The verdict will be set aside where the jury renders a special verdict and answers that they cannot agree upon certain special questions containing the material points at issue. *Cole v. Boyd*, 47 Mich. 98.

**SPECIAL FINDINGS CONTROL:** *Sellings v. Shakespeare*, 46 Mich. 408; *Stroh v. Hinchman*, 37 Mich. 490.

If the special questions proposed, under the above statute, taken singly or as a whole, call for findings which might be controlling of the main issue, they should be submitted by the trial court. *Tyler v. Wright et al.*, 188 Mich., 561, 567; 23 D. L. N., 526; 158 N. W., 1025.

**BASED UPON FACTS:** A special question not based upon the claimed facts in the case was properly refused. *Gilbert v. Stickley*, 204 Mich. 345.

### (12612). Challenges.

**SEC. 40.** In all civil cases each party may challenge peremptorily four jurors; but in all cases of challenges for cause, such cause shall be immediately assigned, and the truth thereof shall be determined by the court.

**HISTORY:** Re-enacts Sec. 58 of R. S. '46, Ch. 103, being C. L. '57, (4400); C. L. '71, (6027); As Am. '83, p. 159, Act 147, Eff. Sept. 8; How. 7607; C. L. '97, (10238), in so far as such section relates to



civil cases. Such section, however, is not expressly repealed by this act. See Compilers' Section (14594). Changed.

**PEREMPTORY CHALLENGES:** The right to peremptory challenges was unknown to the common law and is purely statutory. Neither party can be deprived of the right until the jury is sworn. Then the right must end. *Ayres v. Hubbard*, 88 Mich. 157; *Thorp v. Deming*, 78 Mich. 124; *Hamper's Appeal*, 51 Mich. 71. Overruling a challenge for cause and compelling a party to resort to a peremptory challenge does not prejudice him where he still has a right to peremptory challenge which he does not use. *Sullings v. Shakespeare*, 46 Mich. 408; *Stowell v. Standard Oil Co.*, 139 Mich. 20. But see *Martin v. Farmers' Mutual Insurance Co.*, 139 Mich. 152. Each defendant who pleads separately, is entitled to the peremptory challenges allowed by statute. *Stroh v. Hinchman*, 37 Mich. 490; *Levyn v. Koppin*, 183 Mich. 235. And it makes no difference whether each is represented by the same counsel, or by separate counsel. *People v. Welner*, 110 Mich. 248; *Levyn v. Koppin*, 183 Mich. 235; *People v. Caruse*, 170 Mich. 138.

**CHALLENGES FOR CAUSE:** By this statute the distinction between challenges for principal cause and to the favor is practically abolished. All are classed under the same general head of challenges for cause and all are tried in the same manner. *Holt v. People*, 13 Mich. 226; *Bliss v. Caille Bros. Co.*, 149 Mich. 606.

**PEREMPTORY CHALLENGES:** When the parties announce themselves satisfied with the jury, and the panel of jurors has been sworn, the right to peremptory challenges ceases. *Nottingham v. Vincent*, 50 Mich. 461; *People v. Piper*, 50 Mich. 390.

Under this section (11956) each of defendants tried jointly for larceny does not waive his right to five peremptory challenges by failure to demand a separate trial. *People v. Caruso*, 170 Mich. 137. Each defendant having a several interest is entitled to four peremptory challenges. *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993, 21 D. L. N. 1122. This section has the effect of practically abolishing the distinction between challenges for principal cause and to the favor. *Bliss v. Caille Bros. Co.*, 149 Mich. 601.

**CHALLENGE FOR CAUSE:** In *Holt v. People*, 13 Mich. 226, the court said: "This provision is in harmony with many others in the statute, which have referred to the court the trial of contested questions of fact, either absolutely, or at the option of the court or of the parties. Unlike other provisions, however, the one in question does not point out any mode by which the decision of the court, on any question of fact, can be reviewed by an appellate tribunal, nor does it require the court, on the demand of the party, to find the facts in writing, with the conclusions of law therefrom, that it may be seen whether these conclusions are legitimate, or whether the error, if there be one, is one of fact or of law.

"It is plain, we think, that, by this statute, the distinction between challenges for principal cause and to the favor is practically abolished. All are classed under the same general head of challenges for cause, and all are tried in the same manner. It is true that some of them will be of a character to present a naked question of law, while others will require the court to enter upon examination of disputed questions of fact; but the court, in its decision, only declares that a sufficient cause for challenge does not exist, and is not required to

classify it according to any previous distinction. The sufficiency of the cause will be determined by common law rules; but neither the party, in making its challenge, nor the court, in passing upon it, has any regard to the former classification."

**(12613). No Juror Questioned for Verdict.**

SEC. 41. No juror shall be questioned for any verdict rendered by him, nor shall he be subject to any action, civil or criminal, on account of such verdict, except to indictment for corrupt conduct in rendering such verdict, in the cases prescribed by law.

**HISTORY:** Re-enacts Sec. 59, R. S. '46, Ch. 103, being C. L. '57, (4401); C. L. '71, (6028); How. 7608; C. L. '97, (10239). Unchanged.

**CONSTRUED:** Attaints for untrue verdicts are abolished and the questioning of any juror for any verdict rendered by him is forbidden. *Welch v. Tribune Pub. Co.*, 83 Mich. 670.

A juror cannot be questioned as to matters arising in a previous suit in which he sat as a juror. *People v. Albers*, 137 Mich. 680; *People v. Mol, Id.*, Mich. 700.

**(12614). Service as Juror Within One Year.**

SEC. 42. It shall be a good cause of challenge to any juror, in any court of record in this state, in addition to the other causes of challenge allowed by law, that such person has served as a juror upon the regular panel, or as talesman in such court at any time within one year previous to such challenge.

**HISTORY:** Re-enacts Sec. 3 of Act 129 of '67, as Added '69, p. 106, Act 62, Eff. July 5; C. L. '71, (6045); How. 7584; C. L. '97, (348). Unchanged.

**CONSTRUED:** This section does not prevent a juror of the regular panel from sitting as a juror on more than one case in the same term. *Burden v. People*, 26 Mich. 162, 164. But as to a talesman, see *G. R. Booming Co. v. Jarvis*, 30 Mich. 311.

**CITED:** *Wise v. Lbr. Co.*, 86 Mich. 41; *People v. Thacker*, 108 Mich. 654.

**Special Juries.**

**(12615). Struck Juries.**

SEC. 43. When it shall appear to the circuit court that a fair and impartial trial will be more likely to be obtained in any cause pending therein, by having a struck jury, such court shall order a special jury to be struck for the trial of such cause.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 103, being C. L. '57, (4378); C. L. '71, (6005); How. 7585; C. L. '97, (356). Unchanged.

**(12616). Notice of Striking Jury.**

**Sec. 44.** The party obtaining such order, shall give notice eight days previously, of the time when he will attend before the clerk of the county in which the venue in such action is laid, for the purpose of having such jury struck.

**HISTORY:** Re-enacts Sec. 37, R. S. '46, Ch. 103, being C. L. '57, (4379); C. L. '71, (6006); How. 7586; C. L. '97, (357). Unchanged.

**(12617). How Struck.**

**Sec. 45.** At the time appointed the clerk of the county shall attend at his office, with the original lists of grand and petit jurors returned to him who are then liable to serve, and in the presence of the parties or their counsel, shall proceed to strike a jury as follows:

1. The clerk shall select from such list the names of forty-eight persons, whom he shall deem most indifferent between the parties, and best qualified to try the cause;

2. The party on whose application such struck jury was ordered, or his attorney shall then first strike out one of said names, and the opposite party or his agent or attorney, shall strike out another of such names, and so alternately until each party shall have stricken out twelve names;

3. If either party shall fail to attend at the time and place of striking such persons, or shall neglect to strike out any names according to the foregoing provisions, the clerk shall strike out such names for such party;

4. The clerk shall thereupon make out a list of the names of the twenty-four persons not stricken out, and certify the same to be the persons drawn to serve as jurors, pursuant to the order of the court, and shall deliver such list, so certified, to the sheriff of the county.

**HISTORY:** Re-enacts Sec. 38, R. S. '46, Ch. 103, being C. L. '57, (4380); C. L. '71, (6007); How. 7587; C. L. '97, (358), with a small change in phraseology. Unchanged.

**(12618). Sheriff to Summon Persons Named.**

**Sec. 46.** The sheriff shall summon the persons whose names are contained on the list so delivered to him by the clerk, in the same manner as other jurors are required to be

summoned, and shall return the names of those summoned to the court, at which they are required to appear as jurors.

**HISTORY:** Re-enacts Sec. 39, R. S. '46, Ch. 103, being C. L. '57, (4381); C. L. '71, (6008); How. 7588; C. L. '97, (359). Unchanged.

**(12619). Formation of Jury.**

**SEC. 47.** A jury shall be formed in the manner directed by law in respect to other juries, from the persons so summoned and appearing, who shall try the cause in which such struck jury shall have been ordered; but the court shall have the same power to excuse or discharge any such juror, as in other cases.

**HISTORY:** Re-enacts Sec. 40, R. S. '46, Ch. 103, being C. L. '57, (4382); C. L. '71, (6009); How. 7589; C. L. '97, (360). Unchanged.

**(12620). When Clerk Interested in Cause.**

**SEC. 48.** If it shall appear to the court to which any application for a struck jury shall be made, that the clerk of the county is interested in the cause, or related to either of the parties, or not indifferent between them, such court shall appoint two proper persons to strike such jury; and the persons so appointed shall have the same powers herein conferred upon the clerk, in relation to the striking, certifying and delivering to the sheriff the names of the persons struck as jurors, and the sheriff shall in like manner summon the persons so selected.

**HISTORY:** Re-enacts Sec. 41, R. S. '46, Ch. 103, being C. L. '57, (4383); C. L. '71, (6010); How. 7590; C. L. '97, (361). Unchanged.

**(12621). Expense.**

**SEC. 49.** The expense of striking a jury shall be paid by the party applying for the same, and shall not be taxed in the costs of the suit, and the struck jurors shall be paid as in other cases.

**HISTORY:** Re-enacts Sec. 42, R. S. '46, Ch. 103, being C. L. '57, (4384); C. L. '71, (6011); How. 7591; C. L. '97, (362). Unchanged.

**General Provisions Relating to Jury Trials.**

**(12622). View of Premises.**

**SEC. 50.** When any court of record in which an issue of fact is tried by a jury, shall deem it necessary that the jury view the place or premises in question, or any property or thing

relating to the issue between the parties, such court may, on the application of either party, and the advancement of a sufficient sum to pay the expenses of the jury and officers attending them, in taking such view, order such view to be had, and direct the manner of effecting the same.

**HISTORY:** Re-enacts Sec. 71, R. S. '46, Ch. 103, being C. L. '57, (4413); C. L. '71, (6040); How. 7620; C. L. '97, (10256). Unchanged.

**(12623). Expenses Taxed as Costs.**

**Sec. 51.** The expenses advanced by any party pursuant to the provisions of the preceding section, shall be taxed like other disbursements in the suit, if the party advancing them shall prevail therein, and be entitled to costs.

**HISTORY:** Re-enacts Sec. 72, R. S. '46, Ch. 103, being C. L. '57, (4414); C. L. '71, (6041); How. 7621; C. L. '97, (10257). Unchanged.

**(12624). Trial at Close of Term.**

**Sec. 52.** Whenever at the close of any term of any circuit court of this state, the trial of a cause shall be in progress, such trial shall continue until the same is determined, and the trial shall not be construed as prolonging said term, nor to prevent the commencement of the succeeding term.

**HISTORY:** Re-enacts Sec. 73 of R. S. '46, Ch. 103, as Added '85, p. 68, Act 69, Imd. Eff. Apr. 30; How. 7621a; C. L. '97, (10258). Unchanged.

**(12625). Disagreement of Jury.**

**Sec. 53.** When any jury shall be impaneled to try any issue, to make any inquiry, or to assess any damages, if they cannot agree after being kept together for such time as shall be deemed reasonable by the court or officer before whom they shall have appeared and been impaneled, such court or officer may discharge them, and issue a precept for a new jury, or order another jury to be drawn, as the case may require; and the same proceedings shall be had before such new jury as might have been had before the jury so discharged.

**HISTORY:** Re-enacts Sec. 39, R. S. '46, Ch. 107, being C. L. '57, (4540); C. L. '71, (6184); How. 7768; C. L. '97, (10407). Unchanged.

**CONSTRUED:** *Grovier v. Hall*, 23 Mich. 11.

**(12626). Bribery of Juror.**

**Sec. 54.** If any person drawn or summoned as a juror,

shall take anything to give his verdict, or shall receive any gift or gratuity whatever, from any party to a suit, for the trial of which such person shall be drawn or summoned, in addition to any criminal punishment to which he may be subject by law, he shall be liable to the party aggrieved thereby in ten times the amount or value of the thing which he has taken or received, in addition to the actual damages sustained thereby.

**HISTORY:** Re-enacts Sec. 60, R. S. '46, Ch. 103, being C. L. '57, (4402); C. L. '71, (6029); How. 7609; C. L. '97, (10240). Unchanged.

**(12627). Embracery.**

SEC. 55. Every embracer who shall procure a person drawn or summoned as a juror, to take gain or profit contrary to the provisions of the preceding section, shall be liable in ten times the amount or value of the thing so taken, in addition to the actual damages sustained thereby.

**HISTORY:** Re-enacts Sec. 61, R. S. '46, Ch. 103, being C. L. '57, (4403); C. L. '71, (6030); How. 7610; C. L. '97, (10241). Unchanged.

**(12628). Demurrer to Evidence.**

SEC. 56. Upon the trial of any case in any of the circuit courts in this state the defendant, upon the conclusion of the plaintiff's testimony, may request the court to direct the jury to bring in a verdict for the defendant, or make demurrer to the evidence, without resting his case absolutely.

**HISTORY:** Re-enacts Sec. 1 of Act 182 of '99, p. 274, Eff. Sept. 23, and supersedes such section though it was not expressly repealed by this act. Unchanged.

**FORMER LAW CITED:** Morgan v. Kent Circuit Judge, 150 Mich. 65.

**DEMURRER TO EVIDENCE—DIRECTING VERDICT:** If there be no evidence as to any defendant joined in an action, the court may properly direct a verdict against the plaintiff and in favor of the particular defendant, where the plaintiff does not care to dismiss as to any one of them; and he is not required so to do. Johnston v. Cornelius, 193 Mich. 115; 159 N. W. 318.

**(12629). Exception and Defense.**

SEC. 57. Upon the refusal of the court to grant such motion, the defendant shall have the benefit of an exception, as in ordinary cases, and without waiving such exception may then introduce testimony and make his defense upon the merits.

**HISTORY:** Re-enacts Sec. 2, of Act 182, of '99, p. 274, Eff. Sept. 23, and supersedes such section though it was not expressly repealed by this Act. Unchanged.

(12630). **Instructions to Jury.**

**SEC. 58.** Hereafter in all jury trials in courts of record, in charging or instructing juries, the court shall instruct them only as to the law of the case; and such instructions may be given by the court of its own motion, and shall be taken in full by the court stenographer, or in case there be no stenographer, shall be in writing and filed in the case.

**HISTORY:** This section merges and supersedes parts of Sections 1 and 4 of Act 67, '69, p. 113, Eff. July 5, being C. L. '71, (5023)-(5026); How. 6481, 6484; C. L. '97, (10243)-(10246); though such sections were not expressly repealed by this act. See Compilers' Sections (14573)-(14575). See also note to Compilers' Section (14521). Modified.

**CHARGE TO JURY:** The judge has large discretion in regard to the charge, so long as the judgment of the jury is not subordinated to his opinion on the facts. *Mawich v. Elsey*, 47 Mich. 10; *Merchants' Bank of Canada v. Ortman*, 48 Mich. 419. The charge must be applicable to the case presented by the pleadings. *G. W. Ry. Co. v. Miller*, 19 Mich. 314; *M. H. & O. R. R. Co. v. Marcott*, 41 Mich. 433; *Comstock v. Norton*, 36 Mich. 280. Must be based upon the evidence and in harmony therewith. *Doyle v. Stevens*, 4 Mich. 87; *American, etc., Co. v. Moore*, 5 Mich. 368; *Dodge v. Brown*, 22 Mich. 446; *Druse v. Wheeler*, 26 Mich. 199; *Chadwick v. Butler*, 28 Mich. 352; *Leslie v. Smith*, 32 Mich. 64.

The court may decline to give a requested charge which includes an erroneous proposition, and does not commit error in failing to restrict the request in proper language. *Williams v. City of Lansing*, 152 Mich. 176. Where requests are presented in such length as to make it difficult to arrange them into form, no impropriety arises from a refusal of all of them and the giving of a charge in the court's own language. *Jordan v. Walker*, 154 Mich. 398. Where counsel read their own requests to charge to the jury, see *O'Dell v. Goff*, 153 Mich. 650. Where requests to charge are correct and proper, it is error for the court in giving them to state that they represent respondent's theory of the case. *People v. Farrell*, 137 Mich. 132; See also *People v. Lewis*, 166 Mich. 517.

A complete, entire and connected charge is preferable to fragmentary and isolated propositions made up from the requests to charge. *Aiken v. Weckerly*, 19 Mich. 501; *Fisher v. People*, 20 Mich. 144; *Kimbal, etc., Co. v. Vroman*, 35 Mich. 330; *M. H. & O. R. R. Co. v. Marcott*, 41 Mich. 439. Where, for want of time, the trial judge is not able to prepare and give, in his general charge, that clear and succinct statement of the law most desirable for the consideration of the jury, requests to charge, which state the law correctly and in such clear, terse and comprehensive manner as to be most easily understood by the jury, should be given in the language in which they are presented. *Cook v. Brown*, 62 Mich. 473; *People v. Quimby* 134 Mich.

635. See also *Simons v. Habercorn*, 139 Mich. 132. *Anderson Carriage Co. v. Pungs*, 153 Mich. 583; *Blakeslee v. Manfg. Co.*, 153 Mich. 230; *Ward v. Cook*, 158 Mich. 283; *Saros v. Avenue Theatre Co.*, 172 Mich. 243; *Newton v. Construction Co.*, 184 Mich. 63.

An instruction which leaves the jury, judges of the law as well as of facts, and allows them to render a verdict based upon their abstract notions of what is right between man and man is erroneous. *Hyde v. Shank*, 77 Mich. 526; *Roby Lumber Co. v. Gray*, 73 Mich. 356, 363. An instruction that the jury should find which side is in the right is too general, as it allows them to enter the domain of morals and measure the liability of the parties by the individual notions of the jurors as to whether the conduct of the parties was right or wrong. *Hyde v. Shank*, 77 Mich. 525. A charge should not present mere abstract propositions of law. *Bower v. Earle*, 18 Mich. 378; *Welch v. Ware*, 32 Mich. 83. But, when they may be presumed to have been properly applied by the jury. *People v. Reynolds*, 2 Mich. 422, 425. Objections to expressions, inaccuracies or omissions in the charge should be brought to the court's attention at once, that they may be corrected. *Turner v. People*, 33 Mich. 382, 386. On the subject of instructing the jury, compare, also, *Conkey v. Carpenter*, 106 Mich. 1; *Reiser v. Portere*, 106 Mich. 102; *McGuire v. Vaughan*, 106 Mich. 280; *Clark v. Dillman*, 108 Mich. 625.

Where an attorney makes an improper remark in the argument to the jury, an instruction of the court to disregard the remark may cure the error. *Beaurle v. Railroad*, 152 Mich. 346.

**WHAT PARTY IS ENTITLED TO:** Each party has the right to have his theory of the case recognized and a charge applicable thereto, if supported by proofs. *People v. Cummins*, 47 Mich. 337; *Comstock v. Norton*, 36 Mich. 280; *Sword v. Keith*, 31 Mich. 247; *Maillet v. People*, 42 Mich. 262; *Winchester v. King*, 46 Mich. 102. Parties are entitled to have every important view of the law of the case clearly formulated and given to the jury. *Campau v. Dubois*, 39 Mich. 280. But the defense in a criminal case cannot insist that the court shall charge the jury argumentatively, or comment on the evidence, or point out the weak points in the prosecution. *People v. Crawford*, 48 Mich. 498.

Instructions as to damages, see *Leffenier v. Railway*, 163 Mich. 634; *Totten v. Totten*, 172 Mich. 577.

**HOW CHARGE CONSTRUED:** The charge must be taken and considered as a whole, to arrive at its meaning. *McGinnis v. Kempsey*, 27 Mich. 374; *Daniels v. Clegg*, 28 Mich. 46-7; *Welch v. Ware*, 32 Mich. 78; *Burdick v. Michael*, 32 Mich. 246; *Greenlee v. Lowing*, 35 Mich. 63; *Eggleston v. Boardman*, 37 Mich. 14; *People v. Finley*, 38 Mich. 482; *W. & W. Mfg. Co. v. Walker*, 41 Mich. 239; *Russell v. Phelps*, 42 Mich. 378; *L. S. Iron Co. v. Erickson*, 39 Mich. 492; *Coots v. Chamberlain*, 39 Mich. 572; *Frankel v. Coots*, 41 Mich. 75; *Anderson v. Walter*, 34 Mich. 119; *G. R. & I. R. R. Co. v. Cameron*, 45 Mich. 451; *Driscoll v. People*, 47 Mich. 418; *Dibble v. Nash*, 47 Mich. 589; *Holman v. Railway Co.*, 114 Mich. 216; *Mayer v. Railway*, 152 Mich. 277.

It must also be construed with reference to the evidence in the case. *People v. Scott*, 6 Mich. 287; *Angell v. Rosenbury*, 12 Mich. 241, 261; *Tripp v. Hascelg*, 20 Mich. 263. Although some detached passage, when standing alone, might be erroneous, yet if the charge,



as a whole, points the jury to a correct conclusion, the error will be cured. *Clark v. McGraw*, 14 Mich. 139, 151-2; *Daniels v. Clegg*, 28 Mich. 32; *Turner v. People*, 33 Mich. 322, 386; *Greenlee v. Lowing*, 35 Mich. 63; *Coots v. Chamberlain*, 39 Mich. 572; *Frankel v. Coots*, 41 Mich. 75. And any error that could not have misled the jury, nor have influenced the verdict, will be disregarded. *People v. Scott*, 6 Mich. 287; *Clark v. Moore*, 3 Mich. 61; *Cummings v. Stone*, 13 Mich. 70.

**CHARGE UNSUPPORTED BY EVIDENCE:** If based upon a hypothesis not supported by any evidence, the charge is erroneous. *Hewitt v. Begole*, 22 Mich. 31; *Druse v. Wheeler*, 26 Mich. 199; *Johnson v. McKee*, 27 Mich. 471; *Josselyn v. Bishop*, 25 Mich. 397; *Chadwick v. Butler*, 28 Mich. 349; *Brown v. People*, 36 Mich. 203; *Comstock v. Norton*, 36 Mich. 277. A charge not supported by proofs is misleading and cannot be sustained. *Lacy v. Wilson*, 24 Mich. 481-2; *Lange v. Perley*, 47 Mich. 357. Also, if based upon a mistaken assumption as to the tendency of the evidence, or as to what credit the jury will give to some portions of it rather than to others. *Chadwick v. Butler*, 28 Mich. 349. A charge which assumes the non-existence of facts as to which there is testimony is erroneous. *Wilson v. Crosby*, 109 Mich. 449. See *Colby v. Portman*, 115 Mich. 95; *Fors v. Fors*, 159 Mich. 159; *Howe v. North*, 69 Mich. 280; *Clark v. Dillman*, 108 Mich. 625; *Holman v. Railway Co.*, 114 Mich. 216. It is not error to erroneously charge the jury as to a certain fact where it is not in dispute. *Opsomere v. Opsomere*, 167 Mich. 636.

**AMBIGUOUS, INCONSISTENT OF CONFLICTING CHARGES:** An ambiguous charge, calculated to mislead, should not be given. *Holland v. Rea*, 48 Mich. 218. And cannot be sustained. *Comstock v. Smith*, 26 Mich. 306; *Dodge v. Brown*, 22 Mich. 446. But, unless the ambiguity is misleading, it will not vitiate the charge. *Sheahan v. Dalrymple*, 19 Mich. 239. A charge which is so inconsistent as to be irreconcilable by the jury is bad. *L. S. & M. S. Ry. Co. v. Miller*, 25 Mich. 274. When conflicting charges are given, one of which is erroneous, it will be presumed that the jury may have followed the latter, and the judgment will be reversed. *G. R. & I. R. R. Co. v. Monroe*, 47 Mich. 153. See *Seeley v. Swift Co.*, 151 Mich. 545.

**PARTY CANNOT COMPLAIN:** Of an erroneous charge, unless it works him prejudice. *Sheahan v. Dalrymple*, 19 Mich. 239; *Sinclair v. Murphy*, 14 Mich. 396; *Clark v. McGraw*, 14 Mich. 139; *Richards v. Tozer*, 27 Mich. 451; *English v. Caldwell*, 30 Mich. 362; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308; *Dubois v. Campau*, 28 Mich. 304; *McDonough v. Sutton*, 35 Mich. 1. Nor of a charge given at his request or favorable to him. *Dresser v. Blair*, 28 Mich. 501; *Brigham v. Gurney*, 1 Mich. 349; *Comstock v. Smith*, 20 Mich. 338; *Josselyn v. McAllister*, 22 Mich. 300; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 326; *Stadden v. Hazzard*, 34 Mich. 78. Nor because a charge is too favorable to him. *Bull v. Brockway*, 48 Mich. 523. Even though it is erroneous. *Sheahan v. Dalrymple*, 19 Mich. 242. Nor can he complain of the omission of specific instructions not requested, if the charge is not misleading. *Driscoll v. People*, 47 Mich. 418; *Rankin v. West*, 25 Mich. 202. The failure to instruct the jury in a civil case as to matters common to all cases is not, in general, reversible error. *Isaacs v. McLean*, 106 Mich. 79.

**NO REVERSAL FOR IMMATERIAL ERROR:** A judgment will not

be reversed for an error that works no prejudice to the party complaining. *Clark v. Moore*, 3 Mich. 56; *McBride v. Cicotte*, 4 Mich. 489; *Berry v. Lowe*, 10 Mich. 9; *Griggs v. D. & M. Ry. Co.*, 10 Mich. 117; *Kellogg v. Putnam*, 11 Mich. 344; *Mich. Ins. Co. v. Whittemore*, 12 Mich. 430; *Cummings v. Stone*, 13 Mich. 70; *Tillman v. Fuller*, 13 Mich. 121; *Sinclair v. Murphy*, 14 Mich. 392; *Holmster v. Brown*, 19 Mich. 167; *Sheehan v. Dalrymple*, 19 Mich. 239; *Hill v. Robinson*, 23 Mich. 24; *Comstock v. Smith*, 20 Mich. 338; *Dubois v. Campau*, 28 Mich. 304; *McCurdy v. Clark*, 27 Mich. 451; *Beebe v. Knapp*, 28 Mich. 55; *Cont. Ins. Co. v. Horton*, 28 Mich. 174; *Welmer v. Bunberry*, 30 Mich. 202; *Grand Rapids Boom. Co. v. Jarvis*, 30 Mich. 310; *English v. Caldwell*, 30 Mich. 362; *Stadden v. Hazzard*, 34 Mich. 76; *Swart v. Kimball*, 43 Mich. 453; *Sterling v. Callahan*, 106 Mich. 128; *Moret v. Mason*, 106 Mich. 340.

OPINIONS AS TO TESTIMONY, ETC.: The extent to which a judge may express opinions on the character and weight of testimony and the credibility of witnesses. *Sheahan v. Barry*, 27 Mich. 217; *Elliot v. Van Buren*, 33 Mich. 58; *Mawich v. Elsey*, 47 Mich. 10; *People v. Lyons*, 49 Mich. 78; *Wisner v. Bardwell*, 38 Mich. 278; *M., H. & O. R. R. Co. v. Kirkwood*, 45 Mich. 51. The court may direct the jury's attention to the bearing and effect of the facts in the case. *Welch v. Ware*, 32 Mich. 83; *Battershall v. Stephens*, 34 Mich. 74. And indicate the tendency of the testimony. *Hayes v. Homer*, 36 Mich. 376-7; *Campau v. Langley*, 39 Mich. 451. See *Perrott v. Shearer*, 17 Mich. 54; *Harker v. Railway*, 150 Mich. 699; As to discussion by judge of testimony, see *Renaud v. Bay City*, 124 Mich. 30. May call their attention to important testimony, but cannot indicate what inference to draw therefrom. *Richards v. Fuller*, 38 Mich. 653; *Beurmann v. Van Buren*, 44 Mich. 498. Nor instruct them as to the weight of it. *Blackwood v. Brown*, 32 Mich. 107; *Hall v. People*, 39 Mich. 717. He may caution the jury as to the consideration of conflicting testimony. *Johnson v. McKee*, 27 Mich. 471. But should not call their attention to specific portions or particular witnesses, unless special circumstances require it. *People v. Finley*, 38 Mich. 486. Undisputed facts should not be submitted as if they were in issue. *Medina v. Perkins*, 48 Mich. 67; *Seligman v. Ten Eyck*, 49 Mich. 104; *Lange v. Perley*, 47 Mich. 352. Also to submit questions which, however decided can have no legal influence in the case. *Id.* 47 Mich. 352. In ejectment, the court may charge that plaintiff has not made out a case. *Wisner v. Herring*, 49 Mich. 626. In an action for damages resulting from negligence, it is error for the court to permit the jury to consider the question of contributory negligence, there being no proof that plaintiff did not exercise due care. *Brower v. Edison*, 47 Mich. 91. A charge which gives the jury to understand that a certain disputed question of fact has been established is misleading. *Beaubien v. Kellogg*, 69 Mich. 333. It is error for a judge to use language in his charge naturally tending to influence the jury against the allowance of the plaintiff's claim, if they understand that its purpose is to show that it is doubtful if the arrangements under which plaintiff testifies the claim arose was ever made. *Raymond v. Woolfenden's Estate*, 99 Mich. 165. Withdrawing testimony previously admitted. *Scripps v. Reilly*, 35 Mich. 371. As to the province of the court and the jury, see *Hamilton v. People*, 29 Mich. 189 et seq. If the charge misrepresents the evidence, the attention of the court must be called to it,

or the objection will not be considered. *Reeves v. Kelley*, 30 Mich. 132. Where there is no cause of action and nothing to go to the jury, a charge erroneously denying a right to recover on some other ground is not prejudicial. *Louden v. East Saginaw*, 41 Mich. 18. In instructing the jury, the court may properly assume a fact as admitted where it has been treated as such throughout the trial. *Burt v. Long*, 106 Mich. 210; *People v. Hawkins*, 106 Mich. 488. Where there is evidence fairly tending to establish the plaintiff's case, it is reversible error for the court to state to the jury that the testimony is so indefinite and unsatisfactory that it will not justify a verdict. *Burrows v. Delta Trans. Co.*, 106 Mich. 582.

**DIRECTING A VERDICT:** When a party is entitled to a verdict, under whatever view may be taken of the testimony in the case, it is the court's duty to direct the jury accordingly. *Penn. Min. Co. v. Brady*, 16 Mich. 332; *G. T. Ry. Co. v. Nichols*, 18 Mich. 170; *Kelly v. Hendrie*, 26 Mich. 255; *Roberts v. Field*, 27 Mich. 337, 347; *Wisner v. Davenport*, 5 Mich. 501; *Dudgeon v. Haggart*, 17 Mich. 273; *Davis v. D. & M. R. R. Co.*, 20 Mich. 105, 128; *Fisher v. Thirkell*, 21 Mich. 1; *Lange v. Perley*, 47 Mich. 355. See also *Schmeyer v. Jones*, 152 Mich. 243; *Lonier v. Savings Bank*, 153 Mich. 260; *Curry v. Traver-Bird Co.*, 167 Mich. 21. Where the evidence is undisputed and the parties both ask the court for a directed verdict, neither wishing to submit the case to the jury, the court may direct a verdict as a matter of law. *Culligan v. Alpern*, 160 Mich. 242. Where a verdict has been instructed, the case made by the party ruled against, must be taken as true in determining whether there was anything to be submitted to the jury. *Goda v. Maurer*, 162 Mich. 622; *Algate v. City of Lansing*, 180 Mich. 484; *Higgins v. Cement Co.*, 152 Mich. 395; *Schmidt v. Mining Co.*, 159 Mich. 211. Where there is a total lack of evidence upon a material point, the court should so instruct the jury and direct a verdict accordingly. *Scripps v. Reilly*, 38 Mich. 10; *Conely v. McDonald*, 40 Mich. 150; *Spicer v. Bonker*, 45 Mich. 630; *D. & M. R. Co. v. Van Steinberg*, 17 Mich. 120; *G. T. Ry. Co. v. Nichol*, 18 Mich. 180. Also where there is a mere scintilla of evidence. *Conely v. McDonald*, 40 Mich. 150. Or where the evidence upon a material point clearly has no tendency to establish it. *Hayes v. Homer*, 36 Mich. 376. Where liability is shown by undisputed facts, a verdict may be directed accordingly. *Harvey v. McAdams*, 32 Mich. 472. But a case cannot be thus withdrawn from the jury, unless it is free from conflict. *Marcott v. M. H. & O. R. R. Co.*, 47 Mich. 1. And the case should go to the jury, if there is any conflict upon a material question. *Wisner v. Davenport*, 5 Mich. 501; *Strong v. Saunders*, 15 Mich. 345; *Maas v. White*, 37 Mich. 126; *Brooke v. G. T. Ry. Co.*, 15 Mich. 332; *Conley v. McDonald*, 40 Mich. 150; *Rosie v. Willard*, 44 Mich. 382; *Doyle v. Mizner*, 40 Mich. 160; *Howey v. Fisher*, 111 Mich. 422. See *Perrott v. Shearer*, 17 Mich. 48; *Hayes v. Homer*, 36 Mich. 374. And in case of conflict, a verdict cannot be directed in any particular manner. *Clark v. McGraw*, 14 Mich. 139. Where there are several counts, the jury may in some cases, at defendant's request, be directed to say, if they find against him, upon which count they find. *Scripps v. Reilly*, 35 Mich. 371. See *Hanley v. Balch*, 106 Mich. 46 (distinguishing *Demill v. Moffat*, 45 Mich. 410, and *Rayl v. Hammond's Estate*, 95 Mich. 22.) See *People v. Hawkins*, 106 Mich. 488; *Tillotson v. Weber*, 96 Mich. 153; *Howey v. Fisher*, 111 Mich. 422; *Little*

v. Railway Co., 78 Mich. 205. The judge takes the case from the jury only when it is susceptible of but one opinion. *Mynning v. Railroad Co.*, 64 Mich. 100, quoting *Teipel v. Hilsendegen*, 44 Mich. 462.

**IN WRITING:** Where the judge, in connection with his written charge, read a section of the general laws of the state, pertaining to the case, without its being incorporated in the written charge, it was held that it was not error and the reference to the law in the written charge was sufficient. *Parker v. Judge*, 24 Mich. 408. Nor are oral explanations of a written charge erroneous, if they in no way modify its legal effect. *O'Donnell v. Seager*, 25 Mich. 367. And an objection to the judge's reading from a text-book was held too late, when taken after verdict. *Josselyn v. McAllister*, 22 Mich. 300. This act does not make the written requests to charge as integral part of the record so as to require their return on writ of error, independently of any bill of exceptions. *Hunter v. Parsons*, 22 Mich. 96. Instructions, when written, need not be signed. *Id.* See also *Geary v. People*, 22 Mich. 220; *Wagar v. Peck*, 22 Mich. 368; *Garton v. Union City Bank*, 34 Mich. 281.

**WRITTEN INSTRUCTIONS NOT REQUIRED:** It is not necessary for the judges of the circuit courts to reduce to writing and to read to the jury their charges or instructions. *Newton v. Consolidated Cons. Co.*, 184 Mich., 63; 21 D. L. N., 1282; 150 N. W. 348. *Sheahan v. Barry*, 27 Mich. 217, 224. *Parsille v. Brown*, 188 Mich. 485; 22 D. L. N. 952; 154 N. W. 569.

### (12631). Requests for Instructions.

**SEC. 59.** After the evidence is concluded, and before the case is argued or submitted to the jury, either party may present written requests for instructions on any point of law arising in the cause, and upon such written requests so presented, an argument may be made by counsel for the respective parties previous to the court passing thereon. Any request not substantially covered by the charge as given, shall be deemed to be refused.

**HISTORY:** This section re-enacts and merges a part of Sections 2 and 3 of Act 67, '69, p. 113, Eff. July 5, being C. L. '71, (5204)-(5205); How. 6482-3; C. L. '97, (10244)-(10245). Section 2, however was not expressly repealed by this act. See Compiler's Section (14574). Modified.

**MARKING REQUESTS TO CHARGE:** The requirement that the court shall mark each request to charge, "Given" or "Refused" has been abolished. It is provided that any request not substantially covered by the charge as given, shall be deemed to be refused.

**REQUESTS TO CHARGE:** Should be submitted in time for consideration by the court, but may be made at any time before the jury retires. *People v. Garbutt*, 17 Mich. 9; *Crippen v. Hope*, 38 Mich. 344. They should be few and simple, pertinent to the issue and such as the jury will be compelled to pass upon. *Fowler v. Hoffman*, 31 Mich. 220; *Jordan v. Walker*, 154 Mich. 398. See *Hulin v. People*, 31 Mich. 323; *M. C. R. R. Co. v. Coleman*, 28 Mich. 440; *Herbstreit v. Beckwith*,

35 Mich. 93; *Beurmann v. Van Buren*, 44 Mich. 499. Must be based upon the evidence. *Sheehan v. Dalrymple*, 19 Mich. 243. And be construed therewith. *Angell v. Rosenbury*, 12 Mich. 261.

No error is committed in refusing to instruct the jury on matters which are covered by the general charge. *Chapman v. Strong*, 162 Mich. 624; *Schattler v. Daily Herald Co.* 162 Mich. 115. Requests based upon a hypothesis unsupported by evidence are not allowable. *People v. Jones*, 24 Mich. 227; *Cont. Ins. Co. v. Horton*, 28 Mich. 180; *Moynahan v. Connor*, 30 Mich. 136; *Welmer v. Bunbury*, 30 Mich. 201; *Maillet v. People*, 42 Mich. 265-6; *Van Deusen v. Cathcart*, 43 Mich. 258; *Campau v. Detroit*, 104 Mich. 560. Nor if repugnant to the positions assumed by both parties. *Moynahan v. Connor*, 30 Mich. 136. Nor when implying a claim by the opposite party, which has not in fact been made. *Schoenberg v. Voight*, 36 Mich. 310. Nor, if inconsistent with the theory of the case. *Maillet v. People*, 42 Mich. 265-6. A request that would require the court to give his opinion of the testimony is properly refused. *Philpott v. Kirkpatrick*, 171 Mich. 496. Requests to charge mere abstract principles of law are objectionable. *Kimball, etc., Co. v. Vroman*, 35 Mich. 330; *Lacy v. Wilson*, 24 Mich. 481-2; *Bower v. Earl*, 18 Mich. 378. See *Sword v. Keith*, 31 Mich. 247; *Doyle v. Stevens*, 4 Mich. 91. And requests which ask the court to give its view of the degree of weight which should be given to certain portions of the testimony are not proper. *Hart Mfg. Co. v. Car Co.*, 65 Mich. 570, citing *People v. Finley*, 38 Mich. 482; *Perrott v. Shearer*, 17 Mich. 48; *Beurmann v. Van Buren*, 44 Mich. 596; *People v. Simpson*, 48 Mich. 474; *People v. Crawford*, 48 Mich. 498. Where a request embraces two distinct propositions. *Sword v. Keith*, 31 Mich. 247; *Westchester Ins. Co. v. Earle*, 33 Mich. 143. Ambiguous requests, liable to mislead, should be rejected. *McKercher v. Curtis*, 35 Mich. 481; *Schoenberg v. Voight*, 36 Mich. 310; *Holland v. Rea*, 48 Mich. 218. Also, if they are too obscure to be readily understood by the jury; or embrace propositions of fact only and no instructions on law points applicable to the case. *Schoenberg v. Voight*, 36 Mich. 310. Multiplication of propositions is disapproved. *Kimball, etc., Co. v. Vroman*, 35 Mich. 330; *Fowler v. Hoffman*, 31 Mich. 215. And a charge need not be repeated in compliance with requests repeating the same proposition in different forms. *Daniels v. Clegg*, 28 Mich. 38. It is not error to refuse to put requests in the language of counsel or to refuse specific requests, when the charge fairly presents instructions containing the substance of such requests and fairly and clearly presents all the material questions of law applicable to the case. *Wright v. Irwin*, 35 Mich. 347; *Keables v. Christie*, 47 Mich. 597; *Fraser v. Jennison*, 42 Mich. 236; *Campau v. Dubois*, 39 Mich. 280; *Hurd v. Newton*, 36 Mich. 35; *Ulrich v. People*, 39 Mich. 254; *Van Den Brooks v. Correion*, 48 Mich. 283; *People v. Saunders*, 25 Mich. 119; *Fowler v. Hoffman*, 31 Mich. 221; *Lott v. Sweet*, 33 Mich. 308; *Fisher v. People*, 20 Mich. 144; *Kehrig v. Peters*, 41 Mich. 480; *Daniels v. Clegg*, 28 Mich. 40; *Sword v. Keith*, 31 Mich. 247; *Cont. Ins. Co. v. Horton*, 28 Mich. 181-2; *Leonard v. Pope*, 27 Mich. 145; *People v. Marion*, 29 Mich. 31; *Hoyt v. Jeffers*, 30 Mich. 181; *Joslin v. LeBaron*, 44 Mich. 160; *Clark v. Rice*, 46 Mich. 309; *People v. Sligh*, 48 Mich. 54; *Alton v. Meeuwenberg*, 108 Mich. 629. Nor when the charge covers all the party had a right to ask. *Keables v. Christie*, 47 Mich. 594; *Power v. Harlow*, 57 Mich. 107. Nor where the request

has a tendency to distract the minds of the jurors with metaphysical subtleties. *People v. Finley*, 38 Mich. 482. Nor where the request is based on a cause of action not counted upon. *Pettibone v. Smith*, 37 Mich. 579. Nor where the request is improperly framed. *Dodge v. Brown*, 22 Mich. 452-3. Requests to put the case upon the testimony of a single witness, or to instruct the jury to confine their consideration to one witness more than to another, or that they should find in a particular way, if they believe a particular witness, may be declined. *G. R. & I. R. R. Co. v. Judson*, 34 Mich. 506; *Westchester Ins. Co. v. Earle*, 33 Mich. 154; *Leonard v. Pope*, 27 Mich. 145. Modifying requests. *Weimer v. Bunbury*, 30 Mich. 201; *G. R. & I. R. R. Co. v. Cameron*, 45 Mich. 451.

*Detroit Board Water Com'rs v. Butler Bros. Constr. Co.*, 168 Mich. 137; *Plowaty v. Sheldon*, 167 Mich. 218; *People v. Lewis*, 166 Mich. 513; *Wendt v. Richmond Village*, 164 Mich. 173; *Fors v. Fors*, 159 Mich. 156; *Welch v. Jackson, etc., Tract. Co.*, 154 Mich. 399; *O'Dell v. Goff*, 153 Mich. 643; *Schweyer v. Jones*, 152 Mich. 241.

FORMER LAW CITED: *People v. Quimby*, 134 Mich. 635; *Simons v. Habercorn*, 139 Mich. 133; *People v. Raycroft*, 156 Mich. 454; *People v. Smith*, 177 Mich. 361.

### Formal Exceptions not Necessary.

#### (12632). Exception to Follow Objection.

SEC. 60. It shall not be necessary in the trial of any action or proceeding in any court of record, to except to any ruling or action of the court, if an objection thereto was duly made, but an exception shall be deemed to follow as a matter of course, and it shall not be necessary to except in any case to the charge of the court to the jury, or to the refusal of the court to charge as requested; but any party considering himself aggrieved by any such ruling, action, charge or refusal to charge, may assign errors the same as if exception had been made according to the practice heretofore in use.

HISTORY: This section merges and supersedes Sec. 62, R. S. '46, Ch. 103, being C. L. '57, (4404); C. L. '71, (6031); How. 7611; C. L. '97, (10242); and a part of Act 101, '85, p. 104, Eff. Sept. 19; being How. 7621b; C. L. '97, (10247); as Am. '01, p. 79, Act 52, Eff. Sept. 5, though Act 101 was not expressly repealed by this act. See *Compilers' Section* (14576). Changed.

EXCEPTIONS: To findings of facts, by judge. See *Compilers' Section* (12587). To charge the jury: See notes to *Compilers' Section* (14576).

FORMER RULE: If no exceptions were taken, errors would not be considered. *Wager v. Peak*, 22 Mich. 368; *Foley v. People*, 22 Mich. 228; *Turner v. Grand Rapids*, 20 Mich. 390; *Browns v. Moore*, 32 Mich. 254; *Roberts v. Fitzgerald*, 33 Mich. 4; *School Dist. v. Cook*, 47 Mich. 114; *Prescott v. Patterson*, 49 Mich. 622. And the exceptions taken had to appear on the record. *Foley v. People*, 22 Mich. 228; *Daniels v. Clegg*, 28 Mich. 33; *Rath v. Caton*, 37 Mich. 199; *Hogel-*

kamp v. Weeks, 37 Mich. 423; Prescott v. Patterson, 49 Mich. 622. See Wolf v. Holton, 110 Mich. 166; Holman v. Railway Co., 114 Mich. 208; citing Fitzpatrick v. Hoffman, 104 Mich. 231; Crippen v. Fletcher, 56 Mich. 388.

**ERROR NOT PRESUMED:** Error will not be presumed, but must be affirmatively shown. Curley v. Wyman, 34 Mich. 353; Broug v. Brown, 42 Mich. 119; Peabody v. McAvoy, 23 Mich. 526; Howard v. Patrick, 43 Mich. 121; Ruggles v. Nat'l Bank, 43 Mich. 192; Brown v. Haak, 48 Mich. 229; Gilbert v. Am. Ins. Co., 30 Mich. 400; Burnham v. People, 3 Mich. 195; Maynard v. Penniman, 10 Mich. 153; Kermott v. Ayer, 11 Mich. 181; Friedland v. McNeill, 33 Mich. 40; Borden v. Clark, 26 Mich. 410; Greenlee v. Lowing, 35 Mich. 64; Haynes v. Homer, 36 Mich. 374; Fowler v. Gilbert, 38 Mich. 293; Hall v. Johnson, 41 Mich. 286; F. M. F. Ins. Co. v. Gargett, 42 Mich. 290; Kline v. Kline, 49 Mich. 419; Cummins v. People, 42 Mich. 142; People v. Niles, 44 Mich. 607; Taff v. Hosmer, 14 Mich. 310; Cook v. Hopper, 23 Mich. 515; Maillet v. People, 42 Mich. 262.

**FORMAL EXCEPTIONS NOT NECESSARY:** Hereafter it will not be necessary to take a formal exception to any action or ruling of the court, if such ruling was made after objection thereto.

### Of Bills of Exceptions.

#### (12633). Bill of Exceptions.

**SEC. 61.** Either party desiring a review of the questions of law appearing upon the trial, may, within such time as shall be prescribed by statute or the rules of court, make a bill of exceptions, in the same manner and with the same effect as upon a trial by jury, or a case containing so much of the evidence as may be material to the question to be raised.

**HISTORY:** Re-enacts Sec. 4 of Act 91 of '53, p. 187, Eff. May 16; C. L. '57, 3438; As Am. '67, p. 198, Act 142, Eff. June 27; C. L. '71, (4964); How. 6488; C. L. '97, (10262), except that the former section provided merely that the time should be prescribed by "the rules of court." Changed.

**CONSTRUED:** This section, as originally enacted, was to be construed in connection with Sections 1-3 of Act 91, '53, Compilers' Sections (12584-6) See history above, also notes to Compilers' Section (12587). See Moore v. Royal Oak Lumber & Supply Co., 171 Mich. 402; Bouillion v. Litchfield, 14 Mich. 299.

**CASE MADE:** See note, "What may be reviewed" to Compilers' Section (13752).

#### (12634). Time to Settle.

**SEC. 62.** The court or the circuit judge at chambers may allow such time as shall be deemed reasonable to settle such exceptions and reduce the same to form: *Provided*, That no more than twenty days shall be allowed for such purpose, except upon the production of a certificate from the stenog-

rapher of said circuit stating that the party desiring such extension has ordered a transcript of the testimony necessary for the preparation of said bill of exceptions, and that the same will be furnished as soon as possible by said stenographer. If a motion for a new trial is made within said twenty days, and such motion be denied the time to settle a bill of exceptions may be extended twenty days from the date of such denial without the production of such certificate.

**HISTORY:** Re-enacts Sec. 63, R. S. '46, Ch. 103, being C. L. '57, (4405); C. L. '71, (6032); How. 7612; C. L. '97, (10248); As Am. '09, p. 369, Act 204, Eff. Sept. 1; adding to such section however, all of the above proviso. Modified.

**BILLS OF EXCEPTION:** No change has been made in the time within which bills of exceptions may be settled. It has been provided, however, that no extension of time beyond twenty days shall be allowed for that purpose, except upon the production of a certificate from the stenographer, stating that the party desiring such extension has ordered a transcript of the testimony necessary for the preparation of the bill of exceptions and that the same will be furnished as soon as possible by said stenographer. If within twenty days a motion for a new trial is made, the time, during which said motion is pending and undecided, is not to be counted and a further stay of twenty days from the date of the denial of the motion may be made without the production of such certificate.

**SETTLEMENT OF EXCEPTIONS:** When the bill of exceptions will be presumed to have been signed within the proper time. *Sweezer v. Mead*, 5 Mich. 33. And will not be stricken from the record in the supreme court. *Scribner v. Gay*, 5 Mich. 511. When evidence will not be permitted to contradict the presumption. *Tefft v. Windsor*, 17 Mich. 425. A bill of exceptions will not be stricken out for delay in settling it not caused by the party presenting the bill. *Detroit v. Blackeby*, 20 Mich. 219. A party who is prevented from having a bill of exceptions settled and signed, by the death or resignation, etc., of the circuit judge, is entitled to a new trial as a matter of right. *Tefft v. Windsor*, 17 Mich. 425; *Crittenden v. Schermerhorn*, 35 Mich. 370; *Campau v. Judge*, 40 Mich. 630; *Stebbins v. Field*, 41 Mich. 373; *Wright v. Judge*, 41 Mich. 726; *De Hass v. Judge*, 46 Mich. 12. But see next section, as amended in '79. The trial judge may extend the time, for settling the exceptions, a second time. *People v. Littlejohn*, 11 Mich. 60. When the time has been once extended into a subsequent term, the judge may settle the exceptions at any time thereafter. *White v. Campbell*, 25 Mich. 464. But where no time was fixed in the term at which judgment was rendered, the court has no power over the matter at a subsequent term. *Cleveland v. Stein*, 14 Mich. 335. But if the parties appear, without objections, and settle the bill after term, it will not be stricken out. *Atlas Mining Co. v. Johnston*, 22 Mich. 78. The judge who tried the cause cannot, even by stipulation of the parties, settle the exceptions after his retirement from office. *Crittenden v. Schermerhorn*, 35 Mich. 370. But the parties may stipulate to extend the time. *Hunt v. Judge*, 39 Mich. 123. The exceptions may be settled after writ of error issues. *Brown v. Bissell*, 1 Doug. 273;



Teller v. Willis, 12 Mich. 384. Mandamus lies to compel a judge to settle and sign exceptions, when he declines to do so because of delay not caused by the party presenting the exceptions. De Moss v. Judge, 41 Mich. 725. And also to amend the bill upon proper showing. Sweetzer v. Mead, 5 Mich. 33; Scribner v. Gay, 5 Mich. 511; Crane v. Judge, 24 Mich. 513. As to extension of time for settlement under new rule 47, see Roach v. Judge, 117 Mich. 242. When judge justified in extending time for settlement. Fitzgibbons v. Judge, 152 Mich. 209. When justified in refusing to extend time. Carrier v. Judge, 155 Mich. 344. When judge not justified in extending time. Singer v. Judge, 117 Mich. 318. When not justified in refusing to extend time. Harper v. Judge, 155 Mich. 543. A party has 20 days after judgment in which to settle a bill of exceptions. The court may extend the time for sixty days, but may make no other or further extension of time for settling a bill of exceptions in any case except upon notice and cause shown. Kaiser v. Judge, 162 Mich. 249. See also Kaiser v. Railway, 163 Mich. 110; Id. 164 Mich. 56; Pettinger v. Judge, 164 Mich. 464. A party has twenty days after denial of motion for a new trial in which to settle a bill of exceptions; the motion for a new trial having been seasonably made and brought on for hearing in a reasonable time. Kaiser v. Judge, 162 Mich. 249, citing Harper v. Judge, 155 Mich. 543. Except upon motion and cause shown or the written stipulation of the parties, the court is not authorized to extend the time for settling a bill of exceptions beyond eighty days from the time of judgment. Burgess v. Judge, 171 Mich. 583; Northern Assurance Co. v. Judge, 169 Mich. 238. A party aggrieved by the action of the circuit judge in settling a bill of exceptions should make a motion in the circuit court that the bill be amended in the desired particulars. Upon the denial of such motion, the action of the circuit court may be reviewed in the supreme court by mandamus. McIntire v. Carr, 168 Mich. 462. After settling a bill of exceptions and the issuance of a writ of error, the circuit court has no jurisdiction to grant a new trial. Minkinen v. Mining Co., 169 Mich. 279. See also Shannon v. People, 5 Mich. 38.

See Kaeser v. Detroit United Railway, 164 Mich. 56. In Pettinger v. Montmorency Circuit Judge, 164 Mich. 466, the court said: "An extension of time to move for a new trial or settle a bill of exceptions having been granted at the term at which the judgment was entered, it was valid for at least eighty days. Roach v. Wayne Circuit Judge, 117 Mich. 242 (75 N. W. 465). The motion for a new trial having been denied on March 16, '10, the defendant in the case had a reasonable time thereafter for the settlement of a bill of exceptions. Harper v. Wayne Circuit Judge, 155 Mich. 543 (119 N. W. 913). He was granted thirty days by the respondent.

We are of opinion that after the expiration of the time above granted the respondent had the power, upon sufficient cause shown, after due notice to opposing counsel, to further extend the time for settling the bill of exceptions. In the recent case of Kaiser v. Wayne Circuit Judge, 162 Mich. 247 (127 N. W. 336), it will be noted that the order extending the time was made without cause being shown, and without notice. In 162 Mich. 250 (127 N. W. 922), a motion for rehearing was denied in the last cited case, and the following language was used by Justice Ostrander:

'A rehearing is denied for the reason that the order of the court below extending the time in which to settle a bill of exceptions was properly set aside. But in so far as the opinion limits the right of the court to at any time entertain a motion, supported by affidavits, after due notice to opposing counsel, to extend the time for settling exceptions, we think it should be modified. We are impressed that, in view of some former decisions of the court, a rule upon this subject should be announced only in the form of a rule, to take effect in the future. The opinion therefore will be considered as deciding only the precise question presented by relator's motion.' "

The trial judge may extend the time for settling the exceptions a second time. *People v. Littlejohn*, 11 Mich. 60. When the time has been once extended into a subsequent term, the judge may settle the acceptance at any time thereafter. *White v. Campbell*, 25 Mich. 464.

**CERTIFICATE OF STENOGRAPHER:** This section does not require a litigant seeking a second extension of time to file a second certificate from the official stenographer. The facts required to be certified to by the stenographer are two only: First, that a transcript has been ordered; and second, that the same will be furnished as soon as possible. This information once conveyed to the court is sufficient to warrant repeated extensions by the court in the exercise of a sound discretion. *People v. Withey*, Manistee Circuit Judge, 194 Mich. 527.

**TIME TO SETTLE BILL OF EXCEPTIONS:** The statutes and rules of court providing for extension of time must be complied with, and the sound discretion of the court exercised in the case will not be disturbed. *Gamble v. Oceana Circuit Judge*, 204 Mich. 410; *Brevoort et al. v. Wayne Circuit Judge*, 203 Mich. 388; *Yerkes v. Antrim Circuit Judge*, 200 Mich. 443; *Boyne City Hardware Co. v. Charlevoix Circuit Judge*, 197 Mich. 374.

**BILL OF EXCEPTIONS:** Counsel by written stipulation and without procuring the stenographer's certificate, may extend the time for settling a bill of exceptions not exceeding the time limited by statute. *Reynick v. Saginaw Circuit Judge*, 210 Mich. 566.

**ORDER BY CONSENT:** An order entered upon the journal of the court by consent of counsel in open court is legally sufficient to extend the time to settle a bill of exceptions. *Reynick v. Saginaw Circuit Judge*, 210 Mich. 566.

### (12635). Incorporation of Proceedings on Motion for New Trial.

SEC. 63. In all cases hereafter taken to the supreme court on writ of error or appeal, where a motion for a new trial has been previously refused by the trial judge, the party appealing the same may incorporate in the bill of exceptions a record of all proceedings had on said motion for a new trial, including the reasons given by the trial judge in refusing to grant said new trial. Exceptions may be taken and error assigned on the decision of the circuit judge in refusing such motion, and the same shall be reviewed by the supreme court.

**HISTORY:** Re-enacts Sec. 1 of Act 134 of '93, being C. L. '97, (10504). Unchanged.

**CONSTRUED:** This act does not enlarge the time provided for

suing out a writ of error in Compilers' Section (13741), *Hill v. Hill*, 114 Mich. 599. Nor does it apply where the motion was decided and the writ of error issued before the act took effect. *Gemberling v. Lazarus*, 100 Mich. 324. A writ of error is authorized under this section for the sole purpose of reviewing the action of the circuit court in refusing a new trial. *Walker v. Newton*, 130 Mich. 577. This section entitles an appellant to a reasonable time after denial of a motion for a new trial to settle a bill of exceptions. *Marshall v. Judge*, 156 Mich. 652; *Wilbur v. Railroad Co.*, 145 Mich. 351. When the evidence the right to incorporate the written opinion of the lower court in the bill of exceptions. *U. S. Graphite Co. v. Judge*, 158 Mich. 601. Failure to assign reasons for refusing a new trial does not present a reviewable point of error. *Love v. Railroad Co.*, 170 Mich. 12. Where the record is silent as to the order made or the reason why, there is nothing for the supreme court to review. *Stevenson v. Railway*, 118 Mich. 652; *Wilbur v. Railroad Co.*, 145 Mich. 351. When the evidence is overwhelmingly against plaintiff it is an abuse of discretion to refuse a new trial and such refusal will be reviewed on error. *Cole v. Railway*, 132 Mich. 124; *Hintz v. Railroad Co.*, 132 Mich. 306; *Line v. Railroad Co.*, 143 Mich. 167; *In re McIntyre's Estate*, 160 Mich. 120; *Spray v. Ayotte*, 161 Mich. 594; *Goldsmith v. Railway*, 165 Mich. 178; *Krause v. Railway*, 170 Mich. 438; *Bosch v. Railway*, 175 Mich. 9. The denial of a motion for a new trial to which exceptions were not taken is not reviewable. *Hotchkiss v. Weinmann-Matthews Co.*, 175 Mich. 652. Under this section, the supreme court can only interfere with the verdict as being contrary to the evidence, where it is so manifestly contrary and so palpably wrong as to force the conviction that it was the result of passion, prejudice or ignorance. *Krouse v. Detroit United Ry.*, 170 Mich. 438. A demand for written reasons for refusing a new trial is not necessary to entitle the applicant to incorporate in his bill of exceptions the written reasons actually given without demand. *United States Graphite Co. v. Saginaw Circuit Judge*, 158 Mich. 598. The fact that exceptions to testimony were made grounds of a motion for a new trial will not render them reviewable when they are not indexed, found in the record nor pointed out by counsel. *Conger v. Hall*, 168 Mich. 447. A party has the right to settle a bill of exceptions after the denial of a motion for a new trial and in this case denial of an extension of time for such purpose was error. *Harper v. Wayne Circuit Judge*, 155 Mich. 543. The decision of a circuit judge, denying a motion for a new trial, is not subject to review, unless proper exceptions have been taken thereto. *Comstock v. Taggart*, 156 Mich. 47. This statute does not enlarge the time provided for suing out a writ of error; nor does it apply where the motion was decided and the writ of error issued before the statute took effect. *Hill v. Hill*, 114 Mich. 599.

FORMER LAW CITED: *Knop v. Insurance Co.*, 101 Mich. 361; *McRae v. Lumber Co.*, 102 Mich. 488; *Aultman, Miller & Co. v. Dodson*, 104 Mich. 510; *Finley v. Widner*, 116 Mich. 679; *Brennan v. O'Brien*, 121-494; *People v. Ecarius*, 124 Mich. 626; *Bass v. Railroad Co.*, 142 Mich. 180; *Harper v. Judge*, 155 Mich. 547; *Comstock v. Taggart*, 156 Mich. 50; *Merrill v. Lelsenring*, 157 Mich. 139; *Conger v. Hall*, 158 Mich. 449; *Minkinen v. Mining Co.*, 172 Mich. 406.

See also *Brassel v. Railway Co.*, 101 Mich. 13; *People v. Rathbun*,

105 Mich. 699; McDonald v. Iron Co., 140 Mich. 401; In re Bender's Estate, 159 Mich. 108; Cooper v. Carr, 161 Mich. 406.

The rule is that the exceptions to the denial of a motion for a new trial and all proceedings with reference thereto should be incorporated in the bill of exceptions. In re Keene's Estate, 189 Mich. 97; 22 D. L. N., 1150; 155 N. W., 514.

The question is not presentable to the supreme court for review where the trial court denying the motion for a new trial did not file the reasons for so doing, and where no exceptions were taken. Mahder v. Wax, 192 Mich., 479; Hampton v. Van Nest's Estate, 196 Mich. 404; 163 N. W., 83; Vezina v. Shermer, 198 Mich. 760.

### (12636). Duty of Judge to Sign.

SEC. 64. If the truth of the case be fairly stated in such exceptions, it shall be the duty of the judge holding such court to sign such statement, and he may be compelled to do so by the court to which any writ of error may by law be brought, upon the judgment rendered in such cause, or which shall have authority to decide on such exceptions when returned by him. And in case of the death, resignation, expiration of the term of office, or vacancy in office from any other cause, of the judge whom the cause was tried, when there shall be an official stenographer of such court who has taken full minutes of the testimony, exceptions and charges of the judge at such trial, such minutes shall be prima facie evidence of the testimony given, exceptions taken, and the charge of the court, and other proceedings on such trial, and such exceptions may be settled and signed by the successor in office of such judge, or by any judge authorized in such cases to perform the general duties of the judge of such court.

HISTORY: Re-enacts Sec. 64, R. S. '46, Ch. 103, being C. L. '57, (4406); C. L. '71, (6033); As Am. '79, p. 5, Act 8, Imd. Eff. Mar. 13; How. 7613; C. L. '97, (10249), unchanged.

BILL OF EXCEPTIONS: Its office is to present certain specific points raised by exceptions. Turner v. Grand Rapids, 20 Mich. 396. It should present only the points relied upon. Id.; Morrissey v. People, 11 Mich. 332; Franklin Min. Co. v. Harris, 24 Mich. 117. The certifying of the stenographer's notes entire, with a formal commencement and ending, is disapproved. Harbaugh v. Judge, 32 Mich. 259; Frankenberg v. Nat'l Bank, 33 Mich. 46; Snyder v. Willey, 33 Mich. 483. When the bill of exceptions should incorporate the material evidence, or all bearing upon a certain point. Crane v. Judge, 24 Mich. 514; Gilbert v. Am. Ins. Co., 30 Mich. 400. When, proceedings before referee. Bevier v. Wright, 30 Mich. 484. Same rule applicable to case made. Peabody v. McAvoy, 23 Mich. 529. And the want of a bill of exceptions cannot be supplied by a recital of facts in an order of the court. Monnier v. Mizner, 17 Mich. 271. Rulings and orders made after trial cannot be incorporated. Johr v. People, 26 Mich. 428-9; Watson v. Kane, 31 Mich. 61. See Hill v. People, 16 Mich. 351. The

bill, as settled by the court, must govern, and cannot be enlarged by stipulation. *Niagara Fire Ins. Co. v. De Graf*, 12 Mich. 10; *Duffield v. Detroit*, 15 Mich. 480. The fact that the case was tried before a judge from another circuit and whose attendance cannot be procured, does not authorize the settlement of the bill before the local judge, since the bill may be settled at the trial judge's home. *Hill v. Hill*, 112 Mich. 633. Parties cannot stipulate as to the judge who shall settle a bill of exceptions. *Id.*

Where the trial judge has filed a written opinion for his refusal to grant a new trial, the statute gives the defeated party the right to incorporate the opinion in the bill of exceptions. *U. S. Graphite Co. v. Judge*, 158 Mich. 601. See also *Shannon v. People*, 5 Mich. 38; *Teller v. Willis*, 12 Mich. 388; *Cleveland v. Stein*, 14 Mich. 335; *Pope v. Judge Recorder's Court*, 107 Mich. 25; *McNamara v. Kent Circuit Judge*, 173 Mich. 602.

**STENOGRAPHER'S NOTES: SUCCESSOR OF JUDGE:** The provision making the stenographer's notes prima facie evidence of the testimony cannot be extended beyond its purpose, so as to give such notes the character of depositions or of record evidence generally. *Edwards v. Heuer*, 46 Mich. 95. The provision permitting the successor of the trial judge to settle the exceptions is valid. *Mason v. Phelps*, 48 Mich. 126.

**IN CRIMINAL CASES:** Where a question raised by a motion for new trial is one of law and the judge has found the truth of the facts stated in the affidavits on which the motion is based, or in his decision assumes the truth of the facts, the whole matter may be incorporated in the exceptions and will constitute a part of the record. *Hill v. People*, 16 Mich. 351. And all the rulings on questions of law in a criminal case, before as well as at the trial, should be included in the bill of exceptions. *Hamilton v. Judge*, 28 Mich. 268. The bill should show the whole chain of facts which the evidence tends to prove so that the court of review may understand the rulings of the court below. *Wellar v. People*, 30 Mich. 16.

In *Turner v. Grand Rapids*, 20 Mich. 395, the court said: "The reason for requiring exceptions to be taken to rulings upon the trial, are, for the most part substantially the same in both cases. Parties frequently offer evidence or make objections on the trial, upon grounds, upon the correctness of which they are in doubt, and with the intention of acquiescing in the decision of the judge. And when no exception is taken it is but natural for the court and the opposite party to conclude, that the party against whom the ruling is made intends to acquiesce. The attention of the judge is not, therefore, so strongly turned to the question, and he is less likely to reconsider it or hear further argument upon it, than he would be if an exception was taken. And the adverse party, if an exception be taken, has the option of waiving his offer or his objection, rather than to hazard the delay and expense of having the case reviewed in an appellate court. See 2 Cow. & Hill's notes Phil. Ev. note 545 and cases cited; *Ligget v. Bank of Penn.*, 7 S. & R., 218; *Lanuse v. Barker*, 10 Johns, 312; *Givens v. Bradley*, 3 Bibb. 192; *Marquand v. Webb*, 16 Johns, 89; *Thomas v. Tanner*, 6 T. B. Monroe 52; *Woods v. Kennedy*, 5 Ib. 177-8.

In the case of a bill of exceptions regularly signed, though it does not appear expressly by the bill that an exception was taken, the court will sometimes properly presume that it was regularly taken,

or the judge would not have signed the bill. *Graham's Pr.*, 376; *McBride v. Cicotte*, 4 Mich. 478. This, however, is upon the theory that the exception was in fact taken, which is always held to be necessary.

But the office of a bill of exceptions is only to present certain specific points raised only by exceptions, and properly drawn, sets forth only so much of the evidence as bears upon the particular points. It is not a narration of all the evidence and proceedings on the trial. But the case, in the present instance, is apparently a complete narrative of all the evidence and all the proceedings which took place on the trial, material and immaterial; and no inference can therefore properly be drawn from the signing of the case by the judge, that any exception is taken which is not stated; especially, as this is not the only ruling of the court against the defendants, to which he does not appear to have excepted, while he does appear to have excepted to several other rulings."

P. A. '98 No. 134 does not enlarge the time in which a writ of error may be sued out under the above statute. *Hill v. Hill*, 114 Mich. 601. Neither can parties stipulate as to the judge who shall settle a bill of exceptions. *Hill v. Hill*, 114 Mich. 601. The provisions making the stenographer's notes prima facie evidence of the testimony cannot be extended beyond its purpose so as to give such notes the character of deposition or of record evidence generally. *Edwards v. Heuer*, 46 Mich. 25. The provision is valid which relates to allowing the successor of the trial judge to settle the exceptions. *Mason v. Phelps*, 48 Mich. 126. In *Weller v. People*, 30 Mich. 18, the court said: "It may be proper to remark that while it is not desirable to introduce all the testimony into a bill of exceptions in a criminal case, it is important to indicate in some way the whole chain of facts which the evidence tends to prove. Without this we cannot fully appreciate the relations of many of the rulings, or know what instructions may be necessary to be sent down to the court below. The bill before us is full upon some things, but leaves out some things which it would have been better to include." Thus all the ruling on questions of law in a criminal case, before as well as at the trial, should be included in the bill of exceptions. *Hamilton v. Judge*, 28 Mich. 268. In the event that a question raised by a motion for a new trial in a criminal case is one of law, and the judge has found the truth of the facts stated in the affidavits on which the motion is based, or in his decision assumes the truth of the facts, and the whole matter is incorporated in the acceptance, it is then that they constitute a part of the record. *Hill v. People*, 16 Mich. 351.

**PRINTED RECORD AUTHENTICATION:** A case must be settled and signed by the trial judge, in which evidence has been taken, but where testimony has not been taken, the case is heard on the record, which is authenticated by the clerk. *Thompson v. Harson*, 206 Mich. 139.

### (12637). Motion to Set Aside Verdict.

**SEC. 65.** If a bill of exceptions be signed in a cause it shall not prevent the argument of a motion to set aside the verdict in such cause, on the ground that such verdict was against evidence; but such motion shall be argued, either before or

after the decision of the court on the bill of exceptions, as the court shall direct.

**HISTORY:** Re-enacts Sec. 65, R. S. '46, Ch. 103, being C. L. '57, (4407); C. L. '71, (6034); How. 7614; C. L. '97, (10250), unchanged.

**CONSTRUED:** Shannon v. People, 5 Mich. 38.

#### (12638). Filing and Return of Bill.

**SEC. 66.** If such bill of exceptions be taken in any case pending in any circuit court, it shall be filed with the clerk of such court, who shall return the same, together with the record and other proceedings, in any cause which shall be removed by writ of error, or otherwise.

**HISTORY:** Re-enacts Sec. 66, R. S. '46, Ch. 103, being C. L. '57, (4408); C. L. '71, (6035); How. 7615; C. L. '97, (10251), unchanged.

**CONSTRUED:** Shannon v. People, 5 Mich. 38.

#### Of Referees.

#### (12639.) Reference Upon Consent of Parties.

**SEC. 67.** Issues joined in any civil action at law, whether of fact or of law, may, upon the written consent of the parties, filed with the clerk or upon their oral consent in open court, be referred to such person or such three persons as may be agreed upon by the parties, or appointed by the court in case the parties fail to agree.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 100, being C. L. '57, (4188); As Am. '61, p. 158, Act 119, Eff. June 15; C. L. '71, (5808); How. 7377; C. L. '97, (10089), unchanged.

**FORMER LAWS:** This and the next eight sections supersede sections 3-11 of Chapter 100 of the revised statutes of (1846), C. L. '97, (10089)-(10090)-(10091)-(10092)-(10093)-(10094)-(10095)-(10096)-(10097), which were so changed by the amendment of '61, as not to correspond in subject matter with the original sections. See Underwood v. McDuffie, 15 Mich. 367, sustaining the validity of the amendment.

**CONSTRUED:** Runnels v. Moffat, 73 Mich. 195. As to when irregularities of appointment of referee are waived, see Shepherd v. Shepherd's Estate, 108 Mich. 84.

**REFERRING CAUSES:** May be referred upon the written consent of parties. Bewick v. Fletcher, 39 Mich. 29; Underwood v. McDuffie, 15 Mich. 367. A stipulation for a reference is not operative after judgment and does not return a case, on reversal, to the referee; the case is simply remitted to the court. Hopkins v. Sanford, 41 Mich. 243. When a case has been referred by consent to a particular referee, there is no power to appoint a new one without consent. Smith v. Warner, 14 Mich. 152. A judge cannot appoint himself referee in a cause pending in his own court, even on stipulation of the parties. Woodin v. Phoenix, 41 Mich. 655.

**(12640). Reference Upon Motion.**

SEC. 68. When the parties do not consent, the court may, upon the motion of either, or upon its own motion, direct a like reference in either of the following cases:

1. When the trial of an issue of fact shall require the examination of mutual accounts, or of a long account of one side only, or where the taking of an account shall be necessary for the information of the court before judgment; but no such case shall be referred if either party shall, within ten days after the joining issue, file with the clerk a written demand for a trial by jury;

2. When a question of fact other than upon the pleadings shall arise, upon motion or otherwise, either before or after the judgment; and the circuit judge, in vacation, may, by an order under his hand, direct such a reference on the written application of either party, which application, with notice of the time and place, within the county where the cause is pending, when and where the same will be presented, shall be served on the opposite party or his attorney, for such length of time before presentation as shall be required by the rules of the circuit courts for notices of special motions.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 100, being C. L. '57, (4189), as Am. '61, p. 158, Act 119, Eff. June 15; C. L. '71, (5809); How. 7378; C. L. '97, (10090), unchanged.

CONSTRUED: Mandamus lies to set aside an improper appointment of referee, as a judge appointing himself. *Woodin v. Phoenix*, 41 Mich. 655. A case cannot be referred without consent after either party has filed with the clerk a demand for a jury trial. *Odell v. Reynolds*, 40 Mich. 21. The court may direct a reference upon its own motion, though neither party desires it, if no jury has been demanded. *Hollands v. Wayne Circuit Judge*, 117 Mich. 326.

See also *Haines v. Supervisors*, 87 Mich. 239; *Church v. Anti-Kalsonmine Co.*, 118 Mich. 242. *Hubel Co. v. MacKinnon*, 186 Mich. 617.

**(12641). Trial by Referee.**

SEC. 69. The trial by such referees shall be conducted in the same manner as a trial by the court; they shall have the same power to administer oaths, to issue process to compel the attendance of witnesses, to grant continuances, to preserve order, and to punish all violations thereof, and if any witness shall fail to attend before such referee or referees, after being duly summoned or subpoenaed, according to the practice of the court, or being present, shall refuse to be sworn or to testify, such referee or referees, if in term time, may certify the facts to the court, or if in vacation, to any judge of the



circuit court at chambers, and such court or judge may thereupon, if the facts certified shall appear to warrant it, punish such witness as for a contempt of court, in the same manner as the court could do if the witness had committed such contempt before such court. When more than one is appointed, they must all meet to hear proofs, arguments, and to deliberate; but a decision of the majority shall be regarded as their decision. The circuit judge may, by an order under his hand, filed with the clerk, discharge any referee on cause shown by affidavit, and may, in like manner, fill any vacancy that may occur in their number, or may direct the reference to proceed and be concluded without filling any such vacancy. He shall, in like manner, have power, on cause shown, to make an order for expediting the proceedings before referees, and to compel a report or the signing of a bill of exceptions.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 100, being C. L. '57, (4190); as Am. '61, p. 158, Act 119, Eff. June 15; C. L. '71, (5810); How. 7379; C. L. '97, (10091), unchanged.

**TRIAL BY REFEREES:** Referees need not be sworn. *Underwood v. McDuffie*, 15 Mich. 366-7. A reference stands in lieu of a trial in court. *Abbott v. Mathews*, 26 Mich. 177. When it comes to the supreme court it is treated in all respects as though the trial was had before the court. *Runnels v. Moffat*, 73 Mich. 196-7. The referees are required to conduct their business in the same manner as a trial by the court. The law contemplates the introduction of testimony and all the other incidents of legal proceedings, with rulings on testimony and findings of fact and law subject to revision for errors. *Gibson v. Burrows*, 41 Mich. 716. The allowance of leading questions by a referee cannot be made ground of error. If carried to an extent amounting to an abuse, it may, perhaps, warrant an appeal to the discretion of the circuit court to avoid the decision. *Campau v. Brown*, 48 Mich. 147. All objections to the proceedings before the referee should be taken before him by way of exception, as on a trial in the circuit, or raised upon motion in the circuit court to set aside his action. Irregularities may form ground for relief by motion, but not for reversal on error, unless ruled upon during trial. *Abbott v. Mathews*, 26 Mich. 177. A referee may make such adjournments as convenience seems to require. *Campau v. Brown*, 48 Mich. 147. If the plaintiff fails to appear, judgment as in case of non-suit may be rendered against him. *Abbott v. Mathews*, 26 Mich. 177.

In *Gibson v. Burrows*, 41 Mich. 716, the court said: "Under our statutes (Comp. L., ch. 186) the referees are required to conduct their business in the same manner as a trial by the court. The whole machinery of the law contemplates the introduction of testimony and all the other incidents of legal proceedings, with rulings on testimony and findings of fact and law subject to revision for errors. Here the arbitrators are required to receive no testimony and to act entirely on their own judgment on an inspection of the work out of which the controversy arose. There is no resemblance to a reference.

The award, if valid, must be enforced as a cause of action and not as a substitute for a verdict. No judgment can be given on it."

The proceedings before a referee must be conducted in the same way as those before the court. *Abbott v. Matthews*, 26 Mich. 17. In this case the court said: "All objections to the proceedings before the referee, should be taken before him by way of exception, as on a trial in the circuit, or raised upon motion in the circuit court to set aside his action. The record is not different in referred cases from that in others; and matters of practice in preparing for trial, and upon the trial proceedings would not come up on writ of error, without exceptions. Irregularities may form grounds for relief by motion, but not for reversal on error, unless ruled upon during trial. Upon the report, itself, after filing, the exceptions not taken before the referee, are confined to the referee's conclusions of law, his report being conclusive on the facts. Sess. L., '61, p. 160, §9." Thus when a reference case comes to the supreme court, it is looked upon in the same manner as if the trial had taken place before the court. *Runnels v. Moffat*, 73 Mich. 196. The fact that a referee allowed leading questions, does not give ground for error. *Campau v. Brown*, 48 Mich. 147.

Where a party who consents in open court to the appointment of two referees instead of one or three, he is estopped from afterwards questioning the jurisdiction of the court making such appointment. *Shepherd v. Shepherd's Estate*, 108 Mich. 82.

**DISCHARGE OF REFEREES:** It cannot be doubted that, under this section, the circuit judge might, upon a showing that the referees were prejudiced or biased, discharge one or all of such referees, and refer the same to new referees to be appointed by him. *Union Depot Co. v. Backus*, 92 Mich. 58.

**SETTING ASIDE REFERENCE:** On cause shown, is discretionary and not reviewable on mandamus. *Taylor v. Judge*, 30 Mich. 99.

**FORMER LAW CITED:** *Shepherd v. Shepherd's Estate*, 108 Mich. 84.

### (12642). Report.

**SEC. 70.** The referees shall report to the court in writing, showing therein the facts found, and the conclusions of law separately; and such report may be filed in term time or in vacation, and shall stand as the finding of the court in term time, unless excepted to, and judgment may be entered thereon in the same manner as if the action had been tried by the court.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 100, being C. L. '57, (4191); as Am. '61, p. 159, Act 119, Eff. June 15; C. L. '71, (5811); How. 7380; C. L. '97, (10092), unchanged.

**NOT JUDICIAL POWER:** The judicial power, in the constitutional sense, is not exercised by a referee in determining facts in a cause submitted to him. *Underwood v. McDuffie*, 15 Mich. 361; *People v. Judge*, 18 Mich. 489.

**REPORT OF FINDINGS:** Conclusions of law and fact must be separate. *Smith v. Warner*, 14 Mich. 157. He is bound to decide questions of fact according to the weight of evidence. *Danaher v.*

Ward's Estate, 40 Mich. 302. And his findings of fact are conclusive. *St. Denis v. Saunders*, 36 Mich. 370; *Mason v. Sch. Dist.*, 34 Mich. 232; *Runnels v. Moffat*, 73 Mich. 199, citing *Abbott v. Mathews*, 26 Mich. 177. A finding must decide everything submitted for decision. *Danaher v. Ward's Estate*, 40 Mich. 300. Except immaterial matters. *Cook v. Stevenson*, 30 Mich. 242. His conclusions should be based upon such a statement of facts as will show them to be legitimate. *Weirich v. Cook*, 39 Mich. 135. Referee not required to supplement his general finding by special answers to specific questions of counsel. *Odd Fellows v. Morrison*, 42 Mich. 521. A reference will not sustain a judgment unless it conforms to the statute. *Gibson v. Burrows*, 41 Mich. 713. Sufficiency of findings to support judgment. *Weirich v. Cook*, 39 Mich. 134; *Odd Fellows v. Morrison*, 42 Mich. 521; *Nugent v. Nugent*, 48 Mich. 362.

**AS FINDING OF THE COURT:** This section provides simply that the report of the referee, when not excepted to, shall stand as the finding or determination of the court in term time, for the purpose of authorizing the party in whose favor it is made to take judgment upon it as of course. *Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 443.

**JUDGE'S FINDING:** The judge's conclusions of law, upon rendering judgment on the coming in of the referee's report, may be reviewed by writ of error. *Near v. Mitchell*, 23 Mich. 382.

#### (12643). Notice of Filing of Report.

**SEC. 71.** When the referees shall file their report the clerk shall, without delay, give notice thereof, in writing, to the respective parties, or their attorneys, in the manner provided for the service of notices in the circuit court, and immediately indorse on said report, under his hand, his certificate of the giving of such notice, and the time when the same was given, which certificate shall have the same effect as evidence as the return of service of an original writ by a sheriff; and either party, within ten days after receiving such notice, may file with the clerk exceptions in writing to any conclusion of law in such report, and shall serve a copy of such exceptions on the opposite party, and exceptions being filed and served as aforesaid, the case may be noticed for argument before the court, on such exceptions, on any day in term, on same notice as shall be requisite for special motions; but it shall not be necessary for the parties to file exceptions to the report, in order to obtain a review of any ruling of the referees embodied in a bill of exceptions, settled as provided by the next section.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 100, being C. L. '57, (4192); as Am. '61, p. 159, Act 119, Eff. June 15; C. L. '71, (5812); How. 7381: C. L. '97, (10093), unchanged.

**EXCEPTIONS TO REPORT:** When the only complaint is that erroneous conclusions of law have been drawn, exceptions to the report

must be drawn and the case brought to a hearing thereon. *Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 444. See *Smith v. Warner*, 14 Mich. 157. After the filing of the report, the exceptions are confined to the referee's conclusions of law. *Abbott v. Matthews*, 26 Mich. 177. The exceptions to the report reach that class of errors which might be assigned on a judge's finding without exceptions. *Railroad Co. v. Byerly*, 13 Mich. 443.

In the *Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 444, the court said: "It was evidently the purpose of these several sections to require the party complaining of any ruling by the referee to seek remedy in the circuit court before he should be entitled to bring error based upon such ruling. If the decision complained of was one made in the course of the trial, and which might affect the conclusions of fact, the remedy given is by bill of exceptions; but when the only complaint is that erroneous conclusions of law have been drawn, exceptions to the report must be filed, and the case brought to a hearing upon such exceptions. And on the hearing, it is in the power of the court to correct the erroneous conclusions in the report, or to set aside the report altogether, and refer the case back, where the nature of the error is such that it cannot otherwise be remedied.

A practice that should allow a party to make his objection to the report for the first time in a court of error, after having apparently acquiesced in it in the court below, would be so manifestly unjust to both the opposite party and the court, that we are not prepared to find in the statute an intention to establish it, unless the language employed clearly requires us so to hold; for the result is that we are asked to reverse the judgment of the court below on a point which was never brought to its notice, and to inflict upon the opposite party the costs of a suit in error, when an ample remedy is afforded, without expense, in the circuit court. And this injustice would be the more glaring in cases where the error consisted in some omission which, in the court below, might have been supplied by amendment, but which could not be corrected in this court without reversing the judgment, and remanding the case for a new trial.

We do not think we are required by its terms to give this statute a construction which will warrant such a practice. On the other hand, while section six authorizes judgment to be entered upon the report as of course, when no exceptions have been taken, it is only in the case of exceptions, either to the rulings on the trial or to the report, and after those have been brought to a hearing in the circuit court, that the statute provides, by section nine, that 'the exceptions, if any, the report and the exceptions to the report, shall be considered as forming a part of the record in the case, and the finding of facts by the referee shall be treated as a special verdict.' And this provision is unnecessary and meaningless, if, without any exception to the report, it still becomes a part of the record, for the purpose of allowing a party to assign errors upon it in the supreme court.

A very good reason is apparent for requiring exceptions to a report of referees, where none would have been required to a judge's finding. The latter is the deliberate conclusion of the court itself, from which the party aggrieved should be allowed an appeal; but the former is only the conclusion of an officer of the court, which, if erroneous, it is to be presumed the court will correct when the errors are brought

to its notice, and an opportunity afforded for the exercise of its judgment upon them." After filing of the report, the exceptions are confined to the referee's conclusions or law. *Abbott v. Mathews*, 26 Mich. 177; *Smith v. Warner*, 14 Mich. 157.

**(12644). Exception on Hearing Before Referees.**

**SEC. 72.** Either party, on the hearing before the referees, shall be entitled to take exceptions to any ruling of the referees, in the same manner as on trial in open court; and in case exceptions are so taken, the parties respectfully shall be notified by the referees of the time and place when and where they will meet to complete their report, at which time they shall be informed of the conclusions of the referees; and the parties so excepting, may then, or previous to such time as the referees shall then adjourn to, prepare a bill of exceptions, which shall be settled by the referees on such adjourned day, and shall then be annexed to and filed with their report, and a review thereof may be had in the same manner as of exceptions to the report.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 100, being C. L. '57, (4193); As Am. '61, p. 159, Act 119, Eff. June 15; C. L. '71, (5813); How. 7382; C. L. '97, (10094). Unchanged.

**SHALL BE NOTIFIED:** *Runnels v. Moffat*, 73 Mich. 196; *Smith v. Warner*, 14 Mich. 157.

**BILL OF EXCEPTIONS:** Time is to be given for any one dissatisfied to prepare *Smith v. Warner*, 14 Mich. 157. Objections to decisions made on the trial, which may affect the conclusions of fact can be made available by a bill of exceptions. *Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 444. The bill of exceptions settled and signed by the referee performs the same office as one settled and signed by the circuit judge, when the case is tried in court. *Runnels v. Moffat*, 73 Mich. 197; *Altman v. Wheeler*, 18 Mich. 243. Sufficiency of exception. *Weirich v. Cook*, 39 Mich. 134.

**(12645). Action of Court.**

**SEC. 73.** On the hearing of such bills of exceptions, or upon exceptions to the report, or both, the circuit court may confirm or set aside such report, in whole or in part, and in its discretion refer the case back to the referees, or enter judgment thereon; and in case that judgment shall be entered thereon, error may be brought on such judgment as in other cases, in which case the bill of exceptions, if any, the report and the exceptions to report, shall be considered as forming a part of the record in the case, and the finding of facts by the referees shall be treated as a special verdict.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 100, being C. L. '57,

(4194); *As Am.* '61, p. 160, Act 119, Eff. June 15; *C. L.* '71, (5814); *How.* 7383; *C. L.* '97, (10095). Unchanged.\*

**SETTING ASIDE REPORT:** Cannot be set aside and new trial ordered on the ground that it is against the weight of evidence. *People v. Judge*, 18 Mich. 483. For the referee's report of facts found is conclusive. *St. Denis v. Saunders*, 36 Mich. 370; *Mason v. Sch. Dist.*, 34 Mich. 232; *Runnels v. Moffat*, 73 Mich. 199; *Abbott v. Mathews*, 26 Mich. 177. But where the report is too defective to show the merits of the case no judgment should be rendered upon it. *Carroll v. G. T. R. R. Co.*, 19 Mich. 94. When the report is entirely set aside, the case is left as though it had never been tried. *Rice v. Benedict*, 18 Mich. 75.

A referee's finding of fact is not subject to review. *C. F. & G. W. Eddy v. Lamb*, 150 Mich. 628; See *McKeown v. Harvey*, 40 Mich. 228.

**SENDING REPORT BACK:** The power of the court to refer the case back to a referee is given by the statute only where exceptions have been taken, and is to be exercised upon hearing such exceptions. It takes back the entire case. *Smith v. Warner*, 14 Mich. 158. But the court may send the report back, in furtherance of justice, to make such corrections and to supply such inadvertent omissions as may be made from the report itself even where no exceptions are taken. *Runnels v. Moffat*, 73 Mich. 198; *Bryant v. Hendee*, 40 Mich. 543; *Bewick v. Fletcher*, 39 Mich. 25; *Mason v. Sch. Dist.*, 34 Mich. 228. But if sent back for anything but correction of clerical errors, it must be for a new trial. *Smith v. Warner*, 14 Mich. 152.

**RECORD:** The bill of exceptions, the report and the exceptions to the report will be considered as forming a part of the record of the case. *Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 444.

**SPECIAL VERDICT:** When the finding of facts by the referees is treated as such. *Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 444. See *Danaher v. Ward's Estate*, 40 Mich. 300.

**REVIEW ON ERROR:** When assignments of error should be special. *Altman v. Wheeler*, 18 Mich. 243. When a general assignment is not sufficient. *Bewick v. Fletcher*, 39 Mich. 25. The finding of facts in a referee's report is not open to review upon exceptions, where the proceeding is not so shaped as to raise the question whether any specific finding is unsupported by any evidence. *Mason v. Sch. Dist.*, 34 Mich. 228. And the referee's conclusions are presumed to have been warranted by the proofs, if the bill of exceptions does not contain all the evidence. *Grosvenor v. Ellis*, 44 Mich. 452. A referee's conclusions of fact are not reviewable in the supreme court. *McHugh v. Curtis*, 48 Mich. 262; *Campau v. Brown*, 48 Mich. 148. The allowance of leading questions cannot be made ground of error. *Campau v. Brown*, 48 Mich. 147. Where no exceptions have been settled by a referee himself, the exceptions filed in the circuit court can bring up no questions except such as bear on the legal correctness of the judgment as sustained by the findings. The proceedings before the referee must be presumed regular. *Nutting v. Burked*, 48 Mich. 241. See *Weirich v. Cook*, 39 Mich. 134. See *C. F. & G. W. Eddy v. Lamb*, 150 Mich. 628. In *Smith v. Warner*, 14 Mich. 158, the court said: "The power of the court to refer the case back to a referee is only given by the statute where exceptions have been taken, and is to be exercised

upon hearing such exceptions. This reference back, for any further argument before an exercise of discretion by the referee, is evidently for the purpose of a new trial, and takes back the entire case. It is made by reason of some error which has been properly complained of. It would be a very dangerous thing to allow parties an opportunity of re-argument upon separate matter already considered, where no new evidence has been produced to change the face of the cause. A verdict once given in on the facts, which is legal and complete in itself, can never be properly sent back for re-argument before the jury on one or all of the issues; and it is difficult to perceive any good reason for permitting parties, where no error of law has been passed upon, to try experiments before a referee, who has had all the benefit of their proofs and arguments already. The statute plainly gives no such power, but declares explicitly when a report may be sent back, and what shall be the effect of a report not excepted to, or when the exceptions have been disposed of.

If there is new testimony discovered, or for any other such reason as would render a new trial on extrinsic grounds proper, the court may perhaps use its general power to grant new trials, in cases which have been referred, as well as in other cases. But if this may be done, (which we do not now determine), it can hardly be done by permitting a re-trial of any thing less than the entire controversy. And, if the referee in engrossing his report, or in making up his computation, should make a clerical error, or one which may be corrected from the report itself, we are not disposed to say that at his request and representation the court may not be authorized to restore it to him for correction. But the present is not such a case, and we therefore express no opinion upon the matter. Neither is it necessary in the present case to consider how far the court may go in requiring a referee to make fuller statements of fact, where he has not embodied in his report a complete recital." It is always competent for the court, in furtherance of justice, to refer the report back to the referee, to make such corrections and to supply such inadvertent omissions, as may be made from the report itself, even where no exceptions are taken. *Bryant v. Hendee*, 40 Mich. 543; *Runnels v. Moffat*, 73 Mich. 198; *Bewick v. Fletcher*, 39 Mich. 25; *Mason v. Sch. Dist.*, 34 Mich. 338. In the event, if the report is sent back for anything but corrections of clerical errors, it must be done for the granting of a new trial. *Smith v. Warner*, 14 Mich. 152. The report can not be set aside and new trial ordered because it is against the weight of evidence, for the reason that the referee's report of facts is conclusive. *People v. Wayne Circuit Judge*, 18 Mich. 489; *Runnels v. Moffat*, 73 Mich. 190; *St. Denis v. Saunders*, 36 Mich. 370; *Mason v. Sch. Dist.*, 34 Mich. 232; *Abbott v. Mathews*, 26 Mich. 177; *Carroll v. G. T. R. R. Co.*, 19 Mich. 94; *Rice v. Benedict*, 18 Mich. 75; *Nutting v. Burke*, 48 Mich. 241; *McHugh v. Curtis*, 48 Mich. 262; *Campau v. Brown*, 48 Mich. 148; *Weirich v. Cook*, 39 Mich. 134; *Grosvenor v. Ellis*, 44 Mich. 452; *Bewick v. Fletcher*, 39 Mich. 25; *Altman v. Wheeler*, 18 Mich. 243.

FORMER LAW CITED: *Backus v. Gartner*, 89 Mich. 221.

#### (12646). Referees May Call Parties as Witnesses.

SEC. 74. The referees shall be entitled to call the parties as witnesses in the case on which the court might call them, if

the hearing were in open court; and in all cases where motions are referred, the referees shall be entitled, at their option, to call and examine the parties and their witnesses personally, instead of hearing the motion on affidavits; and commissions may be obtained for the taking of testimony to be used on hearings before referees, in the same manner as on trials in open court.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 100, being C. L. '57, (4195); As Am. '61, p. 160, Act 119, Eff. June 15; C. L. '71, (5815); How. 7384; C. L. '97, (10096). Unchanged.

**(12647). Compensation.**

SEC. 75. The referees shall be allowed such compensation for their services as the court may deem just, which shall be taxed as a part of the costs in the cause, or the parties and the referees, by stipulations to be annexed to the report, may agree on the rate of compensation to be made to the referees, and in every case each referee shall attend to, and return with the report, a certificate under his hand, setting forth the time actually expended by him in the business of such reference: *Provided*, That six hours shall be considered as one day, and three hours one-half day for the purpose of fixing the time employed by any referee upon such reference; and whenever a referee shall fail to report, certify, and return, as aforesaid, the time employed by him in any reference, he shall be deemed to have waived all compensation for his services as such referee: And *Provided further*, That whenever a stipulation in writing, as aforesaid, shall be made between the parties and referees, fixing the compensation, such stipulation shall be attached to, and returned with the report, and the court shall allow the compensation so fixed, and no other.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 100, being C. L. '57, (4196); As Am. '61, p. 161, Act 119, Eff. June 15; C. L. '71, (5816); How. 7385; C. L. '97, (10097). Unchanged.

FORMER LAW CITED: *Shepherd v. Shepherd's Estate*, 108 Mich. 91.

**(12648). Appointment of Auditors.**

SEC. 76. Whenever a cause is at issue, and it shall appear that the trial will require the investigation of accounts, or the examination of vouchers the court in which such issue is to be tried, may appoint one or more auditors to hear the parties, and examine their vouchers and evidence, and to state the account and make report thereof to such court.



**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 100, being C. L. '57, (4197); C. L. '71, (5817); How. 7386; C. L. '97, (10098). Unchanged.

**CONSTRUED:** In case of reference, no issue shall be submitted to the jury until after the account is stated. *Stockman v. Mitchell*, 120 Mich. 293. *Scott v. Bay City*, 150 Mich. 694; *Anti-Kalsomine Co. v. Kent Circuit Judge*, 123 Mich. 658; *Stockman v. Mitchell*, 109 Mich. 348.

**FORMER LAW CITED:** *Beard v. Spalding*, 12 Mich. 309; *Church v. Anti-Kalsomine Co.*, 118 Mich. 242.

**(12649). Auditors to be Sworn.**

**SEC. 77.** Before proceeding to hear any evidence in the cause, the auditors shall be severally sworn, in the same manner as referees are herein required to be sworn, and they shall in like manner give notice to the parties of the time and place appointed for their meeting, and they may adjourn from time to time, as may be necessary.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 100, being C. L. '57, (4198); C. L. '71, (5818); How. 7387; C. L. '97, (10099). Unchanged.

**CONSTRUED:** Before the amendment of '61 to Sections 3-11 of the former act, (see note "Former Laws" to Compilers' Section 12639) section 7 required referees to be sworn. But it is not necessary now. See *Underwood v. McDuffie*, 15 Mich. 361.

**(12650). Report of Majority.**

**SEC. 78.** All the auditors must meet and hear the cause, but a report of a majority of them shall be valid, and such report may be compelled by the court in like manner as in the case of referees.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 100, being C. L. '57, (4199); C. L. '71, (5819); How. 7388; C. L. '97, (10100). Unchanged.

**(12651). Witnesses Before Auditors.**

**SEC. 79.** Witnesses may be summoned and compelled to attend and testify before the auditors, in the same manner as before referees; and either of the auditors may administer the necessary oath to such witnesses.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 100, being C. L. '57, (4200); C. L. '71, (5820); How. 7389; C. L. '97, (10101). Unchanged.

**(12652). Court's Power Over Auditors.**

**SEC. 80.** The court may, for any sufficient reason, discharge the auditors and appoint others, and they may also recommit the report for revision or further examination to the same, or to other auditors.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 100, being C. L. '57, (4201); C. L. '71, (5821); How. 7390; C. L. '97, (10102). Unchanged.

**CONSTRUED:** An order discharging an auditor is within the discretion of the trial court. *Anti-Kalsomine Co. v. Judge*, 123 Mich. 658.

**FORMER LAW CITED:** *Backus v. Gartner*, 89 Mich. 222.

**(12653). Use of Report as Evidence.**

**SEC. 81.** The report of the auditors, if there be no legal objection to it, may be used by either party as evidence on the trial before the jury, but it may be impeached and disproved by other evidence produced on the trial by either party.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 100, being C. L. '57, (4202); C. L. '71, (5822); How. 7391; C. L. '97, (10103). Unchanged.

**CONSTRUED:** The account stated and reported by the auditors, and nothing else, is made evidence by the statute for either party that may see fit to use it on the trial. If neither uses it, it is not evidence in the cause. *Beard v. Spalding*, 12 Mich. 309.

**FORMER LAW CITED:** *Anti-Kalsomine Co. v. Judge*, 123 Mich. 658; *Church v. Anti-Kalsomine Co.*, 118 Mich. 242.

**(12654). Compensation.**

**SEC. 82.** The court shall award a reasonable compensation to the auditors or referees, as the case may be, which shall be paid by the plaintiff, and shall be taxed in his bill of costs, if he shall be entitled to costs in the suit.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 100, being C. L. '57, (4203); C. L. '71, (5823); How. 7392; C. L. '97, (10104). Unchanged.

**CONSTRUED:** *Scott v. Bay City*, 150 Mich. 694.

## CHAPTER XIX.

### PRACTICE IN CHANCERY CASES NOT OTHERWISE PROVIDED FOR.

#### (12655). Publication of Order for Creditors to Exhibit Demands.

SECTION 1. Whenever a bill shall be filed in chancery, for relief, or for the benefit of the creditors generally of any person, or of any estate, or for the benefit of any other persons than the plaintiffs, who will come in and contribute to the expense of such suit, every order which may be made thereon requiring such creditors or other persons to exhibit their demands shall in all cases be published once in each week, for at least three weeks, and as much longer as the court may direct, in any newspaper which the court may designate.

HISTORY: Re-enacts Sec. 79, R. S. '46, Ch. 90, being C. L. '57, (3533); C. L. '71, (5115); How. 6669; C. L. '97, (484), changing "complainant" to "plaintiff," therefore, substantially unchanged.

#### (12656). Appearance of Defendant Not Personally Served.

SEC. 2. In any case where personal service was not had, except in a case of divorce, if the defendant against whom any decree shall have been made, or his representatives, shall afterward appear and petition to be heard, the party so petitioning shall be admitted to answer the plaintiff's bill upon paying or securing to be paid such costs as the court shall adjudge, and the suit shall then proceed in like manner as if such defendant had appeared in due season and no decree had been made.

HISTORY: Re-enacts Sec. 91, R. S. '46, Ch. 90, being C. L. '57, (3544); As Am. '67, p. 88, Act. 62, Eff. June 27; C. L. '71, (5127); How. 6681; C. L. '97, (496), with slight changes in phraseology. Unchanged.

ADMITTED TO ANSWER: When a defendant brought in by publication petitions to be heard, his right to be admitted to answer, on payment of costs, is absolute. His equities cannot be decided on affidavits opposing his petition, or in any way, except in a hearing on the merits. McDonald v. McDonald, 45 Mich. 45. McDowell v. Mecosta Circuit Judge, 178 Mich. 103. The effect of admitting a defendant to

answer after decree is to vacate the decree as to him, but the decree remains in statu quo as to other defendants. *Griggs v. D. & M. Ry. Co.*, 10 Mich. 123. And such an appearance waives all defects in the proceedings to bring him in by publication. *Stone v. Welling*, 14 Mich. 524. The right of a party or his representatives to appear and defend after the passing of a decree founded on substituted service, is absolute, and is not conditioned on notice to complainant, or his grantees or assignees. *Coffin v. Ontonagon Circuit Judge*, 140 Mich. 420.

FORMER LAW CITED: *Newton v. Newton*, 166 Mich. 427; *Steketee v. Newkirk*, 173 Mich. 228.

**(12657). Time for Appearance.**

SEC. 3. The defendant, or his representatives, must so appear within one year after notice in writing of the decree shall have been given to him or them, and within seven years after the making of the decree, when such notice shall not be given.

HISTORY: Re-enacts Sec. 92, R. S. '46, Ch. 90, being C. L. '57, (3545); C. L. '71, (5128); How. 6682; C. L. '97, (497). Unchanged.

CONSTRUED: Must appear within time prescribed. *King v. Harrington*, 14 Mich. 539. See also *Coffin v. Ontonagon Circuit Judge*, 140 Mich. 420, 424; *McDowell v. Mecosta Circuit Judge*, 178 Mich. 103. The time within which the defendant proceeded against by a non-resident, may appear and be permitted to defend, after decree would run from the date of filing and entry of the decree, unless notified in writing that a decree had passed. *Newton v. Newton*, 166 Mich. 421, 427.

**(12658). Confirmation of Decree.**

SEC. 4. If the defendant or his representatives shall not so appear within one year after such notice shall have been given, and if not given, before the expiration of seven years after the making of the decree, the court shall then, by order, confirm the decree against the defendant, and against all persons claiming under him by virtue of any act subsequent to the commencement of the suit, and may make such further order in the premises as shall be just and reasonable.

HISTORY: Re-enacts Sec. 93, R. S. '46, Ch. 90, being C. L. '57, (3546); C. L. '71, (5129); How. 6683; C. L. '97, (498). Unchanged.

ORDER OF CONFIRMATION: As that order is a matter of right and not of discretion, its omission is not material. *King v. Harrington*, 14 Mich. 539.

CITED: *Coffin v. Ontonagon Circuit Judge*, 140 Mich. 424.

**(12659). Sale of Mortgaged Premises.**

SEC. 5. If the bill shall have been filed to procure the foreclosure or satisfaction of a mortgage, the court, instead of

proceeding to a sequestration, may decree a sale of the mortgaged premises, or of such part thereof as may be necessary to discharge the mortgage, and the costs of suit, as in other cases.

**HISTORY:** Re-enacts Sec. 94, R. S. '46, Ch. 90, being C. L. '57, (3547); C. L. '71, (5130); How. 6684; C. L. '97, (499), omitting after "sequestration," "in the manner hereinbefore directed." Unchanged.

**CONSTRUED:** As to the construction of a similar section of a former law, see *Lawrence v. Fellow*, Walk. 468.

**(12660). Stay of Sale.**

**SEC. 6.** In the case mentioned in the last preceding section if the defendant, at any time before the sale of the mortgaged premises, shall appear and pay to the plaintiff such costs as the court shall award, the court shall stay the sale, and the same proceedings shall be thereafter had, as if the defendant had been served with process, and had regularly appeared.

**HISTORY:** Re-enacts Sec. 95, R. S. '46, Ch. 90, being C. L. '57, (3548); C. L. '71, (5131); How. 6685; C. L. '97, (500), changing "complainant" to "plaintiff." Unchanged.

**STAY OF SALE:** To avail himself of this statute two things are required of the defendant, viz: his appearance before the mortgaged premises are sold on the decree and the payment of such costs as the court shall award. The costs only are left discretionary with the court, and, on payment of them, defendant has a right to interpose a defense. The statute extends to all defendants. It is not limited to the mortgagor. It makes no distinction between the mortgagor and a subsequent purchaser. *Bailey v. Murphy*, Walk. 306. This proceeding puts the defendant on precisely the same footing as if, so far as he is concerned, there had never been any decree. *Hardwick v. Bassett*, 25 Mich. 151. See *Griggs v. D. & M. Ry. Co.*, 10 Mich. 117. *Bragg v. Whitcomb*, Walk. Ch. 307.

**(12661). Sale Affected by Appearance.**

**SEC. 7.** No sale and conveyance regularly made under the preceding provisions, upon a bill for the foreclosure and satisfaction of a mortgage, shall be affected or prejudiced by the appearance of the defendant within one year, or the seven years hereinbefore specified, nor by any other proceeding; but such defendant or his representatives may, at any time within seven years after the decree ordering such sale, file a bill against the plaintiff or his representatives, to account for all moneys received by him or them by virtue of such decree, over and above the amount justly due on the mortgage, and costs of suit; and the court shall proceed on such bill, according to the equity of the case.

**HISTORY:** Re-enacts Sec 96, R. S. '46, Ch. 90, being C. L. '57, (3549); C. L. '71, (5132); How. 6686; C. L. '97, (501), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** *McVickar v. Filer*, 31 Mich. 304; *Colton v. Rupert*, 60 Mich. 327, 329.

### Of Injunctions.

#### (12662). Injunction to Stay Trial.

**SEC. 8.** No injunction shall issue to stay the trial of any personal action in a court of law, until the party applying therefor shall execute a bond with one or more sufficient sureties, to the plaintiff in such action at law, in such sum as the circuit judge or other officer allowing the injunction shall direct, conditioned for the payment to the said plaintiff, or his legal representatives, of all moneys which may be recovered by such plaintiff, or his representatives, or the collection of which may be stayed by such injunction, in such action at law, for debt or damages, and for costs therein; and also for the payment of such costs as may be awarded to them in the court in chancery, in the suit in which such injunction shall issue.

**HISTORY:** Re-enacts Sec. 97, R. S. '46, Ch. 90, being C. L. '57, (3550); C. L. '71, (5133); How. 6687; C. L. '97, (502); As Am. '15, p. 499, Act 283. Unchanged.

**NOTE:** As Sec. 502, C. L. '97 was expressly repealed as a part of Ch. 29, C. L. '97, by the repealing section of the Judicature Act, such repeal would naturally take with it the amendment of '15, though this section omits to re-enact the last part of such amendment which read as follows: "but no writ of injunction shall issue from any court of this State which will operate to stay any suit or proceeding pending in any court of the United States, or in any other court of this state, except to be issued by a judge of the court having the same territorial jurisdiction as the court in which such suit or proceeding is pending."

**INJUNCTION TO STAY PROCEEDINGS AT LAW:** The jurisdiction of courts of chancery to issue writs of injunction to stay proceedings at law, has been limited so that no writ of injunction shall issue from any court of this state which will operate to stay any suit or proceedings pending in any court of the United States or in any other court of this state, except it be issued by a judge of a court having the same territorial jurisdiction as the court in which such suit or proceeding is pending.

The question as to the relation of P. A. '15, Act No. 314, to P. A. '15, Act No. 283, was brought up in the case of *Long Point Development Ass'n v. McIntosh*, 193 Mich. 571; 160 N. W. 662. Both sections of the acts are alike, with the exception that P. A. '15, Act No. 283, has the following added: "*but no writ of injunction shall issue from any court of the state which will operate to stay any suit or pro-*

*ceeding pending in any court of the United States or in any other court of this state, except it be issued by a judge of the court having the same territorial jurisdiction as the court in which such suit or proceeding is pending."*

In the above mentioned case, the court said: "During the same session of the legislature, Act No. 314, Public Acts, 1915, known as the 'Judicature Act,' was passed, and by that act all acts or parts of acts inconsistent with and contrary to its provisions were repealed. Said Act No. 283, Public Acts, 1915, was re-enacted, except the portions of the act italicized above, which was omitted. In our opinion, it must be said that said Act No. 314 repealed so much of Act No. 283 as is clearly inconsistent with its provisions. Act No. 283, Public Acts, 1915, was in force and effect from August 25 to January 1, 1916, and the injunction was issued January 10, 1916, so that it appears that neither the bill nor the injunction can be said to be affected by said Act No. 283, Public Acts, 1915, which was not then in force."

A bond to secure the defendant in an injunction bill against damages which may be sustained by the issuance of an order restraining the further prosecution of an action at law under this statute, is not required in the case of a permanent injunction issued by the final decree of the court in such proceeding. The statute has reference to the preliminary injunction which may be issued upon the filing of the bill. *Felton v. Wedthoff*, 185 Mich. 72; 22 D. L. N., 164; 151 N. W., 727. No bond to secure defendant against loss by the injunction proceeding under this statute was required as a condition to the issuance of the restraining order, since the statute relates to a suit or action at law pending, not to the seizure of property by the defendant under a chattel mortgage clause in a contract of sale. *Lehnen v. Ryan*, 185 Mich. 247; 22 D. L. N. 23; 151 N. W. 655.

**INJUNCTION TO STAY TRIAL:** In order to authorize an injunction against the enforcement of a legal right, a case must be made out showing a clear equity, superior to that of the legal owner and such as in a court of equity would control it. *Boinay v. Coats*, 17 Mich. 411. The rules and statutes imposing conditions on the issue of injunctions to stay proceedings at law are not confined to cases where the bill is filed by one of the parties to the proceedings, but embrace all attempts to restrain parties, at the complaint of any one, from enforcing their rights by legal process. *Id.* Staying proceedings in suit or replevin bond. *Wright v. Hake*, 38 Mich. 525. In suit at law for deficiency on foreclosure. *Innes v. Stewart*, 36 Mich. 285. To restrain foreclosure at law. *Green v. Engleman*, 39 Mich. 460. A court of chancery will relieve against a judgment at law where complainant was prevented from making his defense at law by the fraudulent conduct of defendant. *Burpee v. Smith*, Walk. 327. Staying proceedings in chancery. *Mason v. Payne*, Walk. 463. Courts of chancery will not sustain a bill to restrain a suit commenced in a court of a sister state or in any federal court. *Carroll v. Bank*, Har. 197. When a stay of proceedings at law is asked, the bill must show the state of the pleadings and the court in which the suit is pending. *Id.* Mandamus will not lie to compel a court to proceed to the trial of a case that has been enjoined; the sufficiency of the injunction bill cannot be reviewed collaterally whether the bill is in the same court or not. *Ives v. Judge*, 40 Mich. 63. Courts of equity restrain proceedings at law, when necessary to the attainment of justice, not by

assuming jurisdiction over the courts in which the proceedings are pending, but by controlling the parties to such proceedings by injunction. *Burpee v. Smith*, Walk. 327.

**BOND:** The provision requiring a bond is positive and peremptory. *Carroll v. Bank*, Har. 204. An injunction bond is a perfect obligation as soon as filed with the register in chancery. *Lothrop v. Southworth*, 5 Mich. 436. A bond for an injunction is a joint contract which, after a surety's death, will support a claim against his estate as if it were joint and several. *Stewart's Appeal*, 39 Mich. 619. The decree of a court of chancery awarding damages in an injunction suit is conclusive of the amount of damages in a subsequent action upon the injunction bond. *Lothrop v. Southworth*, 5 Mich. 435. See *Wright v. Hake*, 38 Mich. 531; *Williams v. Vail*, 9 Mich. 162. An injunction issued without bond restraining defendant from proceeding to sell goods seized under a writ of attachment, is a nullity. *Lawton v. Richardson*, 115 Mich. 12. But where a replevin has been brought to recover machinery sold to the builder of a mill, title to remain in the seller until he is fully paid, an injunction staying the removal of the machinery until the rights of the mortgagee of the land can be adjudicated does not stay the action at law so as to require a bond, under this section. *American Fdry. Co. v. Judge*, 138 Mich. 167. As to the sufficiency of an allegation of a bill seeking an injunction against foreclosure proceeding; see *Melze-Alderton Shoe Co. v. First State Savings Bank*, 171 Mich. 26. One who has conspired with another fraudulently to procure the issuance of an insurance policy on the life of a third person will be enjoined from suing on the policy. *Metropolitan Life Ins. Co. v. Freedman*, 159 Mich. 114. The requirement that a bond be filed applies only to a preliminary injunction and does not apply to a permanent injunction. *Felton v. Wedthoff*, 185 Mich. 72.

The rule of court concerning injunction masters absolutely prohibits them from granting injunctions to stay proceedings at law without notice previously given to the adverse party. It is said that the rules and statutes imposing conditions on the issue of injunction to stay proceedings at law are not confined to cases where the bill is filed by one of the parties to the proceeding, but embraces all attempts to restrain parties, at the complaint of any one of them from enforcing their rights by legal process. *Boinay v. Coats*, 17 Mich. 411. It is necessary in order to authorize an injunction against the enforcement of a legal right, that a case must be made out to him showing a clear equity, superior to that of the legal owner and such as would be recognized in a court of equity. *Boinay v. Coats*, 17 Mich. 411.

In *Burpee v. Smith*, Walk. Ch. 329, the court said: "Courts of equity restrain proceedings at law, when necessary to the attainment of justice, not by assuming jurisdiction over the court in which the proceedings are pending, but by controlling the parties to such proceedings, by injunction." An injunction does not stay the action at law so as to require a bond under this section where replevin has been brought to recover machinery sold to the builder of a mill, title to remain in the seller until he has fully paid. *American Foundry Co. v. Circuit Judge*, 130 Mich. 170. Under this statute an injunction issued without bond restraining defendant from proceeding to sell goods seized under a writ of attachment, is a nullity. *Lawton v. Richardson*, 115 Mich. 12. An injunction bond is a perfect obligation as soon as filed with the register in chancery. *Lothrop v. South-*



worth, 5 Mich. 436. The decree of the court of chancery awarding damages in an injunction suit is conclusive of the amount of damages in a subsequent action upon the injunction bond. *Lothrop v. Southworth*, 5 Mich. 435. The statutory provisions requiring a bond is positive and peremptory. *Carroll v. Bank*, Har. 204. A bond for an injunction is a joint contract which, after a surety's death, will support a claim against the estate as if it were joint and several, *Stewart's Appeal*, 39 Mich. 619.

**(12663). Stay of Proceedings After Verdict.**

Sec. 9. No injunction shall issue to stay proceedings at law in any personal action, after verdict, and before judgment thereon, unless a sum of money equal to the amount for which the verdict was given, shall be first deposited with the court from which the injunction issues, by the party applying for such injunction, or a bond for the payment thereof shall be given as hereinafter directed.

HISTORY: Re-enacts Sec. 98, R. S. '46, Ch. 90, being C. L. '57, (3551); C. L. '71, (5134); How. 6688; C. L. '97, (503). Unchanged.

**(12664). Stay of Proceedings After Judgment.**

Sec. 10. No injunction shall issue to stay proceedings at law in any personal action, after judgment, unless:

1. A sum of money equal to the full amount of such judgment, including costs shall be first deposited by the party applying for such injunction, or a bond in lieu thereof be given as hereinafter directed; and

2. Unless such party, in addition to such deposit or bond in lieu thereof, shall also execute a bond with one or more sufficient sureties, to the plaintiff in such judgment, in such sum as the circuit judge or officer allowing the injunction shall direct, conditioned for the payment to the said plaintiff, or his legal representatives, of all such damages, and costs, as may be awarded to them by the court, at the final hearing of the cause.

HISTORY: Re-enacts Sec. 99, R. S. '46, Ch. 90, being C. L. '57, (3552); C. L. '71, (5135); How. 6689; C. L. '97, (504). Unchanged.

CONSTRUED: A complainant is not entitled to a preliminary injunction to restrain an officer from making sale of personal property levied upon by virtue of an execution lawfully in his hands for collection, without filing the bond required by this section. *Hinkle v. Baldwin*, 93 Mich. 422. In such a case the officer is a necessary party. *Burpee v. Smith*, Walk. 327. When such an injunction is dissolved the final decree dismissing the bill may properly require payment of the judgment. *Hatheway v. Weeks*, 34 Mich. 237, 245. As to the deposit of money with the register, see *Smith v. Kent Circuit Judge*, 139 Mich. 463, 465.

**(12665). Payment of Deposit to Plaintiff.**

SEC. 11. If, after a verdict or judgment at law, any moneys shall be deposited in the court pursuant to either of the two last sections, the same may be paid, on the order of the court, to the plaintiff in such action at law, upon his executing to the people of this state a bond, in a penalty double the amount so deposited, with such sureties as the court shall approve, conditioned that such plaintiff will pay to the clerk with whom the bill shall be filed, the moneys which he shall so receive, and the interest thereon, or any part thereof, according to any order or decree of the court, that may be made in relation to the same.

HISTORY: Re-enacts Sec. 100, R. S. '46, Ch. 90, being C. L. '57, (3553); C. L. '71, (5136); How. 6690; C. L. '97, (505); changing "register" to "clerk." Unchanged.

**(12666). Proceedings After Final Decision of Cause.**

SEC. 12. Whenever the moneys so deposited shall be paid to the plaintiff in the action at law, if the final decision of the cause in chancery shall be against the party obtaining the injunction, the circuit judge may order the bond that shall have been given to be canceled, and shall continue the injunction to stay the proceedings at law, or shall compel the plaintiff therein to cause such judgment to be satisfied and discharge of record.

HISTORY: Re-enacts Sec. 101, R. S. '46, Ch. 90, being C. L. '57, (3554); C. L. '71, (5137); How. 6691; C. L. '97, (506). Unchanged.

**(12667). Stay of Proceedings After Verdict.**

SEC. 13. No injunction shall issue to stay proceedings at law, in any action for the recovery of lands, or of the possession thereof, after verdict, unless the party applying therefor shall execute a bond, with one or more sureties, to the plaintiff in such action at law, in such sum as the circuit judge or officer allowing the injunction shall direct, conditioned for the payment to the plaintiff in such action, and his legal representatives, of all such damages and costs as may be awarded to them, in case of a decision against the party obtaining such injunction.

HISTORY: Re-enacts Sec. 102, R. S. '46, Ch. 90, being C. L. '57, (3555); C. L. '71, (5138); How. 6692; C. L. '97, (507). Unchanged.

CONSTRUED: Restraining ejectment. *D. & M. Ry. Co. v. Brown*, 37 Mich. 533; *LaFrance v. Griffin*, 160 Mich. 236. No bond is required by this section before issuing an injunction to stay proceedings at

law for the recovery of the possession of lands until after verdict. *Skutt v. Ionia Circuit Judge*, 158 Mich. 43.

**(12668). Ascertainment of Damages.**

SEC. 14. The damages to be paid upon the dissolution of such injunction, shall be ascertained by reference to a circuit court commissioner, or in such manner as the courts shall direct, and shall include not only the reasonable rents and profits of the lands recovered by such verdict, but all waste committed thereon after the granting of the injunction.

HISTORY: Re-enacts Sec. 103, R. S. '46, Ch. 90, being C. L. '57, (3556); C. L. '71, (5139); How. 6693; C. L. '97, (508), changing "master" to "circuit court commissioner." Unchanged.

**(12669). Bond Instead of Deposit.**

SEC. 15. The circuit judge shall have power to dispense with any deposit of moneys required by either of the preceding sections, and in lieu thereof to direct the execution of a bond, with sureties, conditioned to pay the amount so required to be deposited, whenever ordered by the court; or, if a bond is already required in addition to such deposit, then to direct the enlargement of a penalty and condition of such bond as may be requisite; but whenever such deposit shall be dispensed with, the bond so substituted or enlarged, shall be executed by at least two sufficient sureties.

HISTORY: Re-enacts Sec. 104, R. S. '46, Ch. 90, being C. L. '57, (3557); C. L. '71, (5140); How. 6694; C. L. '97, (509). Unchanged.

**(12670). When Deposit or Bond Dispensed With.**

SEC. 16. Whenever an injunction shall be applied for, to stay proceedings at law in an action after judgment or verdict, on the ground that such judgment or verdict was obtained by actual fraud, the circuit judge or officer granting the injunction shall have power to dispense with the deposit of any moneys, or the execution of any bond.

HISTORY: Re-enacts Sec. 105, R. S. '46, Ch. 90, being C. L. '57, (3558); C. L. '71, (5141); How. 6695; C. L. '97, (510). Unchanged.

CONSTRUED: See *Manistique Lumber Co. v. Lovejoy*, 55 Mich. 193. 20 N. W. 899.

**(12671). Sufficiency of Sureties.**

SEC. 17. The sufficiency of the sureties in any bond executed

under the provisions of this chapter, relating to staying proceedings at law by injunction, shall be ascertained, either:

1. By the certificate of any circuit court commissioner of the proper county, stating that he has inquired into the circumstances of such sureties, and is satisfied of their sufficiency; or

2. By the affidavit of such surety, stating that he is a householder, resident within this state, and that he is worth a sum equal to the amount in which the bond shall have been required, over and above all debts and demands against him.

**HISTORY:** Re-enacts Sec. 106, R. S. '46, Ch. 90, being C. L. '57, (3559); C. L. '71, (5142); How. 6696; C. L. '97, (511), changing "master in chancery" to "circuit court commissioner." Unchanged.

**(12672). Filing of Bond.**

**SEC. 18.** Whenever a bond shall be required to be executed, as aforesaid, prior to the issuing of an injunction, the same, with the certificate or affidavit above required, shall be filed with the clerk, before the sealing and delivery of the injunction.

**HISTORY:** Re-enacts Sec. 107, R. S. '46, Ch. 90, being C. L. '57, (3560); C. L. '71, (5143); How. 6697; C. L. '97, (512). Unchanged.

**FILING BOND:** The bond is a perfect obligation as soon as filed. The filing is a delivery in the manner provided by law, and a right of action accrues upon its breach. *Lothrop v. Southworth*, 5 Mich. 447.

**(12673). Delivery of Bond for Prosecution.**

**SEC. 19.** The circuit judge shall direct the delivery of any such bond to the person entitled to the benefit thereof, for prosecution, whenever the condition of such bond shall be broken, or the circumstances of the case shall require such delivery.

**HISTORY:** Re-enacts Sec. 108, R. S. '46, Ch. 90, being C. L. '57, (3561); C. L. '71, (5144); How. 6698; C. L. '97, (513). Unchanged.

**PURPOSE:** The purpose of the statute in requiring a judge's order for delivery, was to preserve the jurisdiction of the court over the bond so long as might be necessary to prevent an unjust use of it. *Lothrop v. Southworth*, 5 Mich. 447.

**(12674). Who May Grant Injunctions.**

**SEC. 20.** Circuit judges, and each circuit court commissioner, except as provided in section one hundred two of chapter two of this act, shall have power to grant injunctions to stay proceedings at law.

**HISTORY:** Re-enacts in part and supersedes Sec. 109, R. S. '46, Ch. 90, being C. L. '57, (3562); As Am. '58, p. 5, Act 4, Eff. May 6; C. L. '71, (5145); How. 6699; C. L. '97, (514). Modified.

**INJUNCTION MASTER:** By the revision of the law relative to circuit court commissioners, the office of "injunction master" was abolished and the powers formerly exercised by that officer are now conferred upon all circuit court commissioners alike, see Compilers' Sections 12165-88, and notes. *T. A. A. & N. Ry. v. D. L. & N. R. R. Co.*, 61 Mich. 11.

**(12675). Sickness of Judge.**

**Sec. 21.** In case the circuit judge of any circuit, and the other officers of any county authorized to grant injunctions, are absent, sick, or in any manner disqualified from ordering or allowing an injunction in any case pending or about to be commenced in such circuit or county, upon due proofs of such facts by affidavit, the circuit judge of any judicial district adjoining the judicial district in which said circuit or county is situated, shall have authority at chambers or at any place where he may be, to grant or deny such injunction the same as if he were the circuit judge of the circuit in which such suit is pending or about to be commenced, and after such injunction is allowed, as aforesaid, the judge ordering the same shall have concurrent jurisdiction to modify or dissolve the same with the presiding judge of the circuit wherein such suit is pending.

**HISTORY:** Re-enacts Sec 1 of Act 96 of '79, being How. 6743; C. L. '97, (555). Unchanged.

**Of the Foreclosure of Mortgages.**

**(12676). Bills for Foreclosure.**

**Sec. 22.** All bills for the foreclosure or satisfaction of mortgages shall be filed in the circuit court in chancery of the county where the mortgaged premises, or any part thereof, are situated.

**HISTORY:** Re-enacts Sec. 110, R. S. '46, Ch. 90; As Am. '48, p. 314, Act 206, Eff. June 2; C. L. '57, (3563); As Am. '61, p. 54, Act 62, Eff. June 15; C. L. '71, (5146); How. 6700; C. L. '97, (515). Unchanged.

See notes to Subdivision 12 of Compilers' Section (12340). *Ulman v. Ulman*, 148 Mich. 353; *Brewer v. Landis*, 111 Mich. 217; *Baker v. Clark*, 52 Mich. 23.

**(12677). Sale of Premises.**

**Sec. 23.** Whenever a bill shall be filed for the foreclosure

or satisfaction of a mortgage, the court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the costs of suit; but the circuit judge shall not, by such decree, order any lands to be sold within six months after the filing of the bill of foreclosure: *Provided*, That if the mortgagor, his heirs, executors, administrators or any person lawfully claiming from or under him or them shall, within six months from the time of such sale, redeem the entire premises sold, by paying to the purchaser, his executors, administrators or assigns, or to the register of deeds in whose office such deed is deposited as provided by section thirty, for the benefit of such purchaser, the sum which was bid therefor, with interest from the time of the sale at the rate per cent borne by the mortgage, not exceeding eight per cent per annum, and in case such payment is made to the register of deeds, the sum of one dollar as a fee for the care and custody of such redemption money, then such deed shall be void and of no effect, but in case any distinct lot or parcel separately sold shall be redeemed, leaving a portion of the premises unredeemed, then such deed shall be inoperative merely to the parcel or parcels so redeemed, and to those portions not so redeemed shall remain valid and of full effect.

**HISTORY:** Re-enacts Sec. 111, R. S. '46, Ch. 90, being C. L. '57, (3564); C. L. '71, (5147); How. 6701; C. L. '97, (516); As Am. '99, p. 310, Act 200, Eff. Sept. 23. Unchanged.

**CONSTITUTIONALITY:** This section as amended in '99 makes no change which amounts to an impairment of the obligations of existing contracts. *State Savings Bank v. Matthews*, 123 Mich. 56. See also *Lohrstorfer v. Lohrstorfer*, 140 Mich. 558.

**PARTIES:** So far as mere legal rights are concerned, upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and the mortgagee, and those who have acquired rights or interest under them, subsequently to the mortgage. *Chamberlain v. Lyell*, 3 Mich. 459.

**COMPLAINANTS:** He who holds the legal title to the debt secured by the mortgage is the legal holder of the mortgage and entitled to enforce it for the benefit of any one who may be interested. *Lee v. Clary*, 38 Mich. 226. Partners need not be joined as complainants in the foreclosure of a mortgage given to only one of the firm as trustee for the partnership. *Sheldon v. Bennett*, 44 Mich. 634. A bill may be filed by a surviving mortgagee to foreclose a mortgage, without making the personal representative of the deceased co-mortgagee a party, mortgages being expressly exempted in the statute requiring grants to two or more persons to be construed to create estates in common. *Martin v. McReynolds*, 6 Mich. 72; *Cote v. Dequindre*, Walk. 64; *Teller v. Wetherell*, 9 Mich. 464. See *Compilers' Sections 11562-3*. Mortgages being part of the personal estate, belong to the personal representa-

tives, and not to the heirs. The executor of the mortgagee is the proper person to file a bill to foreclose. *Abbott v. Godfroy's Heirs*, 1 Mich. 85. See Compilers' Section 13855, and notes. But the bill must allege the death of the testator, the probate of the will and the representative character of the executor. *Middlesworth v. Nixon*, 2 Mich. 425. A foreclosure by executors is not invalidated because only two out of three executors acted, if those two acted under proper authority and there is no showing that the third ever gave an official bond or qualified. *Alexander v. Rice*, 52 Mich. 451. The legatee of a mortgage given as a specific bequest is the owner of it for the purpose of collecting its proceeds and may foreclose in his own name. *Proctor v. Robinson*, 35 Mich. 291. When a chancery foreclosure becomes necessary because of a prior irregular and defective statutory foreclosure, the purchaser at the sale, having succeeded to all the interest of the mortgagee, is the proper complainant. *Gilbert v. Cooley*, Walk. 494; *Niles v. Ransford*, 1 Mich. 338; *Richards v. Morton*, 18 Mich. 255; *Hoffman v. Harrington*, 33 Mich. 392. Payment of a first mortgage by a second mortgagee makes him in equity an assignee of such first mortgage and he may foreclose it. *Mattison v. Marks*, 31 Mich. 421; *Manwarring v. Powell*, 40 Mich. 371. Where property owned by two partners is subject to a mortgage and, as between the two, it is the duty of one to discharge it, but the other pays the debt on condition that the mortgage shall inure to his benefit, an equity arises in his favor entitling him to indemnity through the mortgage. *Laylin v. Knox*, 41 Mich. 40. An equitable assignee of a debt secured by mortgage is entitled to have the mortgage follow the debt, and is the proper party to foreclose. *Briggs v. Hannowald*, 35 Mich. 474. The assignment of the whole, or of a part of a debt secured by mortgage, or of one of several notes so secured, carries with it a proportional interest in the mortgage, unless it is agreed between the parties at the time that no such interest is to pass. *Cooper v. Ullman*, Walk. 251; *Martin v. McReynolds*, 6 Mich. 73. And the assignee may file a bill to foreclose. *Martin v. McReynolds*, 6 Mich. 73. But the assignment of a mortgage, without the debt which it is given to secure, carries no beneficial interest in the mortgage to the assignee, who holds it subject to the will and disposition of the creditor. *Bailey v. Gould*, Walk. 484. One who holds a mortgage as signed to him as security may foreclose. *McKinney v. Miller*, 19 Mich. 152. But the assignment of both debt and mortgage must be shown. *Livingston v. Jones*, Har. 165; *Bailey v. Gould*, Walk. 484. A written assignment is not necessary. *Pease v. Warren*, 29 Mich. 9. While an assignment must be recorded before steps can be taken by an assignee to foreclose a mortgage at law, it is not necessary to a foreclosure in chancery. *Martin v. McReynolds*, 6 Mich. 73. See *Sill v. Ketchum*, Har. 423. A bill may be filed to foreclose a mortgage by one having an equitable title to it only. *Martin v. McReynolds*, 6 Mich. 73. But in such cases the mortgagee, or person holding the legal right to the mortgage, should be made a party, that there may be some one before the court to release the mortgaged premises, or discharge the mortgage of record, on payment of the debt by the mortgagor. Id. See *Briggs v. Hannowald*, 35 Mich. 474; *Fisher v. Meister*, 24 Mich. 447; *Case v. McCabe*, 35 Mich. 100. A trustee, holding a mortgage as such need not make his *cestui que trust* a party to a bill to foreclose it. *Sill v. Ketchum*, Har. 423; *Cook v. Wheeler*, Har. 443.

**DEFENDANTS:** The rule in relation to parties in this class of bills is, that all those should be made parties whose interests are to be affected or concluded by the decree; and this is determined by the inquiry, have they an interest in the equity of redemption? *Chamberlain v. Lyell*, 3 Mich. 459; *McDonald v. McDonald*, 45 Mich. 44. But a person whose connection with the mortgage or the equity of redemption is not shown by the bill is not a proper party and is entitled, so far as he is concerned, to have the bill dismissed with costs. *Havens v. Jones*, 45 Mich. 453. A mortgagee who files a bill to foreclose is not bound to bring in parties interested in the equity of redemption, unless he has actual or constructive notice of their claims; where he has no such notice they are barred by the foreclosure. *Woods v. Love*, 27 Mich. 308. The mortgagor is a necessary party, notwithstanding the personal remedy against him is barred. *Mich. Ins. Co. v. Brown*, 11 Mich. 265. But where the mortgagor has conveyed all his interest in the premises to another, who has assumed the payment of the mortgage as part of the purchase price, such mortgagor is not a necessary party to the foreclosure suit, unless relief is sought against him personally. *Miller v. Thompson*, 34 Mich. 10. All the makers of a joint and several note secured by mortgage, even though the mortgage was given by one only, must be made defendants. *Dederick v. Barber*, 44 Mich. 19. See *Botsford v. Botsford*, 49 Mich. 29. Guarantors of the collection of a debt secured by mortgage are not to be made defendants. *Johnson v. Shepard*, 35 Mich. 124; *Barman v. Carhardt*, 10 Mich. 338; *Joy v. J. & M. P. R. Co.*, 11 Mich. 155. But guarantors of the payment of an obligation so secured may be made defendants. *Johnson v. Shepard*, 35 Mich. 124. Purchasers and incumbrances under the mortgagor subsequent to the mortgage should be made parties defendant. *Wilkinson v. Green*, 34 Mich. 223; *Horton v. Ingersoll*, 13 Mich. 413. Subsequent creditors of the mortgagor whose claims are secured by the property against which the foreclosure is asked should be made parties. *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430. Also a fraudulent grantee of premises equitably subject to a mortgage. *Adams v. Bradley*, 12 Mich. 346. The claims of prior incumbrancers and persons claiming adversely to the mortgagor and prior to the mortgage cannot be litigated in a foreclosure suit, and they should not be made defendants. *Chamberlain v. Lyell*, 3 Mich. 459-60; *Wright v. Dudley*, 8 Mich. 115; *Wurcherer v. Hewitt*, 10 Mich. 453; *Horton v. Ingersoll*, 13 Mich. 409; *F. & M. Bank v. Bronson*, 14 Mich. 361; *Comstock v. Comstock*, 24 Mich. 39; *Summers v. Bromley*, 28 Mich. 127; *Wilkinson v. Green*, 34 Mich. 221; *Bell v. Pate*, 47 Mich. 468. See *Wanzer v. Blanchard*, 3 Mich. 11; *Smith v. Fitting*, 37 Mich. 148. But the question of whether a party is a subsequent purchaser or the holder of an adverse paramount title may be determined. *Wilkinson v. Green*, 34 Mich. 221. And where the adverse claimant has also an interest in the equity of redemption, he should be made a party to foreclose such interest. *Horton v. Ingersoll*, 13 Mich. 409. And where a subsequent purchaser has merely to perfect his record title, procured quit claim deeds from the mortgagor's grantors under such circumstances as would render it fraudulent for him to set up a paramount adverse title on such conveyances, the mortgagee, under proper allegations, may have such alleged adverse title declared null and void. *Wilkinson v. Green*, 34 Mich. 221. Where the adverse claim arises from



a mistake in the description of the land intended to be mortgaged, as to making the adverse claimant a party to the foreclosure bill to correct the mistake, see *Cummings v. Freer*, 26 Mich. 128. Where the mortgage was given by the husband alone for purchase money, the wife is not a necessary party. *Amphlett v. Hibbard*, 29 Mich. 298. Nor are the personal representatives of a deceased mortgagor necessary parties in a foreclosure suit against the heirs, unless the personal estate is sought to be charged with a deficiency in the mortgaged premises to pay the debt. *Abbott v. Godfroy's Heirs*, 1 Mich. 178.

**FORECLOSURE:** One who holds several mortgages to secure a single debt may foreclose either of them at his option separately, until his debt is satisfied. *McKinney v. Miller*, 19 Mich. 152. A mortgage may be foreclosed at any time within the period of the limitation of actions for the recovery of real estate. *Detroit Sav. Bank v. Truesdall*, 38 Mich. 430; *McKinney v. Miller*, 19 Mich. 152; *Powell v. Smith*, 30 Mich. 451; *Sheldon v. Warner*, 45 Mich. 638. See *Abbott v. Godfroy's Heirs*, 1 Mich. 178. As to the presumption of payment from lapse of time. *Bailey v. Gould*, Walk. 478; *Curtis v. Goodenow*, 24 Mich. 18. As to the release of a part of the mortgaged premises to the detriment of a subsequent incumbrance upon another part, see *James v. Brown*, 11 Mich. 25; *Cooper v. Bigly*, 13 Mich. 463; *Dewey v. Ingersoll*, 42 Mich. 17; *Hall v. Edwards*, 43 Mich. 473. As to defenses to foreclosure, see *Smith v. Werkheiser*, 152 Mich. 177; *Davis v. Wardowski*, 164 Mich. 561.

**INSTALLMENTS:** Where there are several notes falling due at different times, the fact that one note matures first will not, of itself, give it a preference over the rest, where the mortgaged premises are insufficient to pay the whole; the security applies pro rata to each. *Cooper v. Ullman*, Walk. 251; *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 Mich. 445; *Wilcox v. Allen*, 36 Mich. 172; *Miles v. Skinner*, 42 Mich. 181; *Bridgman v. Johnson*, 44 Mich. 491; *Jennings v. Moore*, 83 Mich. 235. When the mortgagee assigns one of the notes by an ordinary assignment, without any special provision on the subject, the assignee gains only a pro rata interest in the security. *English v. Carney*, 25 Mich. 181; *Cooper v. Ullman*, Walk. 251. But priority may be given by the parties in the assignment. *Id.* Where two mortgages are executed, delivered and recorded together, neither has any precedence over the other. *McCurdy v. Clark*, 27 Mich. 448; *Van Aken v. Gleason*, 34 Mich. 477. And upon the foreclosure of either, the court, having found the two mortgages to be in law simultaneous, may make a ratable application of the proceeds of sale on both mortgages. *Id.* Foreclosure may be had for an installment. *Dederick v. Barber*, 44 Mich. 19. Each installment must be taken and deemed a separate and independent mortgage. *McCurdy v. Clark*, 27 Mich. 445; *Jennings v. Moore*, 83 Mich. 235. See *Compilers' Section 14950 (4)* and notes. And this includes installments of interest becoming due by the terms of the mortgage, as well as installments of principal. *Edgar v. Beck*, 96 Mich. 421. As to the foreclosure for one installment leaving the mortgage as a security for the others, see *McCurdy v. Clark*, 27 Mich. 445. See *Bridgman v. Bacon*, 44 Mich. 491; *Miles v. Skinner*, 42 Mich. 182. Foreclosure for trifling sums of interest. *Louder v. Burch*, 47 Mich. 109.

**HEARING:** Although taken as confessed as to absent defendants,

as to them and infants, the bill must be brought on for hearing in term. Circuit Court Rule 58, Section 5, (1916). But where defendants neglect to appear after due service, the complainant can proceed ex parte without noticing the case for hearing or placing it on the calendar. *Warner v. Juif*, 38 Mich. 662. But all parties who have appeared are entitled to notice of hearing. *Martin v. McReynolds*, 6 Mich. 75. See notes to Compilers' Section 12457. The affidavit of regularity required by rule is for the convenience of the judge only and the absence of it will not invalidate the proceedings. *Ireland v. Woolman*, 15 Mich. 255.

**COMPUTATION OF AMOUNT DUE:** Not merely what was due at the time of filing the bill, but everything due when the decree is granted may be included. *Vaughn v. Nims*, 36 Mich. 297; *Howe v. Lemon*, 37 Mich. 164; *Bank v. Truesdall*, 38 Mich. 430; *Johnson v. Van Velsor*, 43 Mich. 215; *Hanford v. Robertson*, 47 Mich. 100. But compare *Smith v. Osborn*, 33 Mich. 410. Where the mortgage provides that the whole debt may be declared due for default in making payments, according to the weight of authority a declaration in the bill itself is sufficient and formal notice of an election prior to the suit is unnecessary. *Johnson v. Van Velsor*, 43 Mich. 214-5. See *English v. Carney*, 25 Mich. 178. Where a mortgage is drawn for a larger amount than the debt secured, recovery must be confined to the correct sum. *Laylin v. Knox*, 41 Mich. 48. Interest; its computation and allowance. *Payne v. Avery*, 21 Mich. 524; *Warner v. Juif*, 38 Mich. 662. Compounding. *Hoyle v. Page*, 41 Mich. 533. See *Heath v. Waters*, 40 Mich. 472. See Chapter 118, relative to interest on money and the notes thereto. An agreement endorsed after maturity upon a note, secured by mortgage, to pay a higher rate of interest, is merely a personal undertaking and is not secured by the mortgage. *Spear v. Hadden*, 31 Mich. 267; *Havens v. Jones*, 45 Mich. 253. But where the intent of the parties was to connect the agreement with the mortgage and no rights of third persons intervene, it may charge the land. *Smith v. Graham*, 34 Mich. 303. Taxes paid to protect the mortgage interest may be included. *Vaughn v. Nims*, 36 Mich. 297; *Payne v. Avery*, 21 Mich. 556; *Conn. M. L. Ins. Co. v. Bulte*, 45 Mich. 122. But not if the mortgagee bids in the land at tax sale instead of paying the taxes. *Maxfield v. Willey*, 46 Mich. 252. As to when complainant should be sworn as to payments made. See Compilers' Section 12491 and notes. See also *Chamberlain v. O'Leary*, 161 Mich. 670; *Stabler v. Clark*, 155 Mich. 26; *Commercial National Bank v. Gaugler*, 165 Mich. 403. Attorney's fees are not to be included, even though stipulated for in the mortgage itself. *Hardwick v. Bassett*, 29 Mich. 17; *Bullock v. Taylor*, 39 Mich. 137; *Van Marter v. McMillan*, 39 Mich. 304; *Myer v. Hart*, 40 Mich. 517; *Canfield v. Conkling*, 41 Mich. 371; *Parks v. Allen*, 42 Mich. 482; *Vosburg v. Lay*, 45 Mich. 455; *Louder v. Burch*, 47 Mich. 109; *Millard v. Truax*, 47 Mich. 251; *Botsford v. Botsford*, 49 Mich. 29; *Kennedy v. Brown*, 50 Mich. 336; *Millard v. Truax*, 50 Mich. 343. See *Sage v. Riggs*, 12 Mich. 313. Most of the foregoing cases are reviewed in *Damon v. Deeves*, 62 Mich. 465. See the act of '85 relative to attorney fees on statutory foreclosures. Compilers' Section 14968. See also *Union Trust Co. v. Electric Park Amusement Co.*, 163 Mich. 687. The court may compute the amount due without reference. *Kellogg v. Putnam*, 11 Mich. 346; *Ireland v. Woolman*, 15 Mich. 256; *Vaughn v. Nims*, 36 Mich. 298. The commissioner's

computation, when made and reported, is conclusive unless excepted to. *Thorn v. Hilliker*, 12 Mich. 215. See *Hazen v. Reed*, 30 Mich. 331. As to a decree allowing a set-off, see *Terry v. Terry*, 170 Mich. 330.

**DECREE:** The note and mortgage must be produced and filed in court, or their absence satisfactorily accounted for before a decree can be granted. *Bailey v. Gould*, Walk. 483; *Bassett v. Hatheway*, 9 Mich. 28; *Young v. McKee*, 13 Mich. 556; *Hungerford v. Smith*, 34 Mich. 300; *Mickle v. Maxfield*, 42 Mich. 304. See also *Hasceig v. Brown*, 34 Mich. 503; *Fletcher v. Carpenter*, 37 Mich. 412; *Yerkes v. Blodgett*, 48 Mich. 211. No decree can be taken against an absent defendant brought in by publication and not appearing, nor against an infant, without proofs. See notes to Compilers' Sections (12737) and (12490). The effect of a default in a suit to foreclose for an installment is only to admit the securities as alleged and the amount then due, and cannot operate as an admission of the non-payment of an installment not yet due. *Brown v. Thompson*, 29 Mich. 72. It is the practice in this state on foreclosure to allow a reasonable time for payment, definitely fixed by the decree. *Detroit Sav. Bank v. Truesdall*, 38 Mich. 431.

**SALE:** The power of sale, although usual, is no necessary part of a mortgage. The remedy in equity is open for every breach of condition, whether the parties have seen fit to provide for it or not by the power of sale, which is a private remedy by contract. *Butler v. Ladue*, 12 Mich. 180; *Bank v. Chapelle*, 40 Mich. 447. The omission of the power of sale merely limits the mode of foreclosure to that by bill in equity. *Cowles v. Marble*, 37 Mich. 158. See further on this point, Compilers' Section (14949) and notes. Where a part of the mortgaged premises has been aliened subsequent to the mortgage, that part not parted with will be decreed to be sold first and the parts aliened in the inverse order of alienation. *Mason v. Payne*, Walk. 460; *Caruthers v. Hall*, 10 Mich. 40; *James v. Brown*, 11 Mich. 25; *Cooper v. Bigly*, 13 Mich. 463; *McKinney v. Miller*, 19 Mich. 142; *Ireland v. Woolman*, 15 Mich. 253; *Payne v. Avery*, 21 Mich. 524; *Stibley v. Baker*, 23 Mich. 312; *Sager v. Tupper*, 35 Mich. 134; *Gilbert v. Haire*, 43 Mich. 283. But the defendant who claims the protection of this rule should set up in his answer and establish such facts as will entitle him to it. *Bank v. Truesdall*, 38 Mich. 440; *Caruthers v. Hall*, 10 Mich. 40. A sale of the premises under decree as an entirety will not be disturbed in the absence of anything in the proceedings to show that the sale should have been by parcels. *Vaughn v. Nims*, 36 Mich. 297. As to requirements of notice of sale in the decree, see *Ireland v. Woolman*, 15 Mich. 256. Where a portion of the mortgaged premises is covered by a subsequent incumbrance, the decree may require the land covered by the former one alone to be first sold to satisfy that mortgage. *James v. Brown*, 11 Mich. 29; *Slater v. Breese*, 36 Mich. 77; *Bank v. Truesdall*, 38 Mich. 430. But this must not be done to the prejudice of the prior mortgage. *Bank v. Truesdall*, 38 Mich. 430; *Cooper v. Bigly*, 13 Mich. 463. See *Southworth v. Parker*, 41 Mich. 198. And where a part of the premises has been sold subject to the payment of the whole incumbrance, that part is made as between the parties, the primary fund for the payment. *Mason v. Payne*, Walk. 460. See *Wisner's Estate*, 20 Mich. 442; *Carley v. Fox*, 38 Mich. 387. See further, as to sale in parcels, *Spear v. Hadden*, 31 Mich. 266; *Gris-*

wold v. Fuller, 33 Mich. 268; Vaughn v. Nims, 36 Mich. 297. Sale of undivided interests. Spear v. Hadden, 31 Mich. 266; Eberstein v. Oswalt, 47 Mich. 254. Prior to Act 200 of '99 the sale could not be made in less than one year and six weeks from commencement of suit. Sulver v. McKeown, 43 Mich. 324. See Circuit Court Rule 58, Section 5 (1916). This time may be counted from the issue of the subpoena, when taken out with fair intent to serve as soon as practicable. *Id.* But the court has the discretionary power to postpone the sale until a year from the service of the subpoena. *Ins. Co. v. Renz*, 33 Mich. 298. Where a party brought in by an amended bill is charged with a personal liability, the year should run from the filing of such bill. *Canfield v. Shear*, 49 Mich. 313. Nor can the sale be allowed to take place in less than a year from the time when all defendants have been properly brought in. *Burt v. Thomas*, 49 Mich. 462. A premature sale may be set aside. *Ins. Co. v. Renz*, 33 Mich. 300. As to bill to set aside a chancery foreclosure sale, see *Butters v. Butters*, 153 Mich. 153, 160.

**REDEMPTION PERIOD:** See *Lachman v. Circuit Judge*, 125 Mich. 27. *Michigan Trust Co. v. Libbey*, 127 Mich. 45; *Farr v. Lachman*, 130 Mich. 40. As to the date from which the time of redemption begins to run, see *Trombley v. Klersy*, 147 Mich. 370. As to the time for redemption before sale, see *Redfield v. Reid*, 148 Mich. 545. See also as to redemption, *Miller v. Peter*, 158 Mich. 336. *Ferry v. Miller*, 164 Mich. 429.

**CONSTITUTIONALITY OF AMENDMENT TO THE STATUTE:** P. A. '99, Act No. 200, which amends this statute is constitutional. *State Savings Bank of Detroit v. Matthews*, 123 Mich. 60. In this case the court said: "If we compare the law as amended with it as it was before the amendment occurred, we will find it does not change the time of possession either of the mortgage or of the mortgagee. It changes the form of the decree. It shortens the time after the suit is brought when sale may be made, but it adds a period of redemption after the sale which did not exist before. We do not think it can be said that there is any such material change in the relation of the mortgagor to the mortgagee, or to the rights of each, as to amount to an impairment of the obligation of contracts."

**JURISDICTION:** In this state mortgages can only be foreclosed by statutory publication or a foreclosure suit in chancery, and the jurisdiction of equity in foreclosure proceedings is purely statutory. *Kollen v. Sooy*, 172 Mich. 220. The power to make a personal decree against the makers of a mortgage upon real estate, or against others charged with the payment, comes entirely from the statute providing for chancery foreclosure. *Winsor v. Ludington*, 77 Mich. 213; *Kelly v. Gaukler*, 164 Mich. 519; *Vaughan v. Black*, 63 Mich. 215; *McCrickett v. Wilson*, 50 Mich. 513.

**THE TIME FOR FORECLOSURE:** A mortgage on lands given to secure notes that have been allowed to run after maturity, may be foreclosed at any time within the period of the limitation of actions for the recovery of real estate. *Detroit Savings Bank v. Truesdail*, 38 Mich. 430; *Sheldon v. Warner*, 45 Mich. 638; *Powell v. Smith*, 30 Mich. 451; *McKinney v. Miller*, 19 Mich. 151; *Mich. Ins. Co. v. Brown*, 11 Mich. 265.

See *Robinson v. Hoyt*, 30 Mich. 405; *Curtis v. Goodenow*, 24 Mich. 18; *Gould v. Bailey*, Walk. Ch. 478.

**PARTIES:** In *Chamberlain v. Lyell*, 3 Mich. 459, the court said: "It has accordingly been held that 'so far as mere legal rights are concerned, upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and the mortgagee, and those who have acquired rights or interests under them, subsequently to the mortgage; and the mortgage has no right to make one who claims adversely to the title of the mortgagor and prior to the mortgage, a party defendant for the purpose of trying the validity of his adverse claim of title in this court. The case is analogous in principle to making one who claims adversely to the vendor, a party to a bill filed by the vendee for the specific performance of the contract of sale; in which case it is held that such adverse claimant cannot be made a party for the purpose of having the validity of his claim settled by a decree of this court, which shall thereafter be binding upon him in relation to his claim of title.' (*Eagle Fire Company v. Lent et al.*, 6 Paige, 635, and vide *Lange v. Jones*, 5 Leigh's Rep. 192; *Banks v. Walker*, 3 Barb. Ch. R. 438, 450; *Wood v. Davis*, 4 Bibb. 47; *Holcomb v. Holcomb*, 2 Barb. S. C. R. 20.)"

**COMPLAINANTS:** The legal owner of a debt secured by mortgage is the legal holder of the mortgage and he is the only one who can be the complainant in a foreclosure suit but he may foreclose also for the benefit of anyone interested. *Lee v. Clary*, 38 Mich. 223. It is not necessary to join partners as complainant in the foreclosure of a mortgage given by only one of the firm as trustee for the partnership. *Sheldon v. Bennett*, 44 Mich. 631. Where a bill may be filed by a surviving mortgagee to foreclose a mortgage, it is not necessary to make the personal representatives of the deceased co-mortgagee a party, for it is expressly exempted in the statute requiring grants to two or more persons to be construed to create estates in common. *Martin v. McReynolds*, 6 Mich. 72; *Teller v. Wetherell*, 9 Mich. 454. The fact that mortgages are personal property makes them belong to the personal representatives and not to the heirs, therefore the executor of the mortgagee is the proper complainant in a foreclosure proceeding. *Abbott v. Godfrey's Heirs*, 1 Mich. 165. But in such a case the bill must allege the death of the testator, probate of the will, and the representative character of the executor. *Middleworth v. Nixon*, 2 Mich. 425. In a case where there were three executors and two acted under proper authority to foreclose a mortgage and there was no showing that the third executor ever gave an official bond and qualified, the foreclosure proceedings were not invalidated because two of the executors acted and not the third. *Alexander v. Rice*, 52 Mich. 451. The legatee of a mortgage given as a specific request is the owner of it for the purpose of collecting its proceeds and may foreclose in his own name. *Procter v. Robinson*, 35 Mich. 291. The proper complainant in a foreclosure proceeding where it became necessary on account of a prior irregularity and defective statute to foreclose, is the purchaser at the sale, he having succeeded to all the interest of the mortgagee. *Gilbert v. Cooley*, Walk. 494; *Hoffman v. Harrington*, 33 Mich. 392; *Richards v. Morton*, 18 Mich. 255; *Niles v. Ransford*, 1 Mich. 338. An equitable assignee is the proper party in a foreclosure proceeding. *Briggs v. Hannawald*, 25 Mich. 474.

It is clear that the assignment of a whole or a party of a debt secured by mortgage or of one or several notes so secured, carries with it a proportional interest in the mortgage, unless it is agreed between the parties at the time that no such interest is to be conveyed. *Cooper v. Uilman*, Walk. 251; *Martin v. McReynolds*, 6 Mich. 73. But the assignment of a mortgage, without the debt which it is given to secure, carries no beneficial interest in the mortgage to the assignee, who holds it subject to the will and disposition of the creditor. *Bailey v. Gould*, Walk. 484. It is clear that any one who holds a mortgage assigned to him as security may foreclose the same. *McKinney v. Miller*, 19 Mich. 153. But it is essential that the assignment of both debt and mortgage must be shown. *Livingston v. Jones*, Har. 165; *Bailey v. Gould*, Walk. 481. It is not necessary to have a written assignment. *Pease v. Warren*, 29 Mich. 9. While an assignment must be recorded before steps can be taken by an assignee to foreclose a mortgage at law, it is not necessary to foreclose in chancery. *Martin v. McReynolds*, 6 Mich. 73. Where a second mortgagee pays up the first mortgage, he becomes in equity an assignee of the first mortgage, and he may start foreclosure proceedings in his own name. *Mattison v. Marks*, 31 Mich. 421; *Manwaring v. Powell*, 40 Mich. 371. It is not necessary for a trustee to make a cestui que trust a party to a bill to foreclose a mortgage. *Sill v. Ketchum*, Har. 423; *Cook v. Wheeler*, Har. 443.

**DEFENDANTS:** The rule in relation to parties defendants is that all those should be made parties whose interests are to be affected or concluded by the decree; and this is determined by the inquiry, have they an interest in the equity of redemption? *McDonald v. McDonald*, 45 Mich. 44. But it may be said that a defendant whose connection with the mortgage or equity of redemption is not shown by the bill, is not a proper party and is entitled, so far as he is concerned, to have the bill dismissed with costs. *Havens v. Jones*, 45 Mich. 253.

**FILING OF SECURITIES:** It is apparent that a foreclosure decree cannot be rendered without producing securities or giving adequate reasons why they cannot be produced. *Mickle v. Maxfield*, 42 Mich. 304; *Hungerford v. Smith*, 34 Mich. 300. *Young v. McKee*, 13 Mich. 556; *Bassett v. Hathaway*, 9 Mich. 28; *Bailey v. Gould*, Walk. Ch. 483.

See *Yerkes v. Blodgett*, 48 Mich. 211; *Fletcher v. Carpenter*, 37 Mich. 412; *Haesceig v. Brown*, 34 Mich. 502.

**DEFENSES:** Where complainants rely upon the false representation made concerning the property sold, they have a cause of action against the sellers, and in other words, misrepresentations that may give rise to a cause of action may be interposed as a defense, for the general rule is that a party in a suit in equity may avail himself of every legal defense not inequitable in its nature. *Smith v. Werkheiser*, 152 Mich. 182. Furthermore, the general rule is that a defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud. *Smith v. Werkheiser*, 152 Mich. 180; *Smith v. McDonald*, 139 Mich. 225; *Bristol v. Braidwood*, 28 Mich. 196.

See *Davis v. Wardowski*, 164 Mich. 561.

**PAYMENTS:** No supplemental bill is required to show payment of taxes after the bill was filed and before the decree was taken. *Commercial National Bank v. Gaukler*, 165 Mich. 406. The rule is that the burden of proving payment rests on the defendant. *Chamberlain*

v. O'Leary, 161 Mich. 571. It is the settled rule of law that evidence presented in the form of entries, in a diary, kept in the usual way will not be received as evidence of payment. *Stabler v. Clark*, 155 Mich. 29; *Collins v. Shaw*, 124 Mich. 474; *Weaver v. Bromley*, 65 Mich. 212.

**DECREE:** The rendition of a foreclosure decree depends upon the filing and producing of the securities or the presentation of adequate reasons why such cannot be done. *Mickle v. Maxfield*, 40 Mich. 304. It is not only that the rendition of a decree may be for the sums due at the time of the filing of the bill, but also for the sums due thereafter. *Hanford v. Robinson*, 47 Mich. 100. It is said in this case that it is also claimed that at the time the bill was filed, the \$2,800.00 note was not due, and that the amount thereof should not have been included in the decree. At the time the decree was rendered this note was past due and was therefore properly included.

See *Johnson v. Van Velsor*, 43 Mich. 315; *Detroit Savings Bank v. Truesdail*, 38 Mich. 430; *Howe v. Lemon*, 37 Mich. 164; *Vaughn v. Nims*, 36 Mich. 297.

**TAXES:** In *Hopkins v. Sanders*, 172 Mich. 233, the court said: "It has been generally held that the payment of taxes and assessments by a mortgagee on property covered by his mortgage, to protect his lien and incidentally protect the title of the mortgagor, grows out of a transaction between the parties, which, from its nature, creates an equitable lien. The authorities cited do not foreclose that question in this state.

In *Vaughn v. Nims*, 36 Mich. 298, Justice Campbell states, as a general proposition—

'And there can be no doubt of the propriety of allowing a party to protect his mortgage interest against taxes.'

We think that in case of mortgage foreclosure on land liable to taxation, where taxes have been assessed against it which the mortgagor neglected or refused to pay, and the mortgagee has paid them, a court of equity may declare a lien, if the taxes are not shown to be unjust, inequitable, or illegal, and no special circumstances are shown giving rise to equities in favor of the defaulting mortgagor. The fact that he defaulted in the payment of his taxes before giving the mortgage is not an equitable consideration. The obligation to pay taxes rests primarily on the owner. He knows whether he has paid them or not. When he seeks a loan and offers mortgage security for the same on property he owns, he tactfully represents that it is security in his possession, in which he is primarily interested, which he will care for and protect; that he will perform his plain duty in paying the taxes and conserving such security, even though he may not legally warrant the title.

In this case the mortgagor, having secured the money and solemnly promised to repay it, has since enjoyed its use and possession and use of the property for over three years, has during that time ignored her obligation, paid no taxes, paid no interest, paid nothing on the principal, allowed the bill to be taken as confessed, now makes no tender or offer to pay and redeem, and interposes in a court of equity a technical defense which, if she prevailed, would be of no value to her, except to continue her possession for a time longer, unless she should redeem. The equities in this case are with the complainant. An equitable lien may exist, independent of any express

agreement, arising out of general considerations of right and justice, honest dealing, and duty as applied to the subject-matter, the relations of the parties, and the transactions as a whole. We think it was within the power of the court to declare the taxes paid by complainant (on property in which both were interested, and for the protection of both) an equitable lien, to be added to the amount of the mortgage, and to include the same to the decree of foreclosure." Where complainant pays taxes as a mortgagee, he would succeed to the lien therefore on the land, and in a court of equity would be entitled to reimbursement out of any surplus on foreclosure sale. *Union Trust Co. v. Amusement Co.*, 168 Mich. 580. In *Commercial National Bank v. Gaukler*, 165 Mich. 406, the court said: "This court, however, has determined that where the mortgage provides for the payment of taxes, as the one here in suit does, those taxes paid between the filing of the bill and the taking of the decree are properly included in the decree. *Jehle v. Brooks*, 112 Mich. 131 (70 N. W. 440), and cases cited."

See *Maxfield v. Wiley*, 46 Mich. 252; *Conn. Mut. Ins. Co. v. Bulte*, 45 Mich. 113; *Vaughn v. Nims*, 36 Mich. 297; *Payne v. Avery*, 21 Mich. 524.

**SALES:** Where the decree directed that the notice of the foreclosure sale should be given "according to the course and practice of the court," it was held that the practice in this court had become so uniform as to make this direction sufficiently clear to be valid. *Ireland v. Woolman*, 15 Mich. 253. The rule is that the sale is not to be made in less than one year and six weeks from the commencement of suit. *Culver v. McKeown*, 45 Mich. 324. This time however may be counted from the issue of the subpoena, when taken out with fair intent to serve as soon as practicable. *Culver v. McKeown*, 45 Mich. 324. But the court has the discretionary power to postpone the same until a year from the service of the subpoena. *Insurance Co. v. Renz*, 33 Mich. 298. See *Steel v. Steel*, 201 Mich. 426.

**PERIOD OF REDEMPTION:** In *Ferry v. Miller*, 164 Mich. 432, the court said: "The transaction was a single one and the mortgage a single one. Therefore it is impossible to permit complainant to redeem upon payment of a proportionate amount of the mortgage. Upon payment of the whole amount, however, she may be subrogated to the rights of the mortgagee and collect a proportionate amount from the six lots not owned by her." It is the practice to allow a reasonable time for payment, definitely fixed by the decree. *Detroit Savings Bank v. Truesdall*, 38 Mich. 430.

See *Redfield v. Reid*, 148 Mich. 445; *Trombley v. Kleisy*, 147 Mich. 370; *Farr v. Lachman*, 130 Mich. 40; *Michigan Trust Co. v. Libby*, 127 Mich. 45; *Lachman v. Ottawa Circuit Judge*, 125 Mich. 27; *Gillem v. Foster*, 124 Mich. 685.

In *Miller v. Peter*, 158 Mich. 342, the court said: "Reliance is had upon the complainant's laches in bringing this suit. This question presents itself in two aspects: First, as to the laches in the attack made upon this decree; and, second, as to the laches in attempting to redeem the lands covered by the deed. The cases cited by defendants' counsel are mostly cases in which an attempt is made to attack or set aside judicial proceedings. So far as this case partakes of that character, we think the position of defendants is unassailable. We



do not think this decree should be open to this collateral attack at this late date, after the parties to the transaction are some of them dead and others disabled from testifying."

**(12678). Determination of Decree.**

**SEC. 24.** In foreclosure cases in the original decree therein, the court shall determine and decree as to which defendants, if any, are personally liable for the mortgaged debt, and it shall be provided in such decree that upon the coming in and confirmation of the commissioner's report of sale, if there be any part of the money decreed to be due, either of the principal or interest of the debt, or of the costs decreed to be paid, left unpaid after applying the amount received by the commissioner, upon the sale of the premises, the clerk of the court shall, upon the application of the attorney for the plaintiff, and without notice to defendant or his attorney, issue execution for the amount of such deficiency. The court shall also have power to decree and compel the delivery of the possession of the premises to the purchaser at said sale.

**HISTORY:** This section supersedes Sec. 112, R. S. '46, Ch. 90, being C. L. '57, (3565); C. L. '71 (5148); How. 6702; C. L. '97, (517). Modified.

**DECREE FOR DEFICIENCY IN FORECLOSURE CASES:** The court is required to determine in the original decree as to which defendants, if any, are personally liable for the mortgage debt, and the decree shall further provide that upon the coming in and confirmation of the commissioner's report of sale, if there be any deficiency, upon the application of the attorney for the plaintiff and without notice, an execution issue for the amount of the deficiency.

**STATUTE OF LIMITATIONS:** Begins to run from the date of the decree and not from the filing of the report or the order affirming it. *Smith v. Pegg*, 111 Mich. 232.

**DECREE OF PAYMENT:** Where a mortgage is collateral to the actual personal obligation of the mortgagor, enforceable at law, no matter in what shape that obligation exists, it may be enforced in foreclosure proceedings, under this section, the express purpose of which is to save the necessity of a suit at law for any part of the same debt. *Shelden v. Warner's Estate*, 59 Mich. 449. But the mortgage itself implies no covenant for the payment of the sum secured by it. See *Compilers' Section 11692*, and notes. *Howe v. Lemon*, 37 Mich. 163. The debts for which personal decrees are allowed are such as are "recoverable at law." *Mich. Ins. Co. v. Brown*, 11 Mich. 273; *Johnson v. Shepard*, 35 Mich. 125; *Vaughan v. Black*, 63 Mich. 220; *Shelden v. Erksine*, 78 Mich. 633. When the mortgagor, personally liable, is dead his estate is liable for the deficiency. *Abbott v. Godfroy's Heirs*, 1 Mich. 178; *Dennis v. Sharer*, 56 Mich. 224. A personal decree cannot be made against a defendant not served and not appearing. *Booth v. Conn. M. L. Ins. Co.*, 43 Mich. 299; *McEwan v. Zimmer*, 38 Mich. 774; *Lawrence v. Fellows*, Walk. 468; *Outhwite v. Porter*,

13 Mich. 533; *Tyler v. Peatt*, 30 Mich. 63; *Lillibridge v. Tregent*, 30 Mich. 105; *Goebel v. Stevenson*, 35 Mich. 172; *Innes v. Stewart*, 36 Mich. 285; *McLean v. Isbell*, 44 Mich. 129. Nor against a wife who joins her husband in a mortgage for his debt. *Kitchell v. Mudgett*, 37 Mich. 81; *Howe v. Lemon*, 37 Mich. 164; *Carley v. Fox*, 38 Mich. 387. Nor can an infant be held personally liable on a bond and mortgage made by his guardian. *Wood v. Truax*, 39 Mich. 628. Improper acts of the parties will sometimes preclude a decree for the payment of a deficiency. *Innes v. Stewart*, 36 Mich. 285; *Smith v. Smith*, 46 Mich. 301. As to a supplemental petition for a deficiency decree, see *Prentiss v. Richardson's Estate*, 118 Mich. 259, 261; *Simons v. McDonnell*, 120 Mich. 621, 623; *Field v. Judge*, 124 Mich. 68.

**ISSUE OF EXECUTION:** Execution is not to be awarded in a decree for sale on foreclosure, so long as it is not known that there will be a deficiency. *Howe v. Lemon*, 37 Mich. 164; *Vaughan v. Black*, 63 Mich. 219. The statutory proceeding to collect a deficiency on foreclosure is new and supplementary and not a mere continuation of the foreclosure. *Johnson v. Shepard*, 35 Mich. 116. There must be a special application for the issue of an execution if that is desired, and notice of the application must be given to the defendant. *Howe v. Lemon*, 37 Mich. 164; *Gies v. Green*, 42 Mich. 107; *McCrickett v. Wilson*, 50 Mich. 513; *Vaughan v. Black*, 63 Mich. 219; *Sheldon v. Erskine*, 78 Mich. 633. See *Mickle v. Maxfield*, 42 Mich. 304; *Ransom v. Sutherland*, 46 Mich. 489. (See this latter case for the proper practice.) The commissioners report of a deficiency, with the decree, makes a *prima facie* case for the issue of execution. *Mickle v. Maxfield*, 42 Mich. 309; *Wallace v. Field*, 56 Mich. 3. When the defendant is brought in on petition and notice, if he contests the right to an execution, he should file his answer setting out the grounds of his objection. These grounds must not be inconsistent with the decree and usually such as operate in its discharge; the validity or justice of the decree cannot be inquired into on such an application. The answer should be on oath. The complainant may take issue on it and a reference may be ordered to take proofs. The burden of proof is on defendant. *Ransom v. Sutherland*, 46 Mich. 492. No objections can be made to the issue of an execution for a deficiency, unless they arose after confirmation of the foreclosure sale and recognize the decree and go to its discharge. *Haldane v. Sweet*, 58 Mich. 429. The legislature did not intend by this and the following section to leave it to the discretion of an equity court to authorize an action to be brought, after the sale of the mortgaged premises, for a deficiency, until execution had been issued therefor under the order of the chancery court, and returned unsatisfied in whole or in part. *Steele v. Judge*, 109 Mich. 655. As to the statutory power to make a personal decree against mortgagor, see *Kollen v. Sooy*, 172 Mich. 214; *Kelly v. Gaukler*, 164 Mich. 519.

**LEVY OF EXECUTION:** It can not be levied on the equity of redemption in the mortgaged premises. See *Compilers' Section* (12939) and notes. But may be levied on the crops growing on such premises. *Preston v. Ryan*, 45 Mich. 174.

It is said that the power to make a personal decree against the maker of a mortgage upon real estate, or against others charged with its payment, comes entirely from the statute provided for chancery

foreclosure. *Kollen v. Sooy*, 172 Mich. 220; *Kelly v. Gaukler*, 164 Mich. 519; *Winsor v. Ludington*, 77 Mich. 215; *Vaughan v. Black*, 63 Mich. 215; *McCrickett v. Wilson*, 50 Mich. 513. Under the original jurisdiction, there was no power to enter a personal decree even against the mortgagor himself, for this is purely a statutory innovation. *Kelley v. Gaukler*, 164 Mich. 531; *Sheldon v. Erskine*, 78 Mich. 627; *Vaughan v. Black*, 63 Mich. 215; *Mickle v. Maxfield*, 42 Mich. 304; *Gies v. Green*, 42 Mich. 107; *Howe v. Lemon*, 37 Mich. 164; *Johnson v. Shepard*, 35 Mich. 115.

In *Sheldon v. Erskine*, 78 Mich. 633, the court said: "The absence of a decree for personal liability in the original decree could be no ground of appeal, unless the decree went further, and declared none should exist. The provision authorizing the enforcement of payment for any deficiency is statutory, and cannot be enlarged. By section 6702 of Howell's Statutes it is provided that—

'On the coming in of the report of sale the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied, after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law.'

But by the previous section (5656) it was provided that when the mortgage contains no covenant of payment the mortgagee's remedy must be confined to the land, where no—

'Bond or other separate instrument to secure such payment shall have been given.'

The jurisdiction is therefore limited to cases where the mortgage is given to secure a written obligation, which must itself be capable of legal enforcement, and also not outlawed. *Michigan Ins. Co. v. Brown*, 11 Mich. 265. And it is also to be exercised, and the trial of liability had, on a new hearing, after the deficiency is reported. Any decree in advance of sale made for payment is, at best, no more than declaratory, and can fix no rights. See, further, on the whole subject, *Johnson v. Shepard*, 35 Mich. 115; *Howe v. Lemon*, 37 Id. 164; *Gies v. Green*, 42 Id. 107 (3 N. W. Rep. 283); *Mickle v. Maxfield*, Id. 304 (3 N. W. Rep. 961); *McCrickett v. Wilson*, 50 Id. 513 (15 N. W. Rep. 885); *Ransom v. Sutherland*, 46 Id. 489 (9 N. W. Rep. 530).

But, inasmuch as the question of the premature application for the decree was not much considered on the argument, and it may save further complications, we shall dispose of that matter now. It would be a sufficient answer to the application, that the mortgage does not purport to secure any written promise, but its terms do not correspond to any. But there is the further fatal objection that the statute covers no case where a single decree could not be made in favor of the complainant. It does not contemplate the case where there are several complainants, who hold the mortgage jointly, but have no general right to any of the debts secured. Certainly, there could be no joint suit at law in such a case. The decree for deficiency must be in favor of the complainant, but there is no provision for separate personal decrees in favor of separate complainants. There is no obstacle to a suit at law for a deficiency, and great practical difficulty would attend the trial of 15 or 20 separate proceedings in chancery for that purpose, especially if the first decree should sweep the defendants' property on execution before the rest had their turn. But

the reasons are not material, if there is no law providing for the specific remedy. A statute which transfers to a court of equity jurisdiction to give judgments belonging to the common law cannot be enlarged by construction."

The statute contemplates a supplemental petition with notice to the mortgagor for personal decree against the mortgagor for a deficiency. *Prentis v. Richardson's Estate*, 118 Mich. 259. Where a decree finds defendant personally liable for the payment of the amount found due, but not directing the payment of balance, if any, after sale, it is not a decree for a deficiency, and cannot be such before it is ascertained that there is a deficiency. *Simons v. McDonnell*, 120 Mich. 621.

The original decree cannot of itself furnish any personal relief, nor can a provision for issuing execution for any deficiency after sale. *Vaughan v. Black*, 63 Mich. 220; *Gies v. Green*, 42 Mich. 107; *Howe v. Lemon*, 37 Mich. 164. See *Smith v. Pegg*, 111 Mich. 232; *Haledane v. Sweet*, 58 Mich. 429; *Wallace v. Field*, 56 Mich. 3; *Gale v. Hammond*, 45 Mich. 147; *Preston v. Ryan*, 45 Mich. 174.

#### (12679). Execution for Deficiency.

SEC. 25. After such bill shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.

**HISTORY:** Re-enacts Sec. 113, R. S. '46, Ch. 90, being C. L. '57, (3566); C. L. '71, (5149); How. 6703; C. L. '97, (518). Unchanged.

**SUIT AT LAW:** After the filing of the bill, and while it is pending, and after decree thereon, no suit at law can be instituted to enforce payment of the debt or of any deficiency, without leave of the court. *Joslin v. Millsbaugh*, 27 Mich. 517; *Innes v. Stewart*, 36 Mich. 286; *De Mill v. P. H. Dry Dock Co.*, 30 Mich. 38; *Goodrich v. White*, 39 Mich. 489; *Culver v. Superior Court Judge*, 57 Mich. 29; *Shields v. Riopelle*, 63 Mich. 462. Leave to proceed at law, while foreclosure in chancery is pending, ought not to be granted ex parte, when defendant is within reach. *Goodrich v. White*, 39 Mich. 489. Proceeding at law without leave, in such a case, is an abuse of process. *Id.* But the pendency of a foreclosure suit is not pleadable in abatement to an action at law. *Joslin v. Millsbaugh*, 27 Mich. 517. But resort should be had to the court of equity to restrain the unauthorized suit. *Goodrich v. White*, 39 Mich. 489. But, if the suit proceeds and plaintiff gets judgment it will not be invalidated by the want of leave. *Id.* Suit without leave is a mere irregularity and will not be restrained unless substantial rights are affected. This section is intended merely to avoid unnecessary litigation and not to limit the creditor's remedy. *Steele v. Kent Circuit Judge*, 109 Mich. 654, 655. A sale of mortgaged premises failed to satisfy the amount due and without taking out an execution for the deficiency (the estate of the mortgagor having paid less than 2% for his unsecured debts) the mortgagee sued the purchaser for the value of the timber taken from the land, and was held entitled to recover. *Webber v. Ramsey*, 100 Mich. 58.

The object of this statute is to allow the complainant to elect which remedy he will pursue before sale under the decree made. *Shields v. Riopelle*, 63 Mich. 462. In this case the court said: "The decree settles the amount of the debt, and the report of the circuit court commissioner determines the amount of the deficiency when confirmed after the sale, and the statute provides the mode of its enforcement, by execution, and it must be resorted to before an action at law can be maintained for its recovery, and then the action will lie upon the decree, and not upon the original obligation.

Anything occurring after the amount of the deficiency has been determined by the commissioner's report, either legally or equitably going to its payment in whole or in part, can be allowed by the court on the motion for the execution, and if necessary, in order to ascertain what payment has been made, or what equities have arisen which should operate as payment or discharge, and to what extent, since the report of sale was filed, a reference may be made to take proofs.

After the complainant has elected to pursue his remedy in the chancery court, by proceeding to a sale of the mortgaged property, he has submitted his claims to the equitable remedy; and as is said by Mr. Justice Cooley:

"It is a familiar principle that, when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action."

"I think this doctrine applies to the present case, and, if so, this action should not, under the facts stated in the record, have been entertained by the superior court of Detroit."

### (12680). Other Person as Party.

SEC. 26. If the mortgaged debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the plaintiff may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases.

HISTORY: Re-enacts Sec. 114, R. S. '46, Ch. 90, being C. L. '57, (3567); C. L. '71, (5150); How. 6704; C. L. '97, (519), changing "complainant" to "plaintiff." Modified.

OTHER PERSONS MADE PARTIES: This provision is permissive only, and not mandatory, and an endorser need not be made a party in foreclosure. *Steele v. Kent* Circuit Judge, 109 Mich. 653. It is only where a personal decree is sought against sureties, or other persons besides the mortgagor, that a decree against such third persons must be based on some written obligation. There is no such condition as to the mortgagor himself. *Sheldon v. Warner's Estate*, '59 Mich. 449. The power to make a personal decree against the makers of the mortgage upon real estate, or against others interested in its payment, upon a chancery foreclosure, comes entirely from the statute. *Winsor v. Ludington*, 77 Mich. 219; *Johnson v. Shepard*, 35 Mich. 123; *Culver*

v. Superior Court Judge, 57 Mich. 25. The remedy can be enforced only in those cases which are clearly within the terms of the statute. Winsor v. Ludington, 77 Mich. 219; McCrickett v. Wilson, 50 Mich. 513; Vaughan v. Black, 63 Mich. 215. Guarantors of the payment of a debt secured by mortgage may be made parties and a personal decree for deficiency may be taken against them. The jurisdiction over such persons is not obligatory but permissive. When justice requires that such a party shall have a chance to defend himself at law, or seek redress in any other form against his liability, courts have refused a personal decree. Johnson v. Shepard, 35 Mich. 123, 4. The indorsers of a mortgage note duly protested for non-payment may be joined as defendants in a foreclosure suit and a personal decree entered against them for a deficiency. Mich. St. Bank v. Trowbridge, 92 Mich. 222. See also English v. Carney, 25 Mich. 178; Cooper v. Ullman, Walk. 251. Wilcox v. Allen, 36 Mich. 160, as to the nature of such liability. The purchaser of mortgaged premises may be made a party and personally liable for deficiency. Crawford v. Edwards, 33 Mich. 354; Miller v. Thompson, 34 Mich. 10; Taylor v. Whitmore, 35 Mich. 97; Howe v. Lemon, 37 Mich. 164; Carley v. Fox, 38 Mich. 387; Higman v. Stewart, 38 Mich. 513, 522. Hicks v. McGarry, 38 Mich. 667; Winans v. Wilkie, 41 Mich. 264; Booth v. Conn. M. L. Ins. Co. 43 Mich. 299; Canfield v. Shear, 49 Mich. 313; Gage v. Jenkinson, 58 Mich. 172; Corning v. Burton, 102 Mich. 86. But the debt for which a personal decree is allowed must be one recoverable at law. Johnson v. Shepard, 35 Mich. 123; Sheldon v. Warner's Estate, 59 Mich. 444, 449; Vaughan v. Black, 63 Mich. 215; Winsor v. Ludington, 77 Mich. 215, 219. This section authorizes the joining of guarantors of payment with the principal debtor, in foreclosure proceedings. Union Trust Co. v. Motor Co., 117 Mich. 631, 637. See also Miller v. McLaughlin, 132 Mich. 234.

This section does not authorize a suit in chancery independent of foreclosure proceedings, to recover against either the mortgagor or one obligated to pay the mortgage debt. Kollen v. Sooy, 172 Mich. 214. A guarantee of collection of a debt secured by mortgage creates no obligation on the part of the guarantor to pay until after foreclosure decree and a failure to obtain payment out of the mortgage premises and out of other property of the principal, but it is not necessary that such guarantor be made a party defendant to the foreclosure suit. Johnson v. Shepard, 35 Mich. 123. Gies v. Green, 42 Mich. 107; Mickie v. Maxfield, 42 Mich. 309; Higman v. Stewart, 38 Mich. 513; Barnum v. Carhart, 10 Mich. 339.

FORMER LAW CITED: Kollen v. Sooy, 172 Mich. 220.

#### (12681). What Bill to Foreclose to State.

SEC. 27. Upon filing a bill for the foreclosure or satisfaction of a mortgage, the plaintiff shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected or paid.

HISTORY: Re-enacts Sec. 115, R. S. '46, Ch. 90, being C. L. '57, (3568); C. L. '71, (5151); How. 6705; C. L. '97, (520), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** If the bill fails to show that anything is due on the note executed with the mortgage, or whether any proceedings have been taken at law for the recovery of the debt, it is demurrable. *Bailey v. Gould*, Walk. 483; *Martin v. McReynolds*, 6 Mich. 74.

**(12682). Unsatisfied Execution.**

**SEC. 28.** If it appear that any judgment has been obtained in a suit at law, for the moneys demanded by such bill, or any part thereof, no proceedings shall be had in such case, unless to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied, in whole or in part, and that the defendant has no property whereof to satisfy such execution, except the mortgaged premises.

**HISTORY:** Re-enacts Sec. 116, R. S. '46, Ch. 90, being C. L. '57, (3569); C. L. '71, (5152); How. 6706; C. L. '97, (521). Unchanged.

**NO PROCEEDINGS:** *Dennis v. Hemingway*, Walk. 387. Where judgment has been rendered for part of the debt secured. *Cooper v. Bresler*, 9 Mich. 534. Where a warranty deed was given as security and a bill was filed to foreclose the equity of redemption in the lands, after judgment for the debt. *Maynard v. Percault*, 30 Mich. 160. In a suit to foreclose a mortgage securing notes upon which judgment has been previously rendered in justice's court, the bill must be dismissed unless execution has been issued and returned unsatisfied by the sheriff. *Stegeman v. Fraser*, 161 Mich. 35, 37.

**(12683). Sales of Mortgaged Premises.**

**SEC. 29.** All sales of mortgaged premises under a decree in chancery, shall be made by a circuit court commissioner of the county in which the decree was rendered, or the land or some part thereof is situated, or by some other person duly authorized by the order of the court; and such sale shall be at public vendue between the hour of nine o'clock in the morning and the setting of the sun, at the court house, or place of holding the circuit court in the county in which such estate or some part thereof is situated, or at such other place as the court shall direct.

**HISTORY:** Re-enacts Sec. 117, R. S. '46, Ch. 90, being C. L. '57, (3570); As Am. '63, p. 160, Act 102, Eff. June 22; C. L. '71, (5153); How. 6707; C. L. '97, (522). Unchanged.

**SALE:** See Compilers' Section 12966 and notes thereto, and Circuit Court Rule 58, Section 5, '16. The sale may be advertised but cannot be held until after enrollment. Circuit Court Rule 55, Section 3, '16; *Taylor v. Goodwin*, 40 Mich. 235.

**CONFIRMATION:** A sale is not final until confirmed by the court, but is liable, in the discretion of the court, to be opened for any sufficient cause. *Demurray v. Little*, 17 Mich. 286. See *Richards v.*

Morton, 18 Mich. 255; *Torrans v. Hicks*, 32 Mich. 307; A purchaser on foreclosure cannot demand possession until the commissioners' report of sale is confirmed. *Howard v. Bond*, 42 Mich. 131; Sufficiency of proceedings to confirm. *Ruggles v. Bank*, 43 Mich. 192; *Torrans v. Hicks*, 32 Mich. 307; *Suydam v. Dequindre*, Walk. 23. See also, *Walsh v. Colby*, 153 Mich. 602; *Powell v. Pierce*, 163 Mich. 427; *Hooch v. Sloman*, 155 Mich. 1; *Butters v. Butters*, 153 Mich. 153; *Union Trust Co. v. Elec. Park Am. Co.*, 168 Mich. 574.

A party relying upon irregularities must act with the utmost promptness in order to obtain relief. *Union Trust Co. v. Amusement Co.*, 168 Mich. 580; *Lyon v. Brunson*, 48 Mich. 194; *Goodman v. Burns*, 21 Mich. 211. The court had power under this statute to enroll the decree nunc pro tunc. *Powell v. Pierce*, 163 Mich. 427.

FORMER LAW CITED: *Lachman v. Ottawa Circuit Judge*, 125 Mich. 29; *Morris v. Wayne Circuit Judge*, 130 Mich. 337.

#### (12684). Execution of Deed.

SEC. 30. Deeds shall thereupon be executed by such circuit court commissioner or other person making such sale specifying the names of the parties in the suit, the date of the mortgage, when and where recorded, with a description of the premises sold, and the amount for which each parcel of land therein described was sold, and he shall endorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law; such deed or deeds shall as soon as practicable, and within twenty days after such sale be deposited with the register of deeds of the county in which the land therein described is situated, and the register shall endorse thereon the time the same was received; and for the better preservation thereof, shall record the same at length in a book to be provided in his office for that purpose and shall index the same in the regular index of deeds, and the fee for recording the same shall be included among the other costs and expenses allowed by law. In case such premises or any parcel thereof shall be redeemed the register of deeds shall write on the face of such record the word "redeemed," stating at what date such entry is made and signing such entry with his official signature. Unless the premises described in such deed or any parcel thereof shall be redeemed within the time limited for such redemption as herein provided, such deed shall thereupon as to all parcels not so redeemed become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter.

HISTORY: Re-enacts Sec. 118, R. S. '46, Ch. 90, being C. L. '57, (3571); As Am. '63, p. 160, Act 102, Eff. June 22; As Am. '67, p. 143,



Act 105, Eff. June 27; C. L. '71, (5154); How. 6708; C. L. '97, (523); As Am. '99, p. 310, Act 200, Eff. Sept. 23. Unchanged.

**DEED:** A foreclosure deed gives the same estate as a foreclosure of the equity of redemption and is as effective, as against the owner of the equity, as if executed by such owner. *Ruggles v. Bank*, 43 Mich. 192; *Brennan v. Eggeman*, 73 Mich. 660. The confirmation of a foreclosure sale covering growing crops relates back to the sale and entitles the purchaser to control the crops from that time, if no equities prevent. *Ruggles v. Bank*, 43 Mich. 192. The purchaser becomes the owner of growing crops on the premises. *Scriven v. Moote*, 36 Mich. 64. See *Ledyard v. Phillips*, 32 Mich. 13. As to the endorsing of the redemption clause, see *Lachman v. Ottawa Circuit Judge*, 126 Mich. 27; *Trombley v. Kleray*, 147 Mich. 370. See also *Hochgraef v. Hendrie*, 66 Mich. 564.

**SHALL BE A BAR:** *Summers v. Bromley*, 28 Mich. 127. A subsequent mortgagee is not barred of the right to redeem, unless made a party. *Avery v. Ryerson*, 34 Mich. 362. See *Brown v. Thompson*, 29 Mich. 72; *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430. Until barred by sale and conveyance, the mortgagor retains the right of possession. See *Compilers' Section 13221* and notes thereto. *Crippen v. Morrison*, 13 Mich. 24; *Wagar v. Stone*, 36 Mich. 364; *Detroit Com. Council v. Assessors*, 91 Mich. 92. The mortgagor being entitled to the rents and profits, until his title is divested by a perfected foreclosure, they do not constitute any part of the security and a receiver cannot be appointed for them during foreclosure proceedings. *Wagar v. Stone*, 36 Mich. 364.

**DELIVERY OF POSSESSION:** A writ of assistance is the regular process for carrying out a decree of possession and it lies on foreclosure sales. *Ramsdell v. Maxwell*, 32 Mich. 285. As to the issue of such writs, see *Hart v. Lindsay*, Walk. 144; *Benhard v. Darrow*, Walk. 519; *Baker v. Pierson*, 5 Mich. 456; *Ryerson v. Eldred*, 18 Mich. 195; *Summers v. Bromley*, 28 Mich. 128; *Howard v. Bond*, 42 Mich. 131; *Howe v. Lemon*, 47 Mich. 544; *Ketchum v. Robinson*, 48 Mich. 618.

**RECORDING OF DEEDS:** See *Miller v. Walker*, 141 Mich. 433; *Walsh v. Colby*, 153 Mich. 602. The fact that a deed was not filed in the office of the register within the time fixed, is no ground for setting the sale aside. *Butters v. Butters*, 153 Mich. 161. In this case the court said: "The deed, by inadvertence, was not recorded within the period of redemption, and it is contended that this fact and the provisions of Act No. 200, Pub. Acts 1899, bring the case within the rule of *Doyle v. Howard*, 16 Mich. 261. The reasons given in the opinion in that case for holding the provisions of the statute to be mandatory apply, some of them, with equal force in case of a chancery foreclosure. But the principal and controlling reasons do not apply. Foreclosure proceedings by advertisement are confined to cases in which the mortgage contains a power of sale. The proceedings are wholly ex parte and non-judicial. The office of the register of deeds may be the only place where an interested person may learn whether a sale has been made and of the terms thereof. A chancery foreclosure is a judicial proceeding. There is other written evidence of the sale than that afforded by the deed. The files and records in the office of the register in chancery furnish the most complete information upon the subject."

**(12685). How Proceeds of Sale Applied.**

**SEC. 31.** The proceeds of every sale made under a decree in chancery, shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded; and if there be any surplus, it shall be brought into court for the use of the defendant, or of the person entitled thereto, subject to the order of the court.

**HISTORY:** Re-enacts Sec. 119, R. S. '46, Ch. 90, being C. L. '57, (3572); C. L. '71, (5155); How. 6709; C. L. '97, (524). Unchanged.

**APPLICATION OF PROCEEDS:** In case of installment mortgages. See *Cooper v. Ullman*, Walk. 251. *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 Mich. 445; *Wilcox v. Allen*, 36 Mich. 172; *Miles v. Skinner*, 42 Mich. 181; *Bridgman v. Johnson*, 44 Mich. 491. *Hanford v. Robertson*, 47 Mich. 100.

**SURPLUS:** Where an application is made for the surplus money after satisfaction of a decree of foreclosure, all the parties to the foreclosure are entitled to notice, in order that they may appear and contest the right of the applicant and assert their own. *Smith v. Smith*, 13 Mich. 258; Such surplus money is personal estate. *Id.* General guardians do not represent their wards in foreclosure suits and the new security, required by Circuit Court Rule 63, '16, before money can be turned over to such general guardians calls for a responsible showing and cannot rest on loose verbal statements. *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69. See also as to surplus, *Schmidt v. Gaukler*, 156 Mich. 243; *Union Trust Co. v. Electric Park Amusement Co.*, 168 Mich. 574. Where complainant pays taxes as mortgagee, he would succeed to the lien therefor on the land and in a court of equity would be entitled to reimbursement out of any surplus on foreclosure sale. *Union Trust Co. v. Electric Park Amusement Co.*, 168 Mich. 574; *Schmidt v. Gaukler*, 156 Mich. 243; *Noeker v. Howry*, 119 Mich. 626; *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69; *Smith v. Smith*, 13 Mich. 258.

**(12686). Surplus.**

**SEC. 32.** If such surplus or any part thereof, shall remain in the said court for the term of three months without being applied for, the circuit judge may direct the same to be put out at interest, under the direction of the court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of such court.

**HISTORY:** Re-enacts Sec. 120, R. S. '46, Ch. 90, being C. L. '57, (3573); C. L. '71, (5156); How. 6710; C. L. '97, (525). Unchanged.

**(12687). Bill for Foreclosure of Installment.**

**SEC. 33.** Whenever a bill shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest, or any portion or installment of the principal,

and there shall be other portions or installments to become due subsequently, the bill shall be dismissed upon the defendant's bringing into court, at any time before the decree of sale, the principal and interest due, with costs.

**HISTORY:** Re-enacts Sec. 126, R. S. '46, Ch. 90, being C. L. '57, (3574); C. L. '71, (5157); How. 6711; C. L. '97, (526). Unchanged.

**CONSTRUED:** *Tucker v. Tucker*, 24 Mich. 428; Payment of the amount due before decree puts an end to the suit. *Brown v. Thompson*, 29 Mich. 74; *Brand v. Smith*, 99 Mich. 399.

**(12688). Payment of Installment and Costs.**

**SEC. 34.** If, after a decree for sale entered against a defendant in such case, he shall bring into court the principal and interest due, with costs, the proceedings in the suit shall be stayed; but the court shall enter a decree of foreclosure and sale, to be enforced by a further order of the court, upon a subsequent default in the payment of any portion or installment of the principal, or of any interest thereafter to grow due.

**HISTORY:** Re-enacts Sec. 122, R. S. '46, Ch. 90, being C. L. '57, (3575); C. L. '71, (5158); How. 6712; C. L. '97, (527). Unchanged.

**CONSTRUED:** *Brown v. Thompson*, 29 Mich. 74; *Johnson v. Shepard*, 35 Mich. 115. In a decree upon a bill to foreclose for an installment no payment not due when the decree was rendered can be included. *Smith v. Osborn*, 33 Mich. 410; *Tucker v. Tucker*, 24 Mich. 428. As often as a new installment comes due, if it is desired to enforce payment of it, the party must be allowed a hearing. The determination of the sum actually due is necessary to an enforceable decree; and until this sum is judicially ascertained, there can be nothing to collect. *Perkins v. Perkins*, 16 Mich. 166. An assignment of the foreclosure decree requires an original bill in the nature of a bill of revivor and supplement to enable the assignee to proceed further. *Id.* 167. *Webster v. Hitchcock*, 11 Mich. 56; *Cooper v. Bigley*, 13 Mich. 463; *Brand v. Smith*, 99 Mich. 395.

**(12689). Referencé to Commissioner to Report Situation.**

**SEC. 35.** If the defendant shall not bring into court the amount due, with costs, or if, for any other cause, a decree shall pass for the plaintiff, the court may direct a reference to a commissioner to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony; and if it shall appear that the same can be sold in parcels, without injury to the interests of the parties, the decree shall direct so much of the mortgaged premises to be sold, as will be sufficient to pay the amount then due on

such mortgage, with costs; and such decree shall remain as security for any subsequent default.

**HISTORY:** Re-enacts Sec. 123, R. S. '46, Ch. 90, being C. L. '57, (3576); C. L. '71, (5159); How. 6713; C. L. '97, (528), changing "complainant" to "plaintiff" and "master" to "commissioner." Substantially unchanged.

**CONSTRUED:** As to the sale in separate parcels, see *Walsh v. Colby*, 153 Mich. 602.

#### 12690). Subsequent Defaults.

**SEC. 36.** If, in the case mentioned in the preceding section, there shall be any default subsequent to such decree, in the payment of any portion or installment of the principal or of any interest due upon such mortgage, the court may, upon the petition of the plaintiff, by a further order founded upon such first decree, direct a sale of so much of the mortgaged premises to be made under such decree, as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon, and the same proceedings may be had, as often as a default shall happen.

**HISTORY:** Re-enacts Sec. 124, R. S. '46, Ch. 90, being C. L. '57, (3577); C. L. '71, (5160); How. 6714; C. L. '97, (529), changing "complainant" to "plaintiff." Unchanged.

**PETITION:** As to the form of the petition, its contents and the proper practice under this section, see *Albany City Bank v. Stevens*, Walk. 6. See also *Perkins v. Perkins*, 16 Mich. 162; *Tucker v. Tucker*, 24 Mich. 426; *Smith v. Osborn*, 33 Mich. 410; *Vaughan v. Nims*, 36 Mich. 297; *Howe v. Lemon*, 37 Mich. 164; *Brand v. Smith*, 99 Mich. 399.

**PROCEEDINGS:** The proceeding to obtain a further decree is essentially a new suit in all except form. Every person whose interests are to be affected has a right to be heard. Service of papers must be made as in an original suit, personally or by publication. Any defense which a defendant may have can be introduced and established by proofs. The issues are the same as in the original suit, unless as to the execution of the mortgage and its terms, which are established by the original decree. If the defendant does not appear, complainant's case must be established by proofs. If he has died since the original decree, there must be a suggestion of that fact and some proper action to show upon the record who has succeeded to his rights. A petition may be used instead of a bill of revivor. *Brown v. Thompson*, 29 Mich. 74-5.

#### (12691). Sale of Whole Premises.

**SEC. 37.** If, in any of the foregoing cases, it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, the

decree shall in the first instance be entered for the sale of the whole premises accordingly.

**HISTORY:** Re-enacts Sec. 125, R. S. '46, Ch. 90, C. L. '57, (3578); C. L. '71, (5161); How. 6715; C. L. '97, (530). Unchanged.

**CONSTRUED:** See *Disbrow v. Jones*, Harr. 48.

**(12692). Application of Proceeds.**

**SEC. 38.** In such case the proceeds of such sale shall be applied as well to the interest, portion or installment of the principal due, as towards the whole or residue of the sum secured by such mortgage, and not due and payable at the time of such sale, and if such residue do not bear interest, then the court may direct the same to be paid with a rebate of the legal interest, for the time during which such residue shall not be due and payable; or the court may direct the balance of the proceeds of such sale, after paying the sum due with costs, to be put out at interest, for the benefit of the plaintiff, to be paid to him, as the installments, or portions of the principal, or the interest, may become due, and the surplus for the benefit of the defendant, his representatives or assigns, to be paid to them on the order of the court.

**HISTORY:** Re-enacts Sec. 126, R. S. '46, Ch. 90, being C. L. '57, (3579); C. L. '71, (5162); How. 6716; C. L. '97, (531). Unchanged.

**Proceedings Relating to Conveyance of Lands of Infants and Incompetents, etc.**

**(12693). Court of Chancery May Order Conveyance of Lands.**

**SEC. 39.** Whenever any infant, idiot, lunatic, or other incompetent person shall be seized or possessed of any lands, tenements, or hereditaments, by way of mortgage, or in trust only for others, the court of chancery for the county where such property is situated, or in which such infant, idiot, lunatic, or other incompetent person may be, on the petition of the guardian of such infant, idiot, lunatic, or other incompetent person, or on the application by bill or petition of any person in any way interested, may order and compel such infant, idiot, lunatic, or other incompetent person to convey and assure such lands, tenements and hereditaments to any other person, in such manner as the said court shall direct.

**HISTORY:** Re-enacts Sec. 127, R. S. '46, Ch. 90, being C. L. '57, (3580); C. L. '71, (5163); As Am. '81, p. 384, Act 273, Eff. Sept. 10; How. 6717; C. L. '97, (532). Unchanged.

**(12694). Conveyance Effectual in Law.**

SEC. 40. Every conveyance or assurance, made pursuant to such order, shall be as good and effectual in law as if the same were made by such infant, idiot, lunatic, or other incompetent person, when of lawful age and of sound mind.

HISTORY: Re-enacts Sec. 128, R. S. '46, Ch. 90, being C. L. '57, (3581); C. L. '71, (5164); As Am. '81, p. 384, Act 273, Eff. Sept. 10; How. 6718; C. L. '97, (533), Unchanged.

**(12695). Sale or Disposition of Real Estate.**

SEC. 41. Any infant, idiot, lunatic, or other incompetent person, seized of any real estate, or of any interest therein, either in fee or as tenant for life or years, may apply to the circuit court in chancery for the county where the property may be situated, if the infant, idiot, lunatic, or other incompetent be not a resident of this state, and if a resident of this state, then to the circuit court in chancery of the county in which he may be a resident, or in which the property may be situated, for the sale or disposition of such property, in the manner hereinafter directed. If the applicant has a guardian, then the application shall be made by such guardian, and if he has no guardian, or the guardian is a non-resident, application may be made by a next friend, who may be authorized to act as such by said court. Such next friend shall be appointed in accordance with the provisions of sections twenty-eight and twenty-nine of chapter twelve of this act, relating to the appointment of next friends for infants and persons insane, or otherwise mentally incompetent.

HISTORY: This section re-enacts a part of and supersedes Sec. 129, R. S. '46, Ch. 90, being C. L. '57, (3582); C. L. '71, (5165); As Am. '81, p. 384, Act 273, Eff. Sept. 10; As Am. '83, p. 99, Act 106, Imd. Eff. May 19; How. 6719; C. L. '97, (534). Modified.

CONSTRUED: In re petition of Axtell, 95 Mich. 247; Hovey v. Nellis, 98 Mich. 380. As to an irregular sale on infants property. Under this section, the sale under an order of court of an infant's share in real estate by her stepfather, who was appointed her next friend, will set aside where the record fails to affirmatively show that the parents of the infant, if any, or if none, her near relatives, if any, have knowledge of the intention to make application for the sale. In re Flynn's Estate, 171 Mich. 136. The sale of a ward's lands without confirmation is void. Hunt v. Stevens, 174 Mich. 501. See In re Axtell, 95 Mich. 244.

**(12696). Appointment of Guardian.**

SEC. 42. On such application the court shall, if necessary,

appoint one or more suitable persons to be guardians of such infant, idiot, lunatic, or other incompetent person, in relation to the proceedings on such application.

**HISTORY:** Re-enacts Sec. 130, R. S. '46, Ch. 90, being C. L. '57, (3583); C. L. '71, (5166); As Am. '81, p. 385, Act 273, Eff. Sept. 10; How. 6720; C. L. '97, (535). Unchanged.

**(12697): Bond of Guardian.**

**SEC. 43.** The guardian shall give bond to such infant, idiot, lunatic, or other incompetent person, to be filed with the clerk, in such penalty, with such sureties, and in such form as the court shall direct, conditioned for the faithful performance of the trust reposed; for the paying over, investing and accounting for all moneys that shall be received by such guardian according to the order of any court having authority to give directions in the premises, and for the observance of the orders of the court in relation to the said trust.

**HISTORY:** Re-enacts Sec. 131, R. S. '46, Ch. 90, being C. L. '57, (3584); C. L. '71, (5167); As Am. '81, p. 385, Act 273, Eff. Sept. 10; How. 6721; C. L. '97, (536); changing "register" to "clerk." Unchanged.

**CONSTRUED:** Before the court will order money paid to the guardian, it must be satisfied that he has given sufficient security for the performance of his trust, and that he has not abused it. *Westbrook v. Comstock*, Walk. 314; *Sheahan v. Wayne* Circuit Judge, 42 Mich. 69; Mich. Circuit Court Rule 63.

**FORMER LAW CITED:** In *re Flynn's Estate*, 171 Mich. 137.

**(12698). Prosecution of Bond.**

**SEC. 44.** If such bond be forfeited, the court shall direct it to be prosecuted for the benefit of the party injured.

**HISTORY:** Re-enacts Sec. 132, R. S. '46, Ch. 90, being C. L. '57, (3585); C. L. '71, (5168); How. 6722; C. L. '97, (537). Unchanged.

**(12699). Inquiry Into Merits.**

**SEC. 45.** Upon the filing of such bond, the court may proceed in a summary manner, on oral or other testimony, or by reference to a circuit court commissioner to inquire into the merits of such application.

**HISTORY:** Re-enacts Sec. 123, R. S. '46, Ch. 90, being C. L. '57, (3581); C. L. '71, (5164); As Am. '81, p. 384, Act 273, Eff. Sept. 10; How. 6718; C. L. '97, (533). Unchanged.

**(12700). Order of Court.**

**SEC. 46.** Whenever it shall appear satisfactorily that a disposition of any part of the real estate of such infant, idiot, lunatic, or other incompetent person, or of his interest in any term of years, is necessary and proper, either for the support and maintenance of such infant, idiot, lunatic or other incompetent person, or for his education, or that the interest of such infant, idiot, lunatic or other incompetent person requires or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste or dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale, exchange or other disposition of such real estate or interest, to be made by the guardians of such infants, idiots, lunatics or other incompetent persons, in such manner and with such restrictions as shall be deemed expedient.

**HISTORY:** Re-enacts Sec. 134, R. S. '46, Ch. 90, Am. '48, p. 140, Act. 117, Imd. Eff. Mar. 27, being C. L. '57, (3587); C. L. '71, (5170); As Am. '81, p. 385, Act 273, Eff. Sept. 10; How. 6724; As Am. '97, p. 313, Act 237, Eff. Aug. 30; C. L. '97, (539). In the title of the amendatory Act of '97 the section is cited as 134 but it is erroneously numbered 154 in the body of the act. Unchanged.

**AMENDMENT OF '48:** Act 117 of '48 which immediately follows this section is cited here as an amendment to this section. However, it is in form an original act and nothing in the body of it indicates that it is intended to displace this section. Both sections therefore, have been retained in the Judicature Act, as they were retained in the compilation of '57, '71, Howell's, and '97.

**PETITION:** Requisites of petition and what to be set forth therein. Dorr's Petition, Walk. 145. Leave of the court must be obtained before any sale can be made or agreed upon. *Id.* See Wohlscheld v. Bergrath, 46 Mich. 46.

**FORMER LAW CITED:** Hunt v. Stevens, 174 Mich. 509.

**(12701). Discharge of Incumbrance.**

**SEC. 47.** Whenever it shall be made to appear to the court that it will be manifestly for the interest and advantage of any infant, idiot, lunatic or other incompetent person that any incumbrance upon the real estate of such person should be purchased and discharged, in whole or in part, the court may authorize the guardian of such person to purchase and discharge the same, and if necessary, to sell and dispose of such part of the real estate of such person as may be necessary for that purpose: *Provided*, Such purchase and discharge shall in



no way be construed as vesting in said guardian any right, title or interest in such premises, to the prejudice of such person.

**HISTORY:** Re-enacts Sec. 1 of Act 117 of '48, being C. L. '57, (3603); C. L. '71, (5185); How. 6725; C. L. '97, (540), with slight changes in phraseology. See Historical Note to preceding section. Unchanged.

**FORMER LAW CITED:** Hunt v. Stevens, 174 Mich. 509; Wohlsceid v. Bergrath, 46 Mich. 46.

**(12702). How Real Estate Not to be Disposed of.**

**SEC. 48.** But no real estate or term for years shall be sold, leased or disposed of in any manner against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infant, idiot, lunatic, or other incompetent person.

**HISTORY:** Re-enacts Sec. 135, R. S. '46, Ch. 90, being C. L. '57, (3588); C. L. '71, (5171); As Am. '81, p. 385, Act 273, Eff. Sept. 10; How. 6726; C. L. '97, (541). Unchanged.

**(12703). Report of Sale.**

**SEC. 49.** Upon an agreement for sale, leasing or other disposition of such property, being made in pursuance of such order, the same shall be reported to the court on the oath of the guardian making the same; and if it be confirmed, a lease or conveyance shall be executed under the direction of the court.

**HISTORY:** Re-enacts Sec. 136, R. S. '46, Ch. 90, being C. L. '57, (3589); C. L. '71, (6172); How. 6727; C. L. '97, (542). Unchanged.

**CONSTRUED:** Under this statute no conveyance can be made nor sale completed until reported to the court and sanctioned in each case. Jenness v. Smith, 58 Mich. 283. See also Hunt v. Stevens, 174 Mich. 501, 509.

**(12704). Valid and Effectual Sales.**

**SEC. 50.** All sales, leases, dispositions and conveyances made in good faith by the guardian in pursuance of such order, when so confirmed, shall be valid and effectual as if made by such infant, idiot, lunatic, or other incompetent person when of lawful age and of sound mind.

**HISTORY:** Re-enacts Sec. 137, R. S. '46, Ch. 90, being C. L. '57, (3590); C. L. '71, (5173); As Am. '81, p. 385, Act 273, Eff. Sept. 10; How. 6728; C. L. '97, (543). Unchanged.

**(12705). Incompetent to be Ward of Court.**

SEC. 51. From the time of such application to the court, the infant, idiot, lunatic, or other incompetent person shall be considered as a ward of the court so far as relates to such property, its proceeds and income; and the court shall make orders for the application and disposition of the proceeds of such property and for the investment of the surplus belonging to such infant, idiot, lunatic, or other incompetent person, so as to secure the same for his benefit, and shall direct a return of such investment and disposition to be made on oath, as soon as may be, and shall require accounts to be rendered periodically, by any guardian or other person who may be entrusted with the disposition of the income of such proceeds.

HISTORY: Re-enacts Sec. 138, R. S. '46, Ch. 90, being C. L. '57, (3591); C. L. '71, (5174); As Am. '81, p. 385, Act 273, Eff. Sept. 10, How. 6729; C. L. '97, (544). Unchanged.

**(12706). Proceeds of Sale Deemed Real Estate.**

SEC. 52. No sale made as aforesaid of the real estate of any infant, idiot, lunatic, or other incompetent person, shall give to such infant, lunatic, or other incompetent person, any other or greater interest or estate in the proceeds of such sale than he had in the estate so sold; but the said proceeds shall be deemed real estate of the same nature as the property sold.

HISTORY: Re-enacts Sec 139, R. S. '46, Ch. 90, being C. L. '57, (3592); C. L. '71, (5175); As Am. '81, p. 386, Act 273, Eff. Sept. 10; How. 6730; C. L. '97, (545). Unchanged.

**(12707). Gross Sum in Lieu of Dower.**

SEC. 53. If the real estate of any infant, idiot, lunatic or other incompetent person, or any part of it shall be subject to dower, and the person entitled to such dower shall consent in writing to accept a gross sum in lieu thereof, or the permanent investment of a reasonable sum, in such manner as that the interest thereof be made payable to the person entitled to such dower, during life, the court may direct the payment of such sum in gross or the investment of such sum as shall be deemed reasonable and shall be acceptable to the person entitled to such dower, in manner aforesaid; which sum so paid or invested shall be taken out of the proceeds of the sale of the real estate of such infant, idiot, lunatic, or other incompetent person.

**HISTORY:** Re-enacts Sec. 140, R. S. '46, Ch. 90, being C. L. '57, (3593); C. L. '71, (5176); As Am. '81, p. 386, Act 273, Eff. Sept. 10; How. 6731; C. L. '97, (546). Unchanged.

**(12708). Release of Right of Dower.**

**SEC. 54.** Before any such sum shall be paid, or such investment made, the court shall be satisfied that an effectual release of such right of dower has been executed.

**HISTORY:** Re-enacts Sec. 141, R. S. '46, Ch. 90, being C. L. '57, (3594); C. L. '71, (5177); How. 6732; C. L. '97, (547). Unchanged.

**Sale of Lands Held by Executors in Trust.**

**(12709). Court of Chancery May Direct Sale.**

**SEC. 55.** Whenever any lands, tenements, or hereditaments are held by any executor in trust for others, the court of chancery for the county in which such property is wholly or in part situated may, upon the bill or petition of such executor or any person interested, whenever it shall be made to appear for the best interest of the persons for whom such property is so hold in trust, order, direct and authorize the executor to sell, grant and convey such property at public or private sale, and the sale and conveyance made pursuant to such order, when approved by the court, shall be effectual to pass the title to said property to the purchaser thereof.

**HISTORY:** Re-enacts Sec. 1 of Act 31 of '81, being How. 6733; C. L. '97, (9243). Unchanged.

**(12710). Proceedings.**

**SEC. 56.** Upon the filing of such bill or petition, the proceedings thereon shall be the same as in ordinary suits in chancery so far as practicable. The court may make such orders as may be necessary therein. Guardians shall be appointed for all infant parties, and no sale shall be made until the executor shall have executed and filed with the clerk of the court a bond in such penalty and with such sureties as shall be approved by the circuit judge, for the faithful discharge of his duties, and the proper disposition of the proceeds of the sale, as may be ordered by the court.

**HISTORY:** Re-enacts Sec. 2 of Act 31 of '81, being How. 6734; C. L. '97, (9244). Unchanged.

(12711). Orders and Directions.

SEC. 57. The court shall make all proper orders and directions from time to time for the management, investment and disposition of the moneys received from such sale, and the interest and income therefrom.

HISTORY: Re-enacts Sec. 3 of Act 31 of '81, being How. 6735; C. L. '97, (9245). Unchanged.

Of Notice Lis Pendens.

(12712). Notice to be Filed With Register of Deeds.

SEC. 58. To render the filing of a bill constructive notice to a purchaser of any real estate, it shall be the duty of the plaintiff to file for record, with the register of deeds of the county in which the lands to be effected by such constructive notice, are situated, a notice of the pendency of such suit in chancery, setting forth the title of the cause, and the general object thereof, together with a description of the lands to be affected thereby; and it shall thereupon become the duty of the register to record such notice, in a book kept for that purpose, upon the payment of the same fees as is provided by law for recording deeds. A copy of such record, authenticated by the register, shall be evidence of such notice, and the filing of the same, in all courts and places.

HISTORY: Re-enacts Sec. 29, R. S. '46, Ch. 90, being C. L. '57, (3483); As Am. '61, p. 125, Act 92, Eff. June 15; C. L. '71, (5065); How. 6619; C. L. '97, (441), changing "complainant" to "plaintiff." Unchanged.

LIS PENDENS: The object which the statute has in view is the giving of such a notice as will enable parties to ascertain therefrom the persons and property affected by the bill, with the general nature of the matters in controversy, leaving them to an examination of the court record to ascertain the details and particulars thereof. And where such a notice is given, parties are bound by what appears in the bill and proceedings thereunder. *Alterauge v. Christiansen*, 48 Mich. 67. The object of the notice is to prevent the party to the litigation from alienating the property in dispute, so as to affect the rights of his opponent, and to bind the property, in whosoever hands it may be, with the decree when made in the cause. *Hammond v. Paxton*, 58 Mich. 398. The filing of the notice is a warning to the whole world and whoever afterwards purchases the property affected, takes it with constructive notice, even if, in point of fact, he has never seen or heard of the notice. The notice implied from a statutory record is not defeated by a careless loss or accidental destruction. If the statute is once complied with, the effect as notice continues, notwithstanding the record may fail, from accidental or other reasons,

to give the designed information. *Helm v. Ellis*, 49 Mich. 243. It is not necessary that a notice of lis pendens should be filed to bind one who has actual notice. It is required in the absence of actual notice to charge a party with constructive notice. *Baker v. Pierson*, 5 Mich. 461. Since the filing of the bill is the commencement of the suit, the notice may always be filed at once, and it would lead to very serious mischief, if a failure to serve process at once on a defendant could nullify the effect of such filing. *Gordon v. Tyler*, 53 Mich. 631. Sufficiency of notice. *Alterauge v. Christiansen*, 48 Mich. 67. Error in. *Drew v. Dequindre*, 2 Doug. 93. As to discharge of, from record, see *Compilers' Section 12962*. The notice takes effect from the date of filing. *Lockwood v. Noble*, 113 Mich. 418. As to the necessity for the filing of the notice in order to invoke the doctrine of lis pendens, see *Detroit Citizens' Street Ry. Co. v. Detroit*, 124 Mich. 449, 454. This statute does not in terms postpone the title of the purchaser pendente lite, to the payment of costs, awarded, as in adversary proceedings in the pending suit. *Barbour v. Patterson*, 145 Mich. 469. The filing of a lis pendens, in a suit to foreclose a mortgage on realty is notice of the suit to an owner who obtained title after the execution of the mortgage. *Cossett v. O'Riley*, 160 Mich. 101. The purpose of recording notice of the pendency of a suit is to make the filing of the bill constructive notice to a purchaser of real estate of the claims thereto and therein asserted in the bill. *Barbour v. Patterson*, 145 Mich. 468. In this case the court said: "A judgment for costs, like any other personal judgment, becomes a lien upon real property only by virtue of the contract which is being enforced by express statute provisions or by levy of execution. Executions to collect such judgments run first against the personal estate of the debtor. It is true that costs are, as a rule, usual incidents of litigation, and that notice of the pendency of a suit in chancery involves an understanding that one or other of the parties thereto may recover a judgment therein for his costs. There is, however, no reasonable support for the doctrine that one may not take a conveyance from the defendant in such a suit, of premises which, he is informed by the bill of complaint, belong to the defendant, and to which no claim is asserted, except at the peril of paying a judgment for costs in favor of complainant, thereafter to be rendered. The statute does not, in terms, postpone the title of the purchaser pendente lite to the payment of costs awarded as in adversary proceedings in the pending suit. 1 Comp. Laws, §441, 3 Comp. Laws, §8980. It does, in terms postpone all incumbrances to the payment of a proportional share of the cost of the partition, in view of all of which and of the general rule that money judgments become liens upon real estate by levy only, the court should not determine that a lien is, in effect, created by notice of the pendency of the suit for the costs which may be awarded to complainant."

(12713). **Index.**

SEC. 59. Each register of deeds shall enter in an index to be kept in his office, such references to the said notices, as will enable all persons interested to search his office for such notices without inconvenience.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 90, being C. L. '57, (3484); C. L. '71, (5066); How. 6620; C. L. '97, (442). Unchanged. *Sinclair v. Slawson*, 44 Mich. 123.

**(12714). Certificate of Dismissal of Suit.**

Sec. 60. Whenever any suit in chancery, notice of the pendency of which has been filed with any register of deeds, shall be, or shall have been heretofore dismissed, whether by stipulation, the voluntary act of the plaintiff on final hearing, or otherwise, it shall be the duty of the clerk of the court in which such suit shall have been pending, upon request of any party thereto, to execute, under his hand and the seal of said court, a certificate of the fact of such dismissal, or the attorney for the plaintiff in such suit may execute a like certificate, which shall be acknowledged by said attorney before some officer authorized to take the acknowledgment of deeds. The said register of deeds on receipt of either of such certificates, and on payment to him of a fee of twenty-five cents shall file and preserve the same and shall record the same at length in the books provided for the registry of such notices of pendency of suits, and shall mark on the record of such notice discharged by certificate of the clerk of said court, naming it, or the certificate of said attorney, naming him, as the case may be, with the date of filing such certificate, and the book and page of its record, and thereafter the effect of such notice shall cease and determine.

**HISTORY:** Re-enacts Sec. 1 of Act 156 of '89, being How. 6754a; C. L. '97, (9057), changing "complainant" to "plaintiff," "solicitor" to "attorney," and "register" to "clerk."

See Compilers' Section (12712) as to notice of lis pendens.

As to discharge of liens of mechanics or others, see Compilers' Section (11787). Unchanged.

**Discharge of Mortgages in Certain Cases.**

**(12715). Petition for Discharge.**

Sec. 61. When a recorded mortgage on lands or property has been paid and satisfied, or when fifteen years have elapsed since the debt secured by such mortgage became due and payable, or since the last payment made thereon, and no suit or proceedings have been commenced to collect the same, the owner of such land or property may present a petition to the circuit court for the county in which such land or property so incumbered is wholly or in part situated, duly verified by

the oath of the petitioner, or by some one in his behalf, which shall state the names of the mortgagor and mortgagee, the date of the mortgage, and the liber and page of the record thereof, the facts in regard to payment of the debt thereby secured, or the non-commencement of such suit or proceeding within said fifteen years; and further, that the present residence or whereabouts of the mortgagee (or his assignee, if the mortgage shall have been assigned), is unknown to the petitioner, and that the petitioner has been unable to ascertain the same after diligent search and inquiry; or, if such be the fact, that the mortgagee or assignee is deceased, and that three months have elapsed since his death, and that the names and residence of the legal representatives, if any there are, of the mortgagee or assignee, are unknown to the petitioner, and that he has been unable to ascertain the same after diligent search and inquiry; or when such mortgagee is a trustee merely and without interest therein, that he does not reside in the state of Michigan or is dead; and such petition shall conclude with a prayer that an order of the court may be made discharging said mortgage and declaring it fully paid and satisfied. Upon the presentation of such petition, said court may proceed to hear and determine the truth of the matters therein stated, and if it shall be made satisfactorily to appear to the court, either by the production in evidence of the original mortgage or of the bond, or bonds or promissory notes, to secure the payment of which such mortgage was given, or by any other competent evidence, that the debt secured by such mortgage has been fully paid, both principal and interest thereof; or if it shall be made to appear to the court by competent evidence that said mortgaged debt has been past due for fifteen years, or that fifteen years have elapsed since the last payment was made on such debt, and that no suit or proceeding has been commenced to foreclose such mortgage, the court shall make a certificate to that effect setting forth therein the names of the witnesses and the nature of the evidence by which such facts have been made to appear, and a minute thereof shall be entered in the journal of said court, and such certificate signed by the judge of said court and attested by the clerk thereof under the seal of said court, shall be delivered to the said petitioner and may be recorded in the office of the register of deeds for the county or counties in which such mortgage shall be of record in like manner and with like effect in all respects as if it were a formal discharge of said mortgage duly executed by the mortgagee.

**HISTORY:** Re-enacts Sec. 45 of R. S. '46, Ch. 65 as Added '67, p. 140, Act 102, Imd. Eff. Mar. 26; C. L. '71, (4247); As Am. '77, p. 9, Act 16, Eff. Aug. 21; How. 5705; As Am. '85, p. 306, Act 225, Eff. Sept. 19, As Am. '87, p. 3, Act 3, Imd. Eff. Feb. 3, As Am. '93, p. 85, Act 82, Eff. Aug. 28; C. L. '97, (9011). But Sec. (9011), C. L. '97, was amended '15, p. 331, Act 197, Eff. Aug. 24. (See Compilers' Section (11746). Query: Does this section still supersede Compilers' Section (11746)? Remains unchanged.

**CONSTRUED:** *Moran v. Roberge*, 84 Mich. 600.

### Sales of Lands Devised without Power of Sale.

#### (12716). May be Sold Under Direction of Court.

**SEC. 62.** Whenever any person shall be seized or possessed of any lands, tenements or hereditaments conveyed by deed or devised by will to such person for life, with or without power of appointment by will or sale, or of any lands, tenements, or hereditaments devised to such person in trust, without power of sale, the circuit court in chancery for the county where such property is situated, may on the petition of such person having a life estate, order that such land, tenements and hereditaments, or any part thereof be sold under the direction of the court, whenever by a proper showing by witnesses produced before the court it shall satisfactorily appear that the rights of the interested parties will otherwise be jeopardized.

**HISTORY:** Re-enacts Sec. 1 of Act 233 of '87, being How. 6024a; C. L. '97, (9234); As Am. '01, p. 85, Act 55, Imd. Eff. Apr. 9; As Am. '09, p. 92, Act 56, Eff. Sept. 1. Unchanged.

**CONSTITUTIONALITY:** This is a constitutional and valid procedure in rem. *Garrison v. Hecker*, 128 Mich. 540.

**PETITION:** Petition under oath of a devisee of a life estate, verified in a foreign state but which contains no clerk's certificate to the official character of the notary is fatally defective. *Metcalf v. Carr*, 133 Mich. 124.

**INCOME:** The income from a fund arising from a sale under this act held to be under the jurisdiction of probate court which has exclusive jurisdiction of the settlement of the estates of mentally incompetent persons under guardianship except where its remedies are inadequate. *Nolan v. Garrison*, 156 Mich. 397.

**JURISDICTION—PROBATE COURT:** The fact that a life tenant may petition the chancery court for a sale of a life estate under this section, does not conflict with the power given the probate court to make a like order of sale on the petition of the executor, under section (11287). In *re Rodgers' Estate*, 192 Mich. 164.

#### (12717). Conveyance Good and Effectual in Law.

**SEC. 63.** Every conveyance made by the person so seized pursuant to such order of said court, shall be as good and



effectual in law, and shall convey the same title, as if the same were made by such person being seized of the title in fee to such lands, tenements and hereditaments.

**HISTORY:** Re-enacts Sec. 2 of Act 233 of '87, being How. 6024b; C. L. '97, (9235). Unchanged.

**CONSTRUED:** Harrison v. Hecker, 128 Mich. 540.

**(12718). Petition to be Filed.**

**Sec. 64.** For the purpose of obtaining such order of sale the person so seized of such lands, tenements or hereditaments shall file his petition in the circuit court in chancery for the county where such property is situated, setting out the facts, under oath and the names, residences and interests of all persons who are or may be interested in said property so far as the same is known to the petitioner, and praying that the lands, tenements and hereditaments therein described may be sold, and that the proceeds thereof may be invested under the order of the court, and thereafter treated as real property and subject to the same disposition as would have been made of said property had the same not been sold.

**HISTORY:** Re-enacts Sec. 3 of Act 233 of '87, being How. 6024c; C. L. '97, (9236). Unchanged.

**(12719). Order of Appearance.**

**Sec. 65.** Said court shall thereupon enter an order requiring all persons interested in said property to appear before said court, at a time to be therein named, and show cause if any exist, why the prayer of said petition shall not be granted, which order shall be returnable not less than six weeks nor more than twelve weeks from the date thereof, and a copy of such order shall be personally served upon all persons interested in said land if found in the state of Michigan at least ten days before the return day thereof, and shall be published once in each week for three successive weeks preceding the return day thereof in a newspaper printed and circulated in the county where such property is situated, and in the county in which the petitioner resides, and in such other place or places as the court may direct: *Provided*, That when such application shall be made by any trustee, a copy of such notice shall also be personally served upon the cestui que trust, at least ten days before the return day thereof.

**HISTORY:** Re-enacts Sec. 4 of Act 233 of '87, being How. 6024d; C. L. '97, (9237); As Am. '09, p. 92, Act 56, Eff. Sept. 1. Unchanged.

**CONSTRUED:** Harrison v. Hecker, 128 Mich. 543.

**(12720). Proofs and Hearing.**

SEC. 66. Upon the return day of such order any person interested may appear and show cause against the granting of the prayer of the petition, and proofs may be taken and a hearing had in such manner as the court may direct, and if it shall satisfactorily appear to the court that the interests of the persons owning or interested in such property will be substantially promoted by the sale of the same on account of the said property being exposed to waste or dilapidation, or on account of its being unproductive, or for any other peculiar reasons or circumstances, then, in such case, it shall thereupon order that such property be sold under its direction, and that the proceeds stand in lieu thereof.

HISTORY: Re-enacts Sec. 5 of Act 233 of '87, being How. 6024e; C. L. '97, (9238). Unchanged.

**(12721). Sales Confirmed Effectual.**

SEC. 67. All sales made in pursuance of such order shall be reported to the court, and when confirmed the petitioner shall execute a conveyance of the property, which shall be as good and effectual in law, and shall convey the same title as if the person making the same were seized of the title in fee to such lands, tenements and hereditaments.

HISTORY: Re-enacts Sec. 6 of Act 233 of '87, being How. 6024f; C. L. '97, (9239). Unchanged.

**(12722). Bond.**

SEC. 68. Upon the making of an order of sale as aforesaid the petitioner, or other person or persons appointed trustee or trustees by the court to receive the proceeds of said sale, shall give such bond, in such penalty and with such sureties, and in such form as the court shall direct, which bond shall run to the clerk of the court for the use and benefit of any person who may be or become interested in such lands, tenements or hereditaments, or their proceeds, conditioned for the investing of and accounting for the proceeds of such lands, tenements and hereditaments, and for the observance of all orders of the court in relation thereto.

HISTORY: Re-enacts Sec. 7 of Act 233 of '87, being How. 6024g; C. L. '97, (9240); As Am. '01, p. 85, Act 55, Imd. Eff. Apr. 9. Unchanged.

**(12723). Proceeds to Stand in Lieu of Property**

SEC. 69. Upon the confirmation of such sale, the proceeds thereof shall thereafter stand in lieu of said property, and the court shall make such order as to the investment thereof as may be necessary. And from time to time thereafter such further orders may be made upon the application of any person interested as the circumstances may require.

HISTORY: Re-enacts Sec. 8 of Act 233 of '87, being How. 6024h; C. L. '97, (9241). Unchanged.

**(12724). No Sale Contrary to Provisions of Deed or Will.**

SEC. 70. No sale or conveyance of any kind shall be made of any property contrary to any specific provisions in regard thereto contained in the deed of conveyance, or in the will under which the petitioner holds the said property.

HISTORY: Re-enacts Sec. 9 of Act 233 of '87, being How. 6024i; C. L. '97, (9242); As Am. '09, p. 93, Act 56, Eff. Sept. 1. Unchanged. *Garrison v. Hecker*, 128 Mich. 539.

**Of Barring the Right of Dower of Insane, Imbecile or Idiotic Married Women.****(12725). How Dower May be Barred.**

SEC. 71. Whenever the wife of any person shall have become insane, imbecile, or idiotic, or for any cause shall be unable from defective intellect to join her husband in the conveyance of real estate, and shall have remained in that condition for more than two years, or when it shall be made to appear to the court that such married woman is incurably insane, she may be barred of her right of dower in the lands of her husband, in manner following.

HISTORY: Re-enacts and supersedes Sec. 1 of Act 191 of '73, being How. 5762; C. L. '97, (8947), though such section is not expressly repealed by this act. Unchanged.

**(12726). Petition to Court.**

SEC. 72. The husband, or any person interested in any such real estate, may apply to the circuit court in chancery of the county where such lands, or any part of such lands are situated, by petition under oath, for the appointment of a guardian and for leave to sell her inchoate right of dower; which petition shall state:

1. The name, age and residence of such married woman, and the name, residence and age of her husband, as near as can be ascertained;

2. The nature of the disability of said married woman and the length of time it has existed;

3. A full description of the lands and premises in this state to be affected by such proceedings;

4. The value of each piece of real estate, and the amount of incumbrance upon it (if any), not affected by, or prior to her claim of dower;

5. If the real estate is to be sold by the husband, or has been sold by him, the exact amount of the consideration of such sale as made or agreed upon;

6. The reasons why such sale is desirable to said husband or petitioner.

**HISTORY:** Re-enacts and supersedes Sec. 2 of Act 191 of '73, being How. 5763; C. L. '97, (8948), though such section is not expressly repealed by this act. Unchanged.

**(12727). Order of Hearing and Notice.**

**SEC. 73.** Upon the filing of such petition, the said circuit court in chancery shall enter an order that the petition be heard on a certain day, and notice of the hearing be given by publication or otherwise, in such manner and to such persons as said court shall direct.

**HISTORY:** Re-enacts and supersedes Sec. 3 of Act 191 of '73, being How. 5764; C. L. '97, (8949), though such section is not expressly repealed by this act. Unchanged.

**(12728). Appearance of Wife.**

**SEC. 74.** At such hearing the said wife may appear in person, or by counsel, or by guardian ad litem appointed as in other cases by said court, and may answer such petition in the time and manner said court may direct; and upon the filing of an answer the case shall be deemed at issue. When the case is at issue, or if the said wife shall fail to appear, the court may proceed summarily upon oral or written evidence taken under its order, to hear and determine the case; or, at its discretion, may refer it to a circuit court commissioner, or a special commissioner appointed by the court for the purpose to take proofs and report the same to the court with his opinion:

1. As to the insanity or imbecility of the wife;

2. As to the propriety or necessity of selling said real estate, or of barring her right of dower therein;

3. The cash value at that time of her dower interest in said premises, taking into consideration the respective ages of said husband and wife. Upon the coming in of said report the court shall consider the same, and enter such order as shall be just and equitable. If said court shall decide that the wife is insane, and that it is desirable that the right of dower should be barred, it shall fix the then present value of such dower, and thereafter shall appoint a guardian of such insane person, who shall be some person other than her husband, who shall give bond in a sum to be fixed by the court, with surety or sureties, to be approved by the court, conditioned to receive and invest any moneys that may come into his hands for her sole use and benefit, under the order and direction of the court, both as to its investment and to the disposition of the income thereof.

HISTORY: Re-enacts and supersedes Sec. 4 of Act 191 of '73, being How. 5765; C. L. '97, (8950), changing "respondent" to "wife," though such section is not expressly repealed by this act. Unchanged.

(12729). **Sale of Interest by Guardian.**

SEC. 75. Upon the approval of such bond said guardian may proceed and sell at private sale, as such guardian, the interest of such married woman in said land, at a sum not less than the value of said dower as fixed by said court. He may join with the husband in such conveyance, or if the husband has previously sold and conveyed said property may, by separate conveyance, deed said right of dower to the husband's grantee or grantees, his or their heirs and assigns, but to no other person. Said conveyance shall in all cases be as effective to bar the right of dower of said married woman as if she had, being in sound mind, joined her husband in a deed of said premises.

HISTORY: Re-enacts and supersedes Sec. 5 of Act 191 of '73, being How. 5766; C. L. '97, (8951), though such section is not expressly repealed by this act. Unchanged.

(12730). **Application of Income of Money.**

SEC. 76. Said guardian shall apply the income of said money to the support of said married woman, or allow the same to accumulate, as the court shall direct; and upon the restoration of said married woman to a sound mind shall,

upon the order of the court, transfer to her all the funds in his hands, and upon her death, shall deliver the same to her husband, if he shall be living at her death; if not living, then to her personal representatives.

**HISTORY:** Re-enacts and supersedes Sec. 6 of Act 191 of '73, being How. 5767; C. L. '97, (8952), though such section is not expressly repealed by this act. Unchanged.

**Of Award of Money in Lieu of Dower in Lands Aliened by Husband in His Lifetime.**

**(12731). When Court May Award Money in Lieu of Dower.**

**Sec. 77.** In any suit hereafter to be commenced by any widow for the recovery of dower in lands, which were aliened by her husband in his lifetime, and where dower cannot be assigned therein by metes and bounds without injustice or manifest injury to the widow, or to the owner or owners, or person or persons in possession thereof, or some one of them, the court having cognizance of the matter may award and adjudge a sum of money in lieu of dower to be paid to the widow, or may assign to her as tenant in common, a just proportion of the rents, issues and profits of said lands, regard being had in all cases to the true value of the lands at the time of such alienation by the husband, and of the probable duration of the life of the doweress, at the time such sum of money shall be adjudged, or such rents, issues and profits shall be assigned to her.

**HISTORY:** Re-enacts and supersedes Sec. 1 of Act 63 of '47, being C. L. '57, (2801); C. L. '71, (4298); How. 5768; C. L. '97, (8953), though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** The statutes of dower recognize the propriety of converting into money the value of such property as cannot be actually partitioned. The estate of a doweress may be so commuted in case of lands aliened. *Brown v. Bronson*, 35 Mich. 420-1. Basis of calculation. Id. 421.

This section cited as to provision in lieu of dower. *Chase v. Angell*, 148 Mich. 9. *Rockwell v. Rockwell*, 81 Mich. 493.

**Of the Probate of Foreign Wills in Certain Cases.**

**(12732). Probate of Foreign Will.**

**Sec. 78.** Whenever it shall become necessary to make probate in this state of the last will of any deceased person, which was executed in a foreign country, by the laws of which, no

probate of wills, after the death of the maker, is required or provided for, or, being executed in a foreign country, by the laws of which probate of wills, after the death of the maker, is required or provided for, but the testator, at the time of his death, is not domiciled in such foreign country, if the original will cannot be produced in this state for probate, the same may be proved and allowed in this state, by a full and complete copy thereof in the circuit court in chancery in and for any county, in which the maker of such will left any property, at his or her decease, affected by such will.

**HISTORY:** Re-enacts and supersedes Sec. 1 of Act 101 of '81, being How. 5826; C. L. '97, (9305); As Am. '15, p. 210, Act 125, though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** Probate of foreign wills. *Schober v. Wayne Prob. Judge*, 49 Mich. 323; *Feustman v. Gott Estate*, 65 Mich. 592.

**(12733). Petition for Allowance.**

**SEC. 79.** Any person interested in the proof and allowance of any such foreign will, whether as executor, heir, devisee, legatee or otherwise, may file in any such circuit court in chancery a bill or petition setting forth the facts necessary to give said court jurisdiction in such case, making all proper persons parties thereto, and the proceedings thereupon to bring the defendants before the court shall be the same as is provided for in said court in other cases.

**HISTORY:** Re-enacts and supersedes Sec. 2 of Act 101 of '81, being How. 5827; C. L. '97, (9306), though such section was not expressly repealed by this act. Unchanged. In *re Corning's Estate*, 159 Mich. 474.

**(12734). Taking Testimony.**

**SEC. 80.** Said court shall have full power by the means of commissions or letters rogatory, to take the testimony of any officer, magistrate or other persons having custody or possession of the original will, of the witnesses thereto, and of any other person whose testimony is required, and if upon the proofs of the case, a full and complete copy of such will is shown, and it shall sufficiently appear that the alleged will is valid, and sufficient to pass any of the property, real or personal, of the maker within this state, that said will was executed in a foreign country, that the maker is dead, and that the original will is retained in the foreign country, and cannot be produced in this state for probate, and that the laws

of said foreign country do not require or provide for the probate of said will after the death of the maker, or, being executed in a foreign country, by the laws of which probate of wills, after the death of the maker, is required or provided for, but the testator, at the time of his death, is not domiciled in such foreign country, it shall then be lawful for said circuit court in chancery to admit said will to probate, or so much thereof as it shall find to be valid in this state, and such allowance and probate shall have the same effect as if the same had been made in any probate court of this state, of lawful jurisdiction, upon production and proof of the original will.

**HISTORY:** Re-enacts and supersedes Sec. 3 of Act 101 of '81, being How. 5828; C. L. '97, (9307); As Am. '15, p. 210, Act 125. Unchanged.

**(12735). Probate to be Filed With Probate Court.**

**SEC. 81.** Any probate made as aforesaid, with a transcript of the will proven and allowed, shall be certified to and filed with the probate court of the county in which probate has been made, and thereupon said probate court shall have the same power and jurisdiction in respect to the estate of the deceased as if said will had been proven and allowed in said probate court.

**HISTORY:** Re-enacts and supersedes Sec. 4 of Act 101 of '81, being How. 5829; C. L. '97, (9308), though such section was not expressly repealed by this act. Unchanged.

**(12736). Proceedings in Court of Chancery.**

**SEC. 82.** The proceedings in the circuit court in chancery, unless otherwise herein provided, shall conform to the rules and practice of said court, and an appeal to the supreme court may be taken as in other cases.

**HISTORY:** Re-enacts and supersedes Sec. 5 of Act 101 of '81, being How. 5830; C. L. '97, (9309), though such section was not expressly repealed by this act. Unchanged.



## CHAPTER XX.

### MISCELLANEOUS PROVISIONS CONCERNING ACTIONS.

#### (12737). Entry of Default.

SECTION 1. Upon due proof of service of any declaration or process requiring an appearance, answer or plea, or upon due proof of publication of an order for defendant's appearance, or of the personal service of such order, a default may be filed or entered against the defendant for want of such appearance, answer or plea, within the time provided by law, or by rule of court, and the same proceedings may be had against said defendant in all respects as if he had appeared, answered or plead thereto: *Provided*, That no judgment shall be rendered against a foreign corporation based upon such default, until the expiration of sixty days from the service of process.

HISTORY: Supersedes Sec. 3, R. S. '46, Ch. 97, being C. L. '57, (4109); C. L. '71 (5724); How. 7292; C. L. '97, (9986); and Secs. 43 and 44, R. S. '46, Ch. 90, being C. L. '57, (3497)-(3498); C. L. '71, (5079)-(5080); How. 6633-4; C. L. '97, (455)-(456); and Sec. 84, R. S. '46, Ch. 90, being C. L. '57, (3537); C. L. '71, (5120); How. 6674; C. L. '97, (489). Unchanged.

DEFAULT AND PROOF OF SERVICE: A defendant cannot be defaulted upon a void service. *Ellis v. Fletcher*, 40 Mich. 321; *South Bend Chilled Plow Co. v. Manahan*, 62 Mich. 144; *Boyle v. Detroit*, 152 Mich. 250. Default can be entered only after due proof of service. *Denison v. Smith*, 33 Mich. 158; *Alverson v. Dennison*, 40 Mich. 179; *Marshall v. Calkins*, 114 Mich. 697. In a suit started by filing declaration, proof of service must show that a copy of the declaration was served before judgment by default can be taken. *Campbell v. Judge*, 111 Mich. 247. And such proof must be filed. *Anderson v. Cole*, 114 Mich. 637. Before default can be regularly taken there must be positive evidence of service, and no substantial defect in that respect can be cured by subsequent knowledge of the facts. *Johnson v. Delbridge*, 35 Mich. 436. A defendant who is not served with the process but appears is entitled to notice of trial, and in an action in which only a joint judgment is permissible, the same cannot be rendered without his appearance. *Penfold v. Slyfield*, 110 Mich. 343. Proof of service may be made by affidavit as well as by the sheriff's return. *Arnold v. Nye*, 23 Mich. 296. And the affidavit of service must show how the service was made. *People's Mut. Ben. Soc. v. Judge*, 97 Mich. 627. The affidavit may be sworn to before a deputy clerk. *Norvell v. Mc-*

Henry, 1 Mich. 234. Sufficiency of indorsement of acceptance of service. Allured v. Voller, 107 Mich. 476. See also Calendar v. Olcott, 1 Mich. 344; Allen v. Hazen, 26 Mich. 142; Wyandotte Rolling Mills Co. v. Robinson, 34 Mich. 428; Granger v. Judge, 44 Mich. 384; Detroit Free Press Co. v. Bagg, 78 Mich. 651; Griffin v. McGavin, 117 Mich. 372.

**TAKEN AS CONFESSED:** An order pro confesso cannot be entered before proof of service of the subpoena has been made and filed. Eaton v. Eaton, 33 Mich. 305. But if the proof is filed before the decree is made, it is sufficient. Torrans v. Hicks, 32 Mich. 307. A decree pro confesso cannot be taken against an infant. The case must always be made out by proof. Thayer v. Lane, Walk. 200; Chandler v. McKinney, 6 Mich. 219; Smith v. Smith, 13 Mich. 262; Ballentine v. Clark, 38 Mich. 396. See Carrell v. Potter, 23 Mich. 377. A personal decree pro confesso cannot be taken against a person not served with process and not appearing in the cause. Outhwite v. Porter, 13 Mich. 540; Tyler v. Peatt, 30 Mich. 63; Lawrence v. Fellows, Walk. 468; Bonesteel v. Todd, 9 Mich. 371; Lillibridge v. Tregent, 30 Mich. 105; Goebel v. Stevenson, 35 Mich. 172; Innes v. Stewart, 36 Mich. 285; Booth v. Conn. M. L. Ins. Co., 43 Mich. 299; McLean v. Isbell, 44 Mich. 129.

**EFFECT OF DECREE:** Where a defendant permits a bill to be taken as confessed against him, it is an admission of every material fact stated in it. Ward v. Jewett, Walk. 45. But nothing more than the case made by the bill and not any new agreement set up and relied upon in the proof only. McCabe v. Farnsworth, 27 Mich. 64. The court in decreeing pro confesso must confine itself within the precise limits of the case made by the bill. Griswold v. Fuller, 33 Mich. 271.

**PROOF OF PUBLICATION:** A pre-requisite to proceeding to judgment. King v. Harrington, 14 Mich. 541. How made. See Compilers' Sections (12523-9) and (12507) together with the notes thereto. To be made by affidavit. Perrien v. Feters, 35 Mich. 236. In case of orders to appear, Compilers' Section (12526), relative to proof of publication, governs, rather than Compilers' Section (12523), Brown v. Phillips, 40 Mich. 269. Form of affidavit held good. *Id.* Affidavit held not sufficient. Perrien v. Feters, 35 Mich. 233. By whom the affidavit may be made. Pettiford v. Zoellner, 45 Mich. 363; Dexter v. Cranston, 35 Mich. 453; Brown v. Phillips, 40 Mich. 269; Perrien v. Feters, 35 Mich. 236; Defective affidavits. Torrans v. Hicks, 32 Mich. 307; Gillett v. Needham, 37 Mich. 143. The object of entitling affidavits is to connect them with a suit, so that perjury will lie upon them. An affidavit referring to a paper properly entitled, to which it is appended, must be assumed to have adopted the title by reference. King v. Harrington, 14 Mich. 540.

### (12738). Oath to Sureties or Bail.

**SEC. 2.** Whenever any officer is authorized to take any sureties, or bail, he shall be authorized to administer an oath to every person who shall be offered as such bail or surety, to ascertain his sufficiency.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 107, being C. L. '57, (4526); C. L. '71, (6170); How. 7754; C. L. '97, (10395). Unchanged.

**(12739). Publication of Legal Advertisement.**

**Sec. 3.** All legal advertisements shall be published in a newspaper printed in the county in which the proceedings are carried on, if there be one, and if no newspaper be printed in such county, then such advertisements shall be published in a newspaper published in an adjoining county, or in a paper published nearest to said county in which such proceedings are had.

**HISTORY:** Re-enacts Sec. 56, R. S. '46, Ch. 103, being C. L. '57, (5659); C. L. '71, (7455); How. 9031; C. L. '97, (11236). Unchanged.

**12740). Vexatious Prosecution.**

**Sec. 4.** Every person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or proceeding at law, or in equity, or in any other manner prescribed by law, to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known, shall be liable to the person so arrested, attached or proceeded against, in treble the amount of the damages and expenses which, by any verdict, shall be found to have been sustained and incurred by him; and shall be liable to the person in whose name such arrest or proceeding was had in the sum of two hundred dollars damages, and shall be deemed guilty of a misdemeanor, punishable on conviction, by imprisonment in the county jail for a term not exceeding six months.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 107, being C. L. '57, (4519); C. L. '71, (6163); How. 7747; C. L. '97, (10388). Unchanged. *Powers v. Houghton*, 159 Mich. 372.

**(12741). Neglect to Execute Process.**

**Sec. 5.** Every sheriff, constable, or other officer, to whom shall be directed and delivered any attachment, summons, precept to summon a jury, warrant to apprehend a witness, or any other person, or any other process authorized to be issued by any judge, circuit court commissioner, or justice of the peace, in any special proceeding or matter before such judge, commissioner or justice, except civil suits before justices of the peace, shall execute such process as therein commanded, and for any wilful neglect so to do, may be fined by the officer issuing the same, in a sum not exceeding twenty-five dollars.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 107, being C. L. '57, (4520); C. L. '71, (6164); How. 7748; C. L. '97, (10389). Unchanged.

**(12742). Neglect to Attend as Juror.**

**SEC. 6.** When any person shall have been personally summoned to attend as a juror to inquire into any matter or thing, or to hear and try any controversy, in any special proceeding or matter specified in the last section, and shall wilfully neglect to attend in pursuance to such summons, he may be fined by the officer issuing the same, in a sum not exceeding twenty-five dollars; but this section shall not extend to any case where other special provision is made by law, for punishing the default of any juror.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 107, being C. L. '57, (4521); C. L. '71, (6165); How. 7749; C. L. '97, (10390). Unchanged.

**(12743). Neglect to Attend Jury.**

**SEC. 7.** When any sheriff, constable or other officer, who shall have summoned any jury, in the cases mentioned in the two last sections, shall be required by the officer issuing such summons, to attend such jury and take charge of them, he shall be bound to do so; and for any wilful neglect to obey such order, or for any misconduct while attending such jury, by which the rights or remedies of any party to such proceeding may be impaired or prejudiced, such sheriff, constable or other officer, shall be liable to be fined by the officer before whom such jury shall have appeared, in a sum not exceeding twenty-five dollars.

**HISTORY:** Re-enacts Sec. 21, R. S. 46, Ch. 107, being C. L. '57, (4522); C. L. '71, (6166); How. 7750; C. L. '97, (10391). Unchanged.

**(12744). Notice of Fine.**

**SEC. 8.** Upon any fine being imposed in any of the cases hereinbefore specified, notice thereof shall be given to the person fined, to the end that he may render any excuse to the officer imposing such fine, or show cause why such fine should be remitted.

**HISTORY:** Re-enacts Sec. 22, R. S. '46, Ch. 107, being C. L. '57, (4523); C. L. '71, (6167); How. 7751; C. L. '97, (10392). Unchanged.

**(12745). Return of Delinquency and Fine.**

**SEC. 9.** If no such excuse be rendered, or cause shown,

within thirty days after service of such notice, and such fine shall not have been remitted by the officer imposing the same, such officer shall make a special return of the delinquency or misconduct for which such fine was imposed, with the amount thereof, to the next circuit court for the county in which said delinquent shall reside.

**HISTORY:** Re-enacts Sec. 23, R. S. 46, Ch. 107, being C. L. '57, (4524); C. L. '71, (6168); How. 7752; C. L. '97, (10393). Unchanged.

**(12746). Collection of Fine.**

**SEC. 10.** The clerk of the court to which such return shall be made, shall deliver a copy thereof to the prosecuting attorney of the county, with copies of the minutes of fine imposed by such court, and in the same manner; which shall be collected, and may be remitted or mitigated, in the same manner as fines imposed by courts of record, upon defaulting jurors.

**HISTORY:** Re-enacts Sec. 24, R. S. 46, Ch. 107, being C. L. '57, (4525); C. L. '71, (6169); How. 7753; C. L. '97, (10394). Unchanged.

**(12747). Proceedings in Civil Causes by State to be Same as in Others.**

**SEC. 11.** Every suit or proceeding in a civil cause instituted in the name of the people of this state, by any public officer duly authorized for that purpose, shall be subject to all the provisions of law respecting similar suits or proceedings, when instituted by or in the name of any citizen, except where provision is or shall be otherwise expressly made by statute; and in such suits and proceedings, the people of this state shall be liable to be nonsuited, and to have judgment of non pros. or of discontinuance entered against them, in the same cases, in like manner, and with the same effect, as in suits brought by citizens, except that no execution shall issue thereon.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 107, being C. L. '57, (4528); C. L. '71, (6172); How. 7756; C. L. '97, (10397). Unchanged.

**CONSTRUED:** See notes to Compilers' Section 13706; Railroad v. Bd. of St. Auditors, 102 Mich. 502.

**(12748). Costs Against People.**

**SEC. 12.** Whenever costs shall be adjudged against the people of this state, in any civil suit or proceeding instituted by

any officer duly authorized for that purpose, it shall be the duty of the auditor general to draw on the treasurer for the amount thereof, upon the production of an authenticated copy of the record of judgment, or of the order adjudging such costs, with a taxed bill thereof, and upon the certificate of the attorney general that such suit or proceeding was duly instituted, as by law required.

**HISTORY:** Re-enacts Sec. 28. R. S. '46, Ch. 107, being C. L. '57, (4529); C. L. '71, (6173); How. 7757; C. L. '97, (10398). Unchanged.  
**CITED:** Railroad v. Bd. of St. Auditors, 102 Mich. 502.

**(12749). Action for Labor Against Stockholders.**

**SEC. 13.** An action of assumpsit may be maintained against all or any of the stockholders of any corporation or joint stock association, on their individual liability, for labor performed for such corporation or association, after an execution shall be returned unsatisfied, in whole, or in part, or after an adjudication in bankruptcy against such corporation.

**HISTORY:** New section.

**(12750). Controversies Between or With Counties.**

**SEC. 14.** Whenever any controversy or cause of action shall exist between any of the counties of this state, or between any county and any individual or individuals, such proceedings shall be had either in law or equity, for the purpose of trying and finally settling such controversy, and the same shall be conducted in like manner, and the judgment or decree therein shall have the like effect, as in other suits or proceedings between individuals and corporations.

**HISTORY:** Re-enacts and supersedes Sec. 26, R. S. '46, Ch. 13, being C. L. '57, (325); C. L. '71, (457); How. 463; C. L. '97, (2465); though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** Counties cannot be sued except as authorized by statute. *Detroit v. Blackeby*, 21 Mich. 84, 113. One county may sue another county. *Ontonagon v. Gogebic*, 74 Mich. 724; *Bay v. Arenac*, 111 Mich. 107. As to actions by and against municipal corporations in justices' court, see Compilers' Sections (14169)-(14170), and notes.

**(12751). Loss of Service in Seduction.**

**SEC. 15.** It shall not be necessary in any action on the case for seduction hereafter to be brought, to allege in the declaration, or to prove on the trial, any loss of service in consequence of such seduction; but if the female seduced be a

minor at the time of the seduction, the action may be brought by her father, mother, or guardian; and if such female be of full age, the action may be brought by her father, or any other relative who shall be authorized by her to bring the same.

**HISTORY:** Re-enacts Sec. 50, R. S. '46, Ch. 107, being C. L. '57, (4551); C. L. '71, (6195); How. 7779; C. L. '97, (10418). Unchanged.

**LOSS OF SERVICE:** This and the next two sections were passed to do away entirely with the absurd doctrines arising out of the relations of service and to redress the wrong as it really affects both the character and prospects of the woman and the peace and comfort of the family. There may be possible cases where the elements of incapacity to labor and of expenses incurred in treatment may become considerable elements of damage, but they are usually very small factors in the result. *Stoudt v. Shepherd*, 73 Mich. 592-3.

**ACTION HOW BROUGHT:** In *Watson v. Watson*, 49 Mich. 540; 53 Mich. 168; *Dalman v. Koning*, 54 Mich. 320, and *Weiher v. Meyersham*, 50 Mich. 602, it was held that a woman when of age, whether of age or not when debauched, could sue in her own name for the injury, and that the only reason for requiring any one else to sue formerly was that, when the statutes were passed, no party to the record could be a witness, although interest did not disqualify witnesses. As soon as parties were allowed to testify in their own behalf, the reason for requiring a nominal plaintiff no longer existed and the real party injured was allowed to recover. Those cases also exploded the doctrine that a woman's consent to her own dishonor estopped her from recovery. *Stoudt v. Shepherd*, 73 Mich. 595-6. The damages are the daughter's and not the parent's, when the action is brought by the latter. *Badder v. Keefer*, 91 Mich. 613, citing *Watson v. Watson*, 49 Mich. 545; *Ryan v. Fralick*, 50 Mich. 483. This and the next two sections are enabling, and not restrictive, in giving the right to sue for seduction to representatives of the injured woman; and they do not deprive her of her right, as it existed at the common law or otherwise, to sue in her own name and for her own benefit. *Weiher v. Meyersham*, 50 Mich. 602. Action by a girl who has been practically, though not formally, adopted in her adopted name. *Watson v. Watson*, 49 Mich. 540. Declaration in action brought by parent. *Badder v. Keefer*, 91 Mich. 611. Plaintiff has no cause of action unless she was chaste at the time of the alleged seduction. *Greenman v. O'Riley*, 144 Mich. 537.

**FOUNDATION OF ACTION:** The case of *Dolman v. Koning*, 54 Mich. 320 (following *Johnston v. Disbrow*, 47 Mich. 59), held that, as the unlawful intercourse was the ground of action, the use of force did not negative the legal idea of seduction, and a recovery could be had for all the wrong and its consequences. *Stoudt v. Shepherd*, 73 Mich. 597. An action for seduction will be sustained even if the proofs make a case of rape. *Velthouse v. Alderink*, 153 Mich. 217. Seduction may be accomplished by means of influence and persuasion intended to reach, and actually reaching, the result, which do not necessarily involve either a promise of marriage or pecuniary advantage; and that such effectual persuasion, which is the active cause of it may be as district a grievance as the more venal representations which appeal to covetousness more than to excited feeling. *Stoudt*

v. Shepherd, 73 Mich. 596. Single acts in such affairs seldom make up alone the real transaction and all that preceded them in the mutual relations of the parties is to be considered with them. *Stoudt v. Shepherd*, 73 Mich. 597.

**LIMITATION OF ACTION:** Under the provisions of Act 155, '99, superseded by Subdivision 2 of Compilers' Section (12323), an action for seduction must be brought within three years from the time the cause of action accrued. *May v. Wilson*, 164 Mich. 27. Formerly the period was six years. *Watson v. Watson*, 53 Mich. 168; *Stoudt v. Shepherd*, 73 Mich. 597.

For recent cases predicated upon this statute, see *Velthouse v. Alderink*, 153 Mich. 217 and *Greenman v. O'Riley*, 144 Mich. 534. At common law the seduction of a female gave her no right of action. Her right of action is statutory and, in Michigan, is given by this statute, which gives her a right of action which she can enforce in her own name. *Velthouse v. Alderink*, supra, et p. 222 citing *Watson v. Watson*, 49 Mich. 540; *Greenman v. O'Riley*, supra, citing the *Watson* case and *Ryan v. Fralick*, 50 Mich. 483. Her chastity at the time of her seduction is a necessary element of her cause of action, but her chastity, though once lost, may be regained by repentance and reformation. *Greenman v. O'Riley*, supra. In the *Velthouse* case supra, in which the court says at p. 220: "As was stated in *Stoudt v. Shepherd*, 73 Mich. 588, our statutes have removed from such actions all the rubbish that disfigured them, from attempting to keep up an idea that their idea was to collect damages for loss of service, when in fact that never was more than a legal fiction," the majority opinion of the court holds that the reference to the statute in plaintiff's declaration could not be treated as surplusage, citing *Ryan v. Fralick*, 50 Mich. 483, and that an action can be maintained upon this statute by the seduced woman notwithstanding the intercourse was had by force and against her will.

#### (12752). Sufficiency of Declaration in Seduction.

**SEC. 16.** It shall not be necessary in any such action to allege or prove that the person seduced was the servant of the plaintiff, but instead thereof, it shall be sufficient to set forth in the declaration the relationship of such person to the plaintiff, or that such person is the ward of the plaintiff, as the case may be.

**HISTORY:** Re-enacts Sec. 51, R. S. '46, Ch. 107, being C. L. '57, (4552); C. L. '71, (6196); How. 7780; C. L. '97, (10419). Unchanged. See notes to preceding section.

#### (12753). Construction of Last Two Sections.

**SEC. 17.** The two last sections shall not be so construed as to prevent any person entitled to the services of the person seduced, from maintaining an action for the loss of service or other damage sustained by him in consequence of the seduction.



**HISTORY:** Re-enacts Sec. 52, R. S. '46, Ch. 107, being C. L. '57, (4553); C. L. '71, (6197); How. 7781; C. L. '97, (10420). Unchanged.

**(12754). Agreement on Case.**

**SEC. 18.** The parties to any civil cause depending in any court of record, may agree upon a case containing the facts relating thereto, and submit the same to said court; and the court shall thereupon determine and render judgment in such cause, in the same manner as upon a special verdict, finding such facts.

**HISTORY:** Re-enacts Sec. 46, R. S. '46, Ch. 107, being C. L. '57, (4547); C. L. '71, (6191); How. 7775; C. L. '97, (10414). Unchanged.

**CASE MADE:** See Compilers' Section (13752) and notes, also Sub-division 7 of Compilers' Section (12299).

An agreed case is equivalent to a finding of facts by a court or a special verdict. *Goodrich v. Detroit*, 12 Mich. 288. It is not a stipulation of evidence. *Id.* This statute has no reference to a case where judgment is rendered upon general evidence—*Hedges v. Hibbard*, 46 Mich. 552; *Chatterton v. Parrott*, 46 Mich. 432.

**(12755). Notice of Justification Not Proof of Malice.**

**SEC. 19.** If the defendant in any action for slander or for publishing a libel, shall give notice in his justification, that the words spoken or published were true, such notice, though not maintained by the evidence, shall not, in any case, be of itself proof of the malice charged in the declaration.

**HISTORY:** Re-enacts Sec. 47, R. S. '46, Ch. 107, being C. L. '57, (4548); C. L. '71, (6192); How. 7776; C. L. '97, (10415). Unchanged.

**NOTICE OF DEFENSE:** Under our practice of giving notice of defenses which, at common law, were specially pleaded, this statute does not make a notice of justification evidence of malice, or treat it as a republication of the libel, and no facts are put in issue except those declared on. *Wheaton v. Beecher*, 79 Mich. 443. See *Thompson v. Bowers*, 1 Doug. 321, as to sufficiency of notice. Omission of a plea of justification admits the falsity of a slander declared upon. *Fowler v. Gilbert*, 38 Mich. 292.

**EVIDENCE:** See Compilers' Section (12760). Under our statute the mere failure to prove a justification is not sufficient to create an inference of malice from the plea or notice. *Proctor v. Houghtaling*, 37 Mich. 46. See *Thompson v. Bowers*, 1 Doug. 321; *Meyer v. Pine*, 4 Mich. 409; *Farr v. Rasco*, 9 Mich. 353; *Porter v. Henderson*, 11 Mich. 29; *Huson v. Dale*, 19 Mich. 17; *Whittemore v. Weiss*, 33 Mich. 348; *Peoples v. Post & Tribune*, 54 Mich. 457; *Jastrzembski v. Marxhausen*, 120 Mich. 683.

The court construes this statute (then How. 7776) in *Jastrzembski v. Marxhausen*, 120 Mich. 677, on pp. 682-3: "At the common law, notice of justification, and the failure to sustain it, were evidence of malice, and, by many authorities, conclusive evidence. The rule is

so stated in *Huson v. Dale*, 19 Mich. 30. The rule was a harsh one." \* \* \* "The statute abolished the rule that an unmaintained plea of justification was proof of the malice charged. Counsel treat the word 'proof,' used in the statute, the same as though it read 'evidence.' 'Proof' is that which convinces; 'evidence' is that which tends to convince. We must assume that the legislature used the word in its well-understood definition." \* \* \* "The statute, therefore, did not take away the right of the jury to consider whether an unsustained notice of justification might not be evidence tending to show malice, when taken in connection with the other facts established. \* \* \* "The jury ought to be able to find that there was bad faith in giving notice of justification before they use that fact as evidence of malice."

**INSTRUCTION:** Under this statute, an instruction that if the jury found defendant guilty of slander they must award plaintiff his actual damages, that malice of defendant might increase or augment the actual damages recoverable, that if, when he filed the notice of justification, defendant had no reasonable hope or expectation of proving the truth of it, they might consider that as evidence tending to show malice, did not contravene the statute nor tell the jury that they might consider the unsustained notice as evidence of malice. *Rabior v. Kelley*, 194 Mich. 107; 160 N. W. 392.

#### (12756). Imputation of Want of Chastity Actionable.

**SEC. 20.** Words imputing to any female a want of chastity shall be deemed to be actionable in themselves, and shall subject the person who shall utter and publish such words, to an action on the case for slander, in the same manner as the uttering and publishing of words imputing the commission of a criminal offense.

**HISTORY:** This section re-enacts Sec. 31, R. S. '46, Ch. 107, being C. L. '57, (4532); C. L. '71, (6176); How. 7760; C. L. '97, (10401). Unchanged.

**CONSTRUED:** What may be proved without averment of special damages. *Burt v. McBain*, 29 Mich. 260. Words imputing to a woman a want of chastity are actionable per se. *Richter v. Stolze*, 158 Mich. 594. See also *Warren v. Ray*, 155 Mich. 91; *Leonard v. Pope*, 27 Mich. 146.

#### (12757). Damages for Libel.

**SEC. 21.** In suits brought for the recovery of damages for libel or slander in this state, the plaintiff shall be entitled to recover only such actual damages as he may have suffered in respect to his property, business, trade, profession, occupation or feelings.

**HISTORY:** Re-enacts Sec. 1 of Act 216 of '95, being C. L. '97, (10423). Unchanged.

**CONSTITUTIONALITY:** This section cannot take away the right to recover damages to one's reputation. *Andrews v. Booth*, 148 Mich.

333; *McGee v. Baumgartner*, 121 Mich. 291; *Park v. Free Press Co.*, 72 Mich. 560. See also *Derham v. Derham*, 123 Mich. 455. As to constitutionality, see further *Smedley v. Soule*, 125 Mich. 199.

**CONSTRUED:** This act does not attempt to deprive a party of his right of action for any libel or slander which existed at the common law. *Smedley v. Soule*, 125 Mich. 199. It is not necessary to specially plead injury to the feelings, nor does the law require proof beyond the proof of the slander before it will presume injury to the feelings. *Cribbs v. Yore*, 119 Mich. 239. Attorney fees paid to bring an action for slander are not recoverable in the action brought. *Warren v. Ray*, 155 Mich. 93. See *Loranger v. Loranger*, 115 Mich. 686.

### (12758). Damages to Feelings.

**SEC. 22.** In awarding damages to the plaintiff in any suit brought for the recovery of damages for libel or slander in this state, the jury shall in all cases specify the amount awarded for damages to feelings separately from the amount awarded for other damages mentioned in the foregoing section.

**HISTORY:** Re-enacts Sec. 2 of Act 216 of 1895, being C. L. '97, (10424). Unchanged.

**CONSTRUED:** The object of this statute is to separate damages for injured feelings from those to property, business, trade, profession or occupation. *McGee v. Baumgartner*, 121 Mich. 291. A party desiring a separate finding as to injury to feelings should request the court that the jury be so instructed. *Field v. Magee*, 122 Mich. 559; *McCormick v. Hawkins*, 169 Mich. 650. See also *Hewitt v. Morley*, 111 Mich. 192; *Loranger v. Loranger*, 115 Mich. 681; *Derham v. Derham*, 123 Mich. 451; *Smedley v. Soule*, 125 Mich. 199; *Line v. Spies*, 139 Mich. 490. *Mahlat v. Codde*, 106 Mich. 387; same ruling—*Field v. Magee*, 122 Mich. 556, 559 and *McGee v. Baumgartner*, 121 Mich. 287, 291, in which, on p. 291, the court says: "The object of this statute was to separate damages for injured feelings from those to property, business, trade, profession or occupation, mentioned in the first section of the act." It is necessary to plead specially injury to feelings. *Cribbs v. Yore*, 119 Mich. 237. See also *Line v. Spies*, 139 Mich. 485, 490; *Loranger v. Loranger*, 115 Mich. 681; and *Hewitt v. Morley*, 111 Mich. 187, 192. A verdict in a slander suit of \$100 for damage to character and \$50 for damage for suffering is substantial compliance with the above statute, character meaning reputation and suffering meaning injured feelings. *Maclejewski v. Rychart*, 192 Mich. 530.

### (12759). Exemplary Damages.

**SEC. 23.** No exemplary or punitive damages shall be recovered unless the plaintiff shall before bringing suit give notice by mail or otherwise to the defendant to publish a retraction of the libel, and allow the defendant a reasonable time in which to publish such retraction, and make such amends as are reasonable and possible under the circum-

stances of the case; and proof of the publication or correction shall be admissible in evidence under the general issue on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages: . *Provided*, That the retraction shall be published in the same type and in the same editions of the paper as the original libel, and so far as practicable in the same position.

**HISTORY:** Re-enacts Sec. 3 of Act 216, '95, being C. L. '97, (10425), Section 4 of which act repeals Act 233 of '85, (How. 7782a-c) and Act 229 of '89, (How. 7782d-e), "and all other acts and parts if acts contravening." Unchanged.

**CONSTRUED:** Couch v. Mining Journal Co., 130 Mich. 294; Lawrence v. Herald Pub. Co., 158 Mich. 459; Guston v. Evening Press Co., 172 Mich. 312; Gripman v. Kitchel, 173 Mich. 242. As to the act of '85, see Park v. Detroit Free Press Co., 72 Mich. 560. Retraction under act of '89. Davis v. Marxhausen, 103 Mich. 315.

Though a written retraction is for the court to construe. Lawrence v. Herald Publishing Co., 158 Mich. 459, 465 and Couch v. Mining Journal Co., 130 Mich. 294, 298, it is a question of fact for the jury whether the retraction is published so far as possible in the same position as the original publication, or it is published in a reasonable time, or in the publication the defendant makes such amends as are reasonable and proper under the circumstances of the case. Lawrence v. Herald Publishing Co., 158 Mich. 459, 465.

#### (12760). What Defendant May Show in Actions for Libel.

**SEC. 24.** In actions brought for the recovery of damages for libel in this state, it shall be competent for the defendant or defendants in such action to show in evidence upon the trial of such action that the plaintiff in such action has heretofore recovered a judgment or judgments for damages in an action or actions for libel or libels to the same, or substantially the same purport or effect as the libel for the recovery of damages for which such action has been brought, or that the plaintiff in such action has theretofore brought an action or actions for such libel or has received or agreed to receive compensation for such a libel.

**HISTORY:** Re-enacts and supersedes Sec. 1 of Act 94 of '05, p. 134, Eff. Sept. 16, though such section is not expressly repealed by this act. Sec. 2 of the Act of '05 provided, that said act shall apply to the trial of actions now pending as well as to the trial of actions which may hereafter be brought. Unchanged.

#### (12761). Intervention of Joint Tort Feasors in Libel.

**SEC. 25.** Any defendant or defendants against whom any suit shall be begun for the purpose of recovering damages

arising from the publication of any libel, and on whom a declaration or other process in such suit shall have been served, may, at any time within fifteen days after such service, serve on any other person liable to contribute to such defendant under the provisions of section one of act two hundred thirty-three of the Public Acts of nineteen hundred eleven, relating to the liability of joint tort feorsors in certain cases, a notice of the pendency of such suit; which notice shall state the name of the plaintiff or plaintiffs therein, the name of the court in which the same is pending, and shall be accompanied by a true copy of the declaration filed in said suit, if such declaration shall have been filed prior to the service of such notice. And such person on whom such notice shall have been so served shall have the right to appear within fifteen days from the time of the service on him of such notice, and intervene in such suit and defend the same. Such person, if he so appears, shall have the same rights and liabilities in respect to pleadings and process as if he were an original party defendant in such suit, and such suit shall not be considered at issue until the same is at issue as to such intervening party. And in case he shall fail after such notice to so appear in and defend such suit the final judgment rendered therein shall be conclusive against him in any action for contribution under the provisions of said act.

**HISTORY:** Re-enacts Sec. 2 of Act '233 of '11, p. 403, Eff. Aug. 1, with slight changes in phraseology.

**NOTE:** Section 1 of Act 233, '11, is Compilers' Section (14580). Modified.

**CITED:** Sec. 2, Act 233, '11. In Kirby v. Soule, 178 Mich. 406, the court said, p. 416: "This statute (Act No. 233, P. A. 1911) being in derogation of the common law should, in our opinion, receive a strict construction," holding that defendant could not defer bringing in other parties beyond the statutory period of 15 days and that service of notice must be made within that time after service of process.

#### (12762). Serving Copy of Suggestion on Record.

**Sec. 26.** Whenever a suggestion shall be made upon the record, or in any stage of the proceedings in any cause, which the adverse party shall have a right to controvert, a copy of such suggestion shall be served upon the adverse party or his attorney, in the same manner as other pleadings, and such party may plead thereto, according to the practice of the court, in the same manner, and within the same time, as to a declaration.

**HISTORY:** Re-enacts Sec. 32, R. S. '46, Ch. 107, being C. L. '57, (4533); C. L. '71, (6177); How. 7761; C. L. '97, (10402). Unchanged.

**CONSTRUED:** Bliss v. Calle Bros. Co., 149 Mich. 604; Calle Bros. Co. v. Saginaw Circuit Judge, 155 Mich. 481; Hubel Co. v. MacKinnon, 186 Mich. 617. See note to Turner v. St. Clair Tunnel Co., 102 Mich. 575.

A suggestion is a statement formally entered on the record, of some fact or circumstance material to the further proceedings in the case, which cannot be regularly pleaded. C. J. Huebel Co. v. MacKinnon, 186 Mich. 617; 22 D. L. N. 431; 152 N. W. 1098.

The practice by suggestion, as here provided, furnishes the plaintiff in a replevin suit with a remedy by which to try out the question of an alleged settlement. Huebel Company v. McKinnon, 186 Mich. 617; 22 D. L. N. 431; 152 N. W. 1098.

A moot question will not be determined on appeal in a quo warranto proceeding to determine whether an officer is rightfully holding his office in a corporation. Brown ex rel. Van Buren v. Lawrence, 197 Mich. 178.

#### (12763). Trial of Issue on Suggestion.

**SEC. 27.** If an issue of fact be joined upon any such suggestion, the same shall be tried, and judgment rendered thereon, as on other issues.

**HISTORY:** Re-enacts Sec. 33, R. S. '46, Ch. 107, being C. L. '57, (4534); C. L. '71, (6178); How. 7762; C. L. '97, (10403). Unchanged.  
See note to preceding section.

#### (12764). Judgment.

**SEC. 28.** The party making such suggestion may be non-suited, and may have judgment of non pros or discontinuance entered against him, for the same causes, and in the same cases as in suits at law.

**HISTORY:** Re-enacts Sec. 34, R. S. '46, Ch. 107, being C. L. '57, (4535); C. L. '71, (6179); How. 7763; C. L. '97, (10404). Unchanged.  
See Compilers' Section (12762).

#### (12765). Actions for Malpractice.

**SEC. 29.** If any person professing or holding himself out to be a physician or surgeon, shall be guilty of any malpractice, an action on the case may be maintained against such person so professing, and the rules of the common law, applicable to such actions against licensed physicians and surgeons, shall be applicable to such actions on the case; and such malpractice, may be given in evidence, in bar of any action for services rendered by such person so professing.

**HISTORY:** Re-enacts Sec. 1 of Act 287 of '65, being C. L. '71, (6198); How. 7782; C. L. '97, (10426). Unchanged.

**CONSTRUED:** *Norris v. Kent* Circuit Judge, 100 Mich. 256; *Vandenberg v. Slagh*, 150 Mich. 230. "Under proper pleadings malpractice may be proven for the purpose of defeating a claim for services rendered by a physician or surgeon." *Vandenberg v. Slagh*, 150 Mich. 225, 230, citing C. L. '97, (10426), *supra*.

### Proceedings for Enforcement of Individual Liability of Stockholders.

#### (12766). How Individual Liability Enforced.

**SEC. 30.** Whenever, by the constitution or laws of this state, the stockholders of any corporation are individually liable for any debts of such corporation, the remedy for the enforcement of such liability shall be as hereinafter prescribed, and not otherwise: *Provided*, That this and the next succeeding twelve sections shall not apply to cases where the suit is for labor and the action is brought by the person who performed the labor, or his assignees.

**HISTORY:** Re-enacts and supersedes Sec. 1 of Act 141 of '77, being How. 4886; C. L. '97, (8554); with slight changes in phraseology, though such section is not expressly repealed by this act. Unchanged.

**CONSTITUTIONALITY:** For a consideration of the leading provisions of this act and a discussion of its constitutionality, see *Ripley v. Evans*, 87 Mich. 217. See Const. XII, 4.

**CONFLICTING STATUTES:** Section 29 of Act 232 of '85; C. L. '97, (7065), repealed by section 37 of Act 232 of '03, and re-enacted by section 29 of the same act, *Compilers' Section* (9045), does not repeal or modify Act 141 of '77, superseded by this and the next 12 succeeding sections. *Musselman v. Wright*, 107 Mich. 639. See note to *Compilers' Section* (12778).

**CONSTRUED:** Act 141 of '77, superseded by this section and the 12 following, is a general law applicable to all corporations, and designed to prescribe the procedure for enforcing the liability of stockholders. *Musselman v. Wright*, 107 Mich. 639.

**LIABILITY OF STOCKHOLDERS:** Compare *Pettibone v. McGraw*, 6 Mich. 441; *Bagley v. Beecher*, 35 Mich. 108; *Hanson v. Donkersly*, 37 Mich. 184; *Brockway v. Innes*, 39 Mich. 47; *Tilden v. Young*, 39 Mich. 58; *Powell v. Eldred*, 39 Mich. 552; *Peck v. Miller*, 39 Mich. 594; *Arno v. Judge*, 42 Mich. 362; *Milroy v. Spur M. I. M. Co.*, 43 Mich. 231; *Thompson v. Jewell*, 43 Mich. 240; *Peterson v. Tilden*, 44 Mich. 168; *C. & N. E. R. R. Co. v. Sturgis*, 44 Mich. 538; *Bottomly v. Pt. H., etc., Co.*, 44 Mich. 542; *Beecher v. Dacey*, 45 Mich. 92; *Taylor v. Manwaring*, 48 Mich. 171; *Jones v. Avery*, 50 Mich. 326; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 561; *Connors v. Carp Riv. I. Co.*, 54 Mich. 168; *Brewer v. Mich. Salt Ass'n*, 58 Mich. 351; *Norberg v. Heineman*, 59 Mich. 210; *Mirror, etc., Co. v. Bulkley*, 107 Mich. 447; *Kirkpatrick v. Mehalitch*, 113 Mich. 631; *Kirkpatrick v. Bessalo*,

116 Mich. 657; *Am. Steel & Wire Co. v. Eddy*, 130 Mich. 266; *Macomber v. Endion Grape Juice Co.*, 160 Mich. 54. Secs. 30-42 of this chapter, being Act No. 141, P. A. 1877, constitute "a general law applicable to all corporations, and designed to prescribe the procedure for enforcing the liability of stockholders." It was not repealed by Act No. 232, P. A. 1885. Act No. 232 did no more than say that all actions for labor claims "should be founded on that statute, while Act No. 141 provides the method of procedure." *Musselman v. Wright*, 107 Mich. 639.

**(12767). When Proceedings to be Taken.**

Sec. 31. No proceeding shall be taken to enforce such liability until after a judgment has been recovered against the corporation on account of such indebtedness, and an execution issued upon such judgment to the county in which its principal office is situated or its business carried on has been returned unsatisfied, in whole or in part.

**HISTORY:** Re-enacts and supersedes Sec. 2 of Act 141 of '77, being How. 4887; C. L. '97, (8555); though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** *Ripley v. Evans*, 87 Mich. 224. See note to Sec. 30 of this Chapter.

**(12768). Secretary to File List of Stockholders.**

Sec. 32. Whenever judgment has been recovered against any corporation for an indebtedness for which the stockholders of such corporation are by law liable, and an execution has been issued thereon as above provided, and returned unsatisfied, the court, upon application of the plaintiff, shall enter an order in such suit requiring the secretary, or other proper officer of such corporation, within a time designated in such order, to file in said cause a statement, under oath, of the names and residences of all persons, who appear by the books of such corporation, or that such officer has reason to believe were stockholders therein at the time the debt for which such judgment was recovered, accrued, and the amount of stock held by each of said persons, and upon service upon such officer of a duly certified copy of such order, it shall be his duty to comply therewith.

**HISTORY:** Re-enacts and supersedes Sec. 3 of Act 141 of '77, being How. 4888; C. L. '97, (8556); though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** *Ripley v. Evans*, 87 Mich. 225. See note to Sec. 30 of this Chapter.



(12769). **Petition.**

SEC. 33. The statement mentioned in the last preceding section having been filed, plaintiff may make and file in the case his petition in writing, setting forth:

1. That he has obtained a judgment against the corporation, and the amount thereof;

2. That execution has been issued thereon and returned in whole or in part unsatisfied, as the same may be, and the sum remaining unpaid thereon;

3. That the several persons named in such statement of the officer of the corporation were, at the date the debt accrued on which the judgment was rendered, stockholders in such corporation, and the amount of stock held by each;

4. What was the consideration received by the corporation for the debt on which such judgment was rendered;

And praying that judgment may be awarded against said several stockholders in favor of the plaintiff for the sum so as aforesaid averred to be due from said corporation, and that a citation may issue from said court, under the seal thereof, to the said several stockholders, requiring them to appear in said cause, on a certain day to be therein named and answer why judgment should not be entered against them as therein prayed. On the filing of such petition, an order for citation to issue shall be made as of course, and it shall be the duty of the clerk of the court immediately to issue the same, which shall be addressed to the several persons named in the petition as stockholders, and may be served by any person in any part of this state. The return day of such citation shall not be less than fifteen nor more than thirty days from the date of its issue. Jurisdiction over any of the persons named in such citation shall be secured by a personal service of the same within this state.

**HISTORY:** Re-enacts and supersedes Sec. 4 of Act 141 of '77, being How. 4889; C. L. '97, (8557), though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** *Ripley v. Evans*, 87 Mich. 225. See note to Sec. 30 of this chapter.

(12770). **Answer.**

SEC. 34. On the return day named in such citation, or at such time thereafter as the court may allow for that purpose, each of the persons so cited and served shall make separate and several answer in writing, signed by him, to such petition; which answer, if the liability be denied, or

facts shall be relied upon in defense against such charge of liability, shall contain a statement of such facts, or the specific grounds of defense, and shall be verified by the oath of the defendant.

**HISTORY:** Re-enacts and supersedes Sec. 5 of Act 141 of '77, being How. 4890; C. L. '97, (8558), changing "respondents" to "defendants," though such section is not expressly repealed by this act. Unchanged. See note to Sec. 30 of this chapter.

**(12771). Trying of Issue.**

**Sec. 35.** The issue thus made by the petition and answer, whether of fact or law, shall be tried in the same manner as like issues of fact or law.

**HISTORY:** Re-enacts and supersedes Sec. 6 of Act 141 of '77, being How. 4891; C. L. '97, (8559), though such section is not expressly repealed by this act. Unchanged. See note to Sec. 30 of this chapter.

**(12772). Judgment as Evidence.**

**Sec. 36.** On the trial of any issue of fact formed as aforesaid, the judgment against the corporation and the amount thereon remaining unpaid, as shown by the return of the execution thereon, shall be prima facie evidence of the sum due to the plaintiff, but not that the debt on which said judgment was rendered is one for which defendants are personally liable.

**HISTORY:** Re-enacts and supersedes Sec. 7 of Act 141 of '77, being How. 4892; C. L. '97, (8560), changing "respondents" to "defendants," though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** Ripley v. Evans, 87 Mich. 226. See note to Sec. 30 of this chapter.

**(12773). Each Issue Deemed Original Suit.**

**Sec. 37.** Each of the issues so formed shall be deemed and treated as an original suit or cause in respect to the payment of the county jury and stenographer's fees, and the final taxation of costs. The right of review by the supreme court, and the method of procedure to secure it, shall be in all respects the same as in a common law trial.

**HISTORY:** Re-enacts and supersedes Sec. 8 of Act 141 of '77, being How. 4893; C. L. '97, (8561), though such section is not expressly repealed by this act. Unchanged. See note to Sec. 30 of this chapter.

**(12774). Judgment on Admission or Default.**

**Sec. 38.** If any such defendant shall answer admitting the

facts set forth in such petition, or if default in answering shall be made by any of them, judgment shall at once be rendered against such defendant, severally, for the amount remaining unpaid of the judgment against said corporation, upon proof being made that the debt is one for which such defendant, as stockholder, is personally liable.

**HISTORY:** Re-enacts and supersedes Sec. 9 of Act 141 of '77, being How. 4894; C. L. '97, (8562), changing "respondents" to "defendants," though such section is not expressly repealed by this act. Unchanged. See note to Sec. 30 of this chapter.

#### (12775). Judgment.

**SEC. 39.** If any such issue of law or of fact shall be determined adversely to the defendant, judgment shall thereupon be awarded against him for the full amount remaining unpaid of the judgment against such corporation, if it shall have been determined that such judgment was for a debt for which such defendant is personally liable as a stockholder in said corporation, or upon proof of that fact.

**HISTORY:** Re-enacts and supersedes Sec. 10 of Act 141, of '77, being How. 4895; C. L. '97, (8563), changing "respondents" to "defendants," though such section is not expressly repealed by this act. Unchanged.

#### (12776). Apportionment of Sum.

**SEC. 40.** After the several issues so formed shall have been determined and judgment awarded against the several persons named in such petition, and personally served with citation to appear as hereinbefore provided, who have been adjudged liable, the court shall make an order in the cause apportioning between them the sum for which they have thus been severally adjudged liable, pro rata, according to the stock held by each. If any of the defendants shall refuse or neglect to pay the amount apportioned against him, for the period of fifteen days thereafter, an execution shall be issued against his goods and chattels for the collection thereof.

**HISTORY:** Re-enacts and supersedes Sec. 11 of Act 141 of '77, being How. 4896; C. L. '97, (8564); changing "respondents" to "defendants," though such section is not expressly repealed by this act. Unchanged. See note to Sec. 30 of this chapter.

#### (12777). Re-apportionment.

**SEC. 41.** On the return of such execution unsatisfied in

whole or in part, or if for any cause there shall be a failure to collect of any of the defendants the sum so as aforesaid apportioned against him, the court shall have power, and it shall be its duty on application by or on behalf of the plaintiff, and the fact being made to appear, to re-apportion the sum so remaining uncollected, on the basis of the preceding section provided, among the remainder of said defendants so adjudged liable, and an execution shall issue for the collection thereof in like manner as provided in said last named section.

**HISTORY:** Re-enacts and supersedes Sec. 12 of Act 141 of '77, being How. 4897; C. L. '97, (8565); with slight change in phraseology, though such section is not expressly repealed by this act. Unchanged.

**(12778). Contribution.**

SEC. 42. Any stockholder who shall be compelled to pay more than his pro rata share of the debts of the corporation shall be entitled to enforce contribution from such other of the stockholders as are also liable for such debts and have not contributed their due proportion in payment thereof.

**HISTORY:** Re-enacts and supersedes Section 13 of Act 141 of '77; How. 4898; C. L. '97, (8566), though such act is not expressly repealed by this act. Unchanged.

**NOTE:** Section 14 of Act 141 of '77, omitted from this act, repeals, "all acts and parts of acts inconsistent with this act, or giving any other or different form of remedy." See *Ripley v. Evans*, 87 Mich. 226; *Connors v. Carp River Iron Co.*, 54 Mich. 169. See note to Sec. 30 of this chapter.

**Actions for Private Nuisances.**

**(12779). Judgment of Abatement.**

SEC. 43. In actions on the case for a private nuisance, when the plaintiff prevails, he shall, in addition to the usual judgment for damages and costs, also have judgment that the nuisance be abated and removed, unless the judge holding the circuit court at which any issue of fact joined therein shall be tried, shall certify in the minutes of such trial, that the abatement thereof is unnecessary.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 112, being C. L. '57, (4718); C. L. '71, (6373); How. 7961; C. L. '97, (11209). Unchanged.

**CONSTRUED:** *Skelton v. Fenton Elec. L. & P. Co.*, 100 Mich. 87; *Ronayne v. Loranger* 66 Mich. 373; *Wilmarth v. Woodcock*, 58 Mich. 485. As to nuisances, see notes to Subdivision 3 of Compilers' Section

(2640). Equity jurisdiction in matters concerning nuisances, see Compilers' Section (12302), Subdivision 2 and notes.

**(12780). Execution and Warrant of Abatement.**

SEC. 44. In case of a judgment that the nuisance be abated and removed, the plaintiff shall have execution in the common form for his damages and costs, and a separate warrant to the proper officer, requiring him to abate and remove the nuisance, at the expense of the defendant, in like manner as public and common nuisances are abated and removed.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 112, being C. L. '57, (4719); C. L. '71, (6374); How. 7692; C. L. '97, (11210). Unchanged.

**(12781). Stay of Warrant.**

SEC. 45. The court may, on the application of the defendant, order a stay of such warrant for such time as may be necessary, not exceeding six months, to give him an opportunity to remove the nuisance, upon his giving satisfactory security to do so within the time specified in the order.

HISTORY: Re-enacts Sec. 3, R. S. '46, Ch. 112, being C. L. '57, (4719); C. L. '71, (6374); How. 7962; C. L. '97, (11211). Unchanged.

**(12782). Expense of Abatement.**

SEC. 46. The expense of abating and removing the nuisance pursuant to such warrant, shall be collected by the officer in the same manner as damages and costs are collected upon execution, excepting that the materials of any buildings, fences, or other things that may be removed as a nuisance, may be sold by the officer, in like manner as goods are sold on execution for the payment of debts; and the officer may apply the proceeds of such sale to defray the expenses of the removal, and shall pay over the balance thereof, if any, to the defendant upon demand; and if the proceeds of the sale are not sufficient to defray the said expenses, he shall collect the residue thereof as before provided.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 112, being C. L. '57, (4721); C. L. '71, (6376); How. 7964; C. L. '97, (11212). Unchanged.

## CHAPTER XXI.

### SUITS ON OFFICIAL AND OTHER BONDS.

#### (12783). Assignment of Specific Breaches.

SECTION 1. When an action shall be prosecuted in any court of law upon any bond of any public officer, or upon any bond for the breach of any condition, other than the payment of money, or for any penal sum for the non-performance of any covenant or written agreement, the plaintiff shall assign the specific breaches for which the action is brought, and upon the trial of such action, the verdict and judgment shall be for such damages as are found arising from the specific breaches assigned; and such judgment shall not be a bar to any further action by the same, or any other plaintiff, for any subsequent breaches of the condition of said bond; but said bond shall stand as security for any further or subsequent breaches to the amount of the remainder of the penalty thereof.

HISTORY: This section supersedes Sec's. 8-17, R. S. '46, Ch. 107, being C. L. '57, (4509)-(4510)-(4511)-(4512)-(4513)-(4514)-(4515)-(4516)-(4517)-(4518); C. L. '71, (6153)-(6154)-(6155)-(6156)-(6157)-(6158)-(6159)-(6160)-(6161)-(6162); How. 7737-46; C. L. '97, (10378)-(10379)-(10380)-(10381)-(10382)-(10383) - (10384) - (10385) - (10386)-(10387); and Sec's. 2, 3, 5, 6, 7 and 16, R. S. '46, Ch. 120, being C. L. '57, (4919)-(4920)-(4922)-(4923)-(4924)-(4933); C. L. '71, (6632)-(6633)-(6635)-(6636)-(6637)-(6646); How. 8220, 8221, 8223, 8224, 8225, 8234; C. L. '97, (9782)-(9783)-(9785)-(9786)-(9787)-(9796). Changed.

**SUITS ON BONDS:** Heretofore in suits upon bonds for the breach of a condition other than the payment of money or for any penal sum, for the non-performance of any covenant or written agreement, the practice has been to enter judgment for the full amount of the penalty with a further judgment awarding execution only for the amount of damages actually found. The new practice provides a procedure in such cases uniform in that respect with the procedure in suits upon official bonds, the judgment entered being merely for the amount of the damages recovered and the undertaking to the amount of the remainder of the penalty thereof standing as security for further breaches. The procedure by *scire facias* is done away with.

**ACTION ON BOND:** Money bond. *White Sewing Mach. Co. v. Dakin*, 86 Mich. 583. Burden of proof, in case of bond other than for payment of money. *Young v. Stephens*, 9 Mich. 500. Assignment of breach. *Delashman v. Berry*, 21 Mich. 516. No recovery beyond the penalty of the bond. *Spencer v. Perry*, 18 Mich. 399. See *Millsbaugh*

v. Schultz, 180 Mich. 313; Bishop v. Freeman, 42 Mich. 533; Odd Fellows v. Morrison, 42 Mich. 523; Prentiss v. Spalding, 2 Doug. 89.

FORMER LAW: See Millspaugh v. Schultz, 180 Mich. 310; 21 D. L. N. 387; 146 N. W. 634.

**(12784). Pendency of Suit Not to Affect Suits for Subsequent Breaches.**

SEC. 2. During the pendency of any suit upon such official bond, or after judgment rendered in such suit, any other party aggrieved by the default or delinquency of such officer, may, in like manner prosecute an action upon such official bond; and the pendency of any other suit on the same bond, or a judgment recovered by or against any other person on such bond, shall not abate or in any manner affect such suit, or the proceedings therein, except as hereinafter provided.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 120, being C. L. '57, (4921); C. L. '71, (6634); How. 8222; C. L. '97, (9784). Modified.

**(12785). Barring of Suit.**

SEC. 3. No such suit shall be barred, nor shall the amount which the plaintiff may be entitled to recover therein, be affected by any notice given by any surety in such bond, of a judgment recovered thereon, unless it be accompanied by an allegation that the sureties in such bond, some or one of them, have been obliged to pay the damages assessed by such judgment, or some part thereof, for the want of sufficient property of such officer whereon to levy the same, or that they will be obliged to pay the same, or some part thereof for the same reason; nor unless such notice be verified by the oath of the defendant giving the same.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 120, being C. L. '57, (4926); C. L. '71, (6639); How. 8227; C. L. '97, (9789), changing "sheriff" to "officer." Modified.

**(12786). Distribution of Moneys Raised on Executions.**

SEC. 4. If it shall appear that the amount of any damages so recovered, which such surety has been obliged to pay, or will be obliged to pay, as specified in the last section, is equal to the amount for which such defendant shall be liable, by virtue of the bond, he shall be acquitted and discharged of all further liability, and judgment shall be rendered in his favor.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 120, being C. L. '57, (4927); C. L. '71, (6640); How. 8228; C. L. '97, (9790). Unchanged.

**(12787). Where Damages Paid do not Equal Liability.**

SEC. 5. If it shall appear that the amount of any damages so recovered, which such surety has been obliged to pay, or which he will be obliged to pay, is not equal to the liability of such surety, the amount thereof shall be allowed to such defendant, in estimating the extent of his liability in any such action.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 120, being C. L. '57, (4928); C. L. '71, (6641); How. 8229; C. L. '97, (9791). Unchanged.

**(12788). Execution Levied First Against Officer.**

SEC. 6. Whenever a judgment shall be obtained against an officer and his sureties, a direction shall be indorsed on the execution issued thereon, by the attorney issuing the same, to levy the amount of such execution, in the first place, of the property of such officer, and if sufficient property of such officer cannot be found to satisfy such execution, then to levy the deficiency of the property of the sureties.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 120, being C. L. '57, (4929); C. L. '71, (6642); How. 8230; C. L. '97, (9792), changing "sheriff" to "officer." Modified.

PRINCIPAL AND SURETY: This section does not direct that the principal and surety be sued together, but directs what shall be done in case of a joint judgment against both, and does not make it necessary to so join them. *Doran v. Butler*, 74 Mich. 647.

**(12789.) Where Judgments Exceed Liability of Sureties.**

SEC. 7. Whenever several judgments shall be obtained at the same term, upon any official bond of any officer, for damages, amounting in the whole to more than the sums for which the sureties therein shall be liable, the court shall order the moneys levied upon such judgments from the property of the sureties, to be distributed to the persons for whose use such judgments were recovered respectively, in proportion to the amount of their respective recoveries.

HISTORY: Re-enacts Sec. 13, R. S. '46, Ch. 120, being C. L. '57, (4930); C. L. '71, (6643); How. 8231; C. L. '97, (9793). Modified.

CONSTRUED: This section does not authorize suit for the use and benefit of a third person on a city marshal's bond. *City of Eaton Rapids v. Stump*, 127 Mich. 1.

**(12790). Distribution of Moneys Raised on Executions.**

SEC. 8. If executions be issued upon several judgments



obtained at the same term, upon any such official bond, and sufficient moneys shall not be raised to satisfy all of the said executions, the court shall distribute the moneys collected on such executions to the plaintiffs in proportion to the amount of their respective recoveries.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 120, being C. L. '57, (4931); C. L. '71, (6644); How. 8232; C. L. '97, (9794), with slight changes in phraseology. Modified.

## CHAPTER XXII.

### OF JUDGMENTS AND DECREES.

#### (12791). Judgment Upon Verdict.

SECTION 1. When a verdict shall have been rendered in any action, the plaintiff shall not thereafter be nonsuited, but judgment shall be rendered upon the matter found by such verdict.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 106, being C. L. '57, (4439); C. L. '71, (6076); How. 7660; C. L. '97, (10297). Unchanged.  
CITED: Knack v. Wayne Circuit Judge, 147 Mich. 488.

#### (12792). Motion to Set Aside Judgment.

SEC. 2. No judgment in any court of record shall be set aside for irregularity, on motion, unless such motion be made within one year after the time such judgment was rendered.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 106, being C. L. '57, (4440); C. L. '71, (6077); How. 7661; C. L. '97, (10298). Unchanged.

CONSTRUED: When a motion to set aside a judgment for irregularity is too late. Hyde v. Calhoun Circuit Judge, 1 Doug. 417. A judgment will not be set aside for irregularity when the party asking it has delayed until the other has lost his remedy by lapse of time. Granger v. Detroit Superior Court Judge, 44 Mich. 384.

#### (12793). Judgment Upon Plea of Confession.

SEC. 3. Judgments may be entered in any circuit court at any time, upon a plea of confession, signed by an attorney of such court, although there be no suit then pending between the parties, if the following provisions be complied with, and not otherwise:

1. The authority for confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract or other evidence of the demand for which such judgment was confessed;

2. Such authority shall be produced to the officer signing such judgment, and shall be filed with the clerk of the court in which the judgment shall be entered, at the time of the filing and docketing of such judgment.

HISTORY: Re-enacts Sec. 3, R. S. '46, Ch. 106, being C. L. '57,

(4441); C. L. '71, (6078); How. 7662; C. L. '97, (10299), with slight changes in phraseology. Unchanged.

**JUDGMENT BY CONFESSION:** Authority to confess judgment must be contained in some instrument distinct from the instrument sued upon. *Acme Food Co. v. Kirsch*, 166 Mich. 433. But it is no valid objection to a judgment by confession that the warrant of attorney is upon the same piece of paper as the note it authorizes judgment to be taken upon. *Trombly v. Parsons*, 10 Mich. 272. A judgment secured in another state on a warrant of attorney contained in a promissory note executed in Michigan is void. *Acme Food Co. v. Kirsch*, 166 Mich. 433. May be entered in vacation. *Watkins v. Wallace*, 19 Mich. 57. Warrant of attorney need not be proved to sustain judgment by confession within a year and a day after its execution. *Elliott v. Ives*, 44 Mich. 190. Provisions of this statute construed with act organizing superior court of Detroit. *Elliott v. Ives*, 44 Mich. 190.

**(12794). Judgment Against Surety for Costs.**

**SEC. 4.** Whenever any person shall become security for costs for another, in any court in this state, whether such security be required by law to be given, or be required by order of the court, in case the defendant in any such action shall recover final judgment or decree for costs against the plaintiff, thereupon judgment or decree shall be immediately, and in such suit, entered, as well against such surety as against such plaintiff, and execution may issue against such surety, in the same manner as if he had been himself a party to such suit.

**HISTORY:** Re-enacts Sec. 1 of Act 168 of '67, being C. L. '71, (6133); How. 7663; C. L. '97, (10353). Unchanged.

**CONSTRUED:** This section does not apply to appeal and certiorari bonds. *Knack v. Wayne Circuit Judge*, 147 Mich. 491.

**JUDGMENT AGAINST SURETY:** Surety for costs in justice's court, in case of appeal, is liable for costs in the appellate court. *Dunn v. Suthff*, 1 Mich. 24. Certiorari to a justice is in the nature of an appeal so far as to allow the circuit judge to include the surety in the judgment for costs. *McLean v. Isbell*, 44 Mich. 129; *Boatz v. Berg*, 51 Mich. 9. But judgment against sureties for costs must be limited to the penalty of the bond. *Gay v. Hults*, 56 Mich. 153. Judgment cannot be rendered in the circuit court against a surety upon an appeal from the decision of commissioners on claims against an estate. *Reed v. Northrup*, 50 Mich. 442; *Willard v. Fralick*, 31 Mich. 431; *Bondie v. Bourassa*, 46 Mich. 323. The power to render judgment against sureties is statutory and cannot be extended by implication. *Willard v. Fralick*, 31 Mich. 433. To authorize the rendition of judgment for costs against a surety in a chancery appeal bond, a certified copy of the bond must be made a part of the return, to enable the court to inspect it on the hearing and ascertain as to its sufficiency. *Vanderpool v. Notley*, 71 Mich. 431. When the supreme court will not award costs against the surety. *Ortmann v. Bank*, 42 Mich. 464. See *Smith v. Kent Circuit Judge*, 139 Mich. 464; *Loh v. Wayne Circuit Judge*, 26

Mich. 186; Chappee v. Thomas, 5 Mich. 53; Prentiss v. Spalding, 1 Doug. 91.

**(12795). Judgment Against Appellant and Surety.**

**SEC. 5.** In all cases where judgment shall be rendered against the appellant in the circuit court, or in the supreme court, the same may, on motion of the appellee made before judgment against the appellant, be entered against both appellant and surety, and be collected on execution against them as in ordinary cases of judgment against two or more.

**HISTORY:** Re-enacts Sec. 214 of Act 153 of '55, being C. L. '57, (3866); As Am. '71, p. 22, Act 18, Eff. July 18; C. L. '71, (5462); How. 7029; C. L. '97, (933), omitting, however, the provisos in the old section. Unchanged.

**CONSTITUTIONALITY:** The provision for the entry of judgment against the surety on an appeal bond is not unconstitutional. Chappee v. Thomas, 5 Mich. 59.

**JUDGMENT AGAINST SURETY:** The liability of a surety on the bond cannot be extended by a stay of proceedings on the judgment against the appellant and surety. Gildersleeve v. Kent Circuit Judge, 97 Mich. 606. This section applies to bonds on certiorari. Knack v. Wayne Circuit Judge, 147 Mich. 486. See Parsons v. Russell, 11 Mich. 133; Cox v. Crippen, 13 Mich. 509; Lang v. People, 14 Mich. 446; Willard v. Fralick, 31 Mich. 431.

**FORMER LAW:** The following cases construe the provisos to C. L. '97, (933), which were omitted from this section. Wright v. King, 107 Mich. 660-2; McRoberts v. Lyon, 76 Mich. 34; Weiss v. Judge, 50 Mich. 158.

**(12796). Judgment Against Sureties on Appeal Bond.**

**SEC. 6.** And in any case where the defendants, or any two or more of them, shall have taken any cause where they are joint defendants, by appeal to the circuit court, from the justice court, and shall have filed a bond on appeal, and on the trial in the circuit court, a verdict shall be rendered for one or more of such defendants so appealing, the surety or sureties on such appeal bond shall not be released from his or their liability on such bond by reason of such verdict, but judgment shall enter against said surety or sureties as well as against the defendant or defendants against whom verdict is rendered on such trial in the circuit court.

**HISTORY:** Re-enacts the latter part of Sec. 1 of Act 199 of '99, p. 309, Eff. Sept. 23; As Am. '03, p. 172, Act 137, Eff. Sept. 17. Unchanged.

**CONSTRUED:** Wilson v. Medler, 140 Mich. 209; Hillman v. Hulett, 149 Mich. 294; Hoek v. Twp. of Allendale, 161 Mich. 583.

**(12797). When Execution to Issue.**

**SEC. 7.** In case any amount is collected on any judgment or decree, if such judgment or decree be afterward reversed the court shall award restitution of the amount so collected, with interest from the time of collection.

**HISTORY:** This section supersedes Sec. 232 of Act 153 of '55, being C. L. '57, (3884); C. L. '71, (5480); How. 7047; C. L. '97, (951). Modified.

**CONSTRUED:** See *Whelpley v. Nash*, 46 Mich. 25; *Swantek v. Jarmozski*, 174 Mich. 698, 700.

**(12798). Judgment in Actions on Joint Obligations.**

**SEC. 8.** In actions against two or more persons, upon any joint obligation, contract or liability, upon due proof that the process or declaration has been served upon either of such persons, the defendant so served shall answer to the plaintiff, and the judgment in such action if rendered in favor of the plaintiff, shall be against all of the defendants in the same manner as if all had been served.

**HISTORY:** This section supersedes and merges Sec's. 1 and 5, R. S. '46, Ch. 107, being C. L. '57, (4502)-(4506); C. L. '71, (6146)-(6150); How. 7730, 7734; C. L. '97, (10371)-(10375). Unchanged.

**CONSTITUTIONALITY:** The provisions for judgment and execution against joint debtors, upon due service on either, are not in conflict with the constitutional guaranty of life, liberty and property. *Brooks v. McIntyre*, 4 Mich. 316. See *Hamilton v. Rogers*, 67 Mich. 135; *Bonesteel v. Todd*, 9 Mich. 371.

**CONSTRUED:** C. L. '97, (10371), applies to all joint undertakings, or liabilities and covers an obligation which is joint and several. *Goebel v. Stevenson*, 35 Mich. 172. A joint and several demand cannot be treated as a joint obligation of less than all the debtors; it must be joint as to all or several as to all. *Winslow v. Herrick*, 9 Mich. 380. These proceedings are special and statutory and cannot be extended, referring only to cases where process is served upon one and allowing judgments in such cases no force against parties not served, except that joint property actually within the jurisdiction may be levied on. *Hamilton v. Rogers*, 67 Mich. 135. Such judgments cannot be enforced against sole property, nor used as evidence against parties not served with process in any other suit, to fix their liability. *Welch v. Hull*, 73 Mich. 52. See *Bonesteel v. Todd*, 9 Mich. 371; *Goebel v. Stevenson*, 35 Mich. 185; *Ralston v. Chapin*, 49 Mich. 277. Judgment entered against joint defendants is valid where service was had upon but one defendant. *Sheldon Axle Co. v. Landman*, 186 Mich. 62. See *People v. Fidelity & Deposit Co.*, 163 Mich. 101; *Rickman v. Rickman*, 180 Mich. 252; *Smith v. Ayrault*, 71 Mich. 475.

**JUDGMENT:** The joint debtor served may confess judgment and bind the joint property. *Goebel v. Stevenson*, 35 Mich. 186. Joint judgment cannot be entered against several defendants, when service

against a portion of them has neither been made nor attempted. *Proctor v. Lewis*, 50 Mich. 329. Process must issue against all the defendants and the intentional omission to serve either defendant, if seasonably found within the jurisdiction, would be an abuse of the writ. *Ralston v. Chapin*, 49 Mich. 277. But joint judgment may be entered against parties, one of whom is outside of the jurisdiction and cannot therefore be lawfully served. *Gunzburg v. Miller*, 39 Mich. 80. The defendant not served may appear and plead; and the judgment preserves all of defendant's common law rights. *Ralston v. Chapin*, 49 Mich. 276, 278. Judgment in case of partners. *Brooks v. McIntyre*, 4 Mich. 316. Personal service of a writ of attachment upon one partner gives the court jurisdiction, though no property is attached, and a judgment based upon such service will support the levy of an execution upon the partnership property. *Smith v. Runnels*, 94 Mich. 617.

**EXTINGUISHMENT OF DEMAND:** A judgment in Ohio, on a joint note, held a merger. *Candee v. Clark*, 2 Mich. 255. A judgment in New York, on a joint note, extinguishment of the demand. *Bonesteel v. Todd*, 9 Mich. 371. See *Goebel v. Stevenson*, 35 Mich. 185.

#### (12799). Judgment as Evidence.

**SEC. 9.** Such judgment shall be conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand after the liability of such defendant shall have been established by other evidence.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 107, being C. L. '57, (4503); C. L. '71, (6147); How. 7731; C. L. '97, (10372). Unchanged.

**CONSTRUED:** *Welch v. Hull*, 73 Mich. 52; *Rickman v. Rickman*, 180 Mich. 252.

#### (12800). Order Against Joint Defendants Not Served.

**SEC. 10.** In either of the cases mentioned in the preceding sections, the plaintiff in the judgment may on motion, have an order against the defendants therein who were not served with the process or declaration by which the suit was commenced, by which, the parties against whom it is issued, shall be required to appear before the court in which such judgment shall have been rendered, to show cause why, the plaintiff ought not to have execution against them upon such judgment, in the same manner, and with the like effect, as if they had been served with the process or declaration by which the suit was commenced.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 107, being C. L. '57, (4507); C. L. '71, (6151); How. 7735; C. L. '97, (10376). Modified.

**JOINT DEBTORS:** In suits against joint debtors where one or more are not served, the judgment being entered in form against all

of them, it is provided that an order may be issued to show cause why the plaintiff ought not to have execution against the debtors not served, and upon failure to appear or to show sufficient cause to the contrary, execution may issue against such defendant in the same manner as if he had been served with process. This practice supersedes the former proceeding by *scire facias*. If the return to the order to show cause raises merely questions of law or of fact not going to the merits of the main action, they will be disposed of by the court. If, however, defenses are disclosed which might have been pleaded in the main action, the proper practice would be to permit a plea to be entered to the declaration on file and to proceed to trial thereon in the usual manner.

FORMER LAW CITED: *Burt v. Jackson* Circuit Judge, 35 Mich. 228.

**(12801). When Execution to Issue.**

SEC. 11. If any defendant, after due service of such order, shall fail to appear on the return day thereof, or if he shall appear and show no sufficient cause to the contrary, the court shall make an order that execution issue against such defendant in the same manner, and with the like effect, as if he had been served with the process or declaration by which the suit was commenced, and thereupon execution may be issued and served accordingly.

HISTORY: Supersedes and re-enacts in part Sec. 7, R. S. '46, Ch. 107, being C. L. '57, (4508); C. L. '71, (6152); How. 7736; C. L. '97, (10377). Modified.

JOINT DEBTORS: See note to last section.

**(12802). Judgment Against Defendants as Right May Appear.**

SEC. 12. In any action against two or more defendants, judgment may be rendered for the plaintiff against some one or more of the defendants, and also in favor of some one or more of the defendants against the plaintiff, according as the rights and liabilities of the respective parties shall appear, either upon confession, default, by pleading or on trial; and when judgment shall be rendered in favor of any defendant, he shall recover costs against the plaintiff, in the same manner as though judgment had been rendered for all the defendants; but no judgment shall be entered upon any purely several liability against any party not served with process.

HISTORY: Supersedes and merges Sec's. 8 and 15, R. S. '46, Ch. 99, being C. L. '57, (4162)-(4169); C. L. '71, (5778)-(5778); How. 7347, 7354; C. L. '97, (10057)-(10064). Unchanged.

CONSTRUED: When the provision as to judgment against one or more joint defendants, does not apply. *Anderson v. White*, 39 Mich. 130; See *Hosle v. Wayne* Circuit Judge, 22 Mich. 496; *Sherman v.*

Palmer, 37 Mich. 511; Steel v. Kent Circuit Judge, 109 Mich. 655; Barger v. Farnham, 130 Mich. 493; Comstock v. Potter, 191 Mich. 636.

**(12803). Judgment Against Part of Defendants.**

SEC. 13. It shall not be necessary for the plaintiff to include in the same record a judgment against all parties severally, or jointly and severely liable, but judgment may be entered against any of the parties thereto, whenever the plaintiff would be entitled to the same if the suit had been commenced against such parties only; and if the trial or hearing of such cause be put off by any of the parties, or if a default shall have been obtained against part of the defendants, the plaintiff may proceed to the hearing or trial against the other parties, in the same manner as if the suit had been commenced against the other parties only, and the action shall thereby be severed.

**HISTORY:** Supersedes and re-enacts in part Sec. 16, R. S. '46, Ch. 99, being C. L. '57, (4170); C. L. '71, (5786); How. 7355; C. L. '97, (10065). Modified.

**(12804). Motion for Judgment by One Defendant.**

SEC. 14. One or more of the defendants in any suit may move for judgment as in case of nonsuit, although the other defendants shall not unite in the motion; but one of several defendants jointly liable shall not make such motion, unless the other joint contractors with him shall unite in the motion.

**HISTORY:** Supersedes and re-enacts in part Sec. 18, R. S. '46, Ch. 99, being C. L. '57, (4172); C. L. '71, (5788); How. 7357; C. L. '97, (10067).

**ENTERING OF JUDGMENT:** Section 15 of the original bill was omitted from this act as finally passed because it had already become a law. See P. A. 15, Act No. 217; C. L. '15, (14568). See also Part Two, Miscellaneous Practice Acts in this book.

**(12805). Enrollment of Decree.**

SEC. 16. After the expiration of twenty days from the time a final decree shall be entered, if no appeal therefrom shall have been claimed, and no petition for a rehearing shall have been presented, the clerk by whom such final decree shall have been entered, shall attach together the bill, pleadings and such other papers filed in the cause, as may from time to time by general rules be directed, together with the taxed bill of costs therein, and shall annex thereto a copy of the decretal order, signed by the circuit judge, and countersigned by the clerk who entered the same.



**HISTORY:** Supersedes and re-enacts Sec. 58, R. S. '46, Ch. 90, being C. L. '57, (3512); C. L. '71, (5094); How. 6648; C. L. '97, (463). Unchanged.

**ENROLLMENT OF DECREE:** Instead of enrollment taking place only at the request of a party, it is provided, that if no appeal is taken or petition for re-hearing presented within 20 days, that it shall be the duty of the clerk to enroll the decree without waiting for any request so to do.

**ENROLLMENT:** *Hochgraef v. Hendrie*, 66 Mich. 561. The omission of the taxed bill of costs will not undo the enrollment, but the omission may be corrected by having the bill subsequently included among the enrolled papers. *Mickle v. Maxfield*, 42 Mich. 309; See *Wilkie v. Judge*, 52 Mich. 641; *Low v. Mills*, 61 Mich. 40. As to enrollment, see also *Youngs v. Peters*, 118 Mich. 45, 46; *Barnum v. Barnes*, 118 Mich. 264; *Harmon v. Metcalfe*, 134 Mich. 643, 644; *Olmstead v. Meyer*, 172 Mich. 698.

With reference to enrollment of a decree in a foreclosure case after the taking of an appeal, see *Harmon v. Metcalfe*, 134 Mich. 643. A tax sale is not void because made before enrollment of the decree for "the statute prescribes a time for the sale to take place, which precludes the application of 2 How. Secs. 6648-9" (i. e., C. L. '97, 463-4). *Barnum v. Barnes*, 118 Mich. 264, 267; *Youngs v. Peters*, 118 Mich. 45, 46.

**REHEARING:** A rehearing can be granted only before enrollment; but the same object may be obtained after enrollment by a bill of review. *Benedict v. Thompson*, Walk. 447. Under this statute thirty days are allowed for the presentation of a petition for rehearing. *Id.* Same case, 2 Doug. 304.

#### (12806). Certificate of Enrollment.

Sec. 17. The clerk shall then annex to the papers so attached together, his certificate, under the seal of the court wherein he shall certify according to the fact, the time when the said papers were so attached for the purpose of enrollment, and the name or names of the parties at whose instance the same was done; and thereupon, the said papers so attached, annexed, and signed, together with said certificate, shall be filed by the clerk, and remain a record in his office; and such certifying and filing shall be deemed an enrollment of the decree and proceedings, for all purposes whatsoever.

**HISTORY:** Re-enacts Sec. 59, R. S. '46, Ch. 90, being C. L. '57, (3513); As Am. '69, p. 55, Act 36, Eff. May 18; C. L. '71, (5095); How. 6649; C. L. '97, (464), changing "register" to "clerk." Unchanged.

**CERTIFICATE AND SEAL:** It is not until the papers are attached together, and the required certificate of the register, under the seal of the court, annexed, and filed in his office, that the decree and proceedings are deemed to be enrolled. *Low v. Mills*, 61 Mich. 41.

**RECORD:** The enrollment of the decree and proceedings constitute collectively the record of the chancery cause. *Thayer v. McGee*, 20 Mich. 205.

ENROLLMENT NUNC PRO TUNC: See Compilers' Section (12811).  
FORMER LAW CITED: *Youngs v. Peters*, 118 Mich. 46; *Barnum v. Barnes*, 118 Mich. 267.

**(12807). Record of Decree in Office of Register of Deeds.**

SEC. 18 After the entry and enrollment of any final decree affecting or determining the title to real estate, a copy of such decree, duly certified by the clerk of the county in which the same was entered, under the seal of the court, may be received and recorded in the office of the register of deeds of the proper county, and shall have the same effect as the original decree; and if such decree shall direct the execution of a conveyance or other instrument affecting the title to real estate, the record of such certified copy shall have the same effect as the record of such conveyance or other instrument affecting the title to real estate would have if duly executed pursuant to said decree.

HISTORY: Re-enacts Sec. 60, R. S. '46, Ch. 90, being C. L. '57, (3514); C. L. '71, (5096); As Am. '73, p. 126, Act 93, Eff. July 31; How. 6650; C. L. '97, (465), changing "register" to "clerk." Substantially unchanged.

See Compilers Sections (11779)-(11780)-(12517), relative to the recording of decrees by registers of deeds and their introduction in evidence.

**(12808). Acknowledgement of Satisfaction of Decree.**

SEC. 19. Upon producing and filing with the clerk with whom any decree may have been entered, a written acknowledgment by the party in whose favor such decree was rendered, that he has been fully paid and satisfied, the amount of all moneys directed by such decree to be paid, certified by some officer authorized to take the acknowledgment of deeds, to have been duly acknowledged before him by the party signing the same, the clerk shall enter in the docket of such decree, a note of the satisfaction and discharge thereof, and such decree shall thereupon be discharged, and be of no force or validity.

HISTORY: Re-enacts Sec. 16, R. S. '46, Ch. 90, being C. L. '57, (3515); C. L. '71, (5097); How. 6651; C. L. '97, (466), changing "register" to "clerk." Unchanged.

CONSTRUED: See *Hochgraef v. Hendrie*, 66 Mich. 567. For other provisions as to discharge of decrees, see Compilers' Section (12962).

**(12809). Discharge of Decree.**

SEC. 20. The court shall have power to order a decree to be

discharged upon a hearing of the parties, and upon satisfactory evidence that such decree has been fully paid or satisfied.

**HISTORY:** Re-enacts Sec. 62, R. S. '46, Ch. 90, being C. L. '57, (3516); C. L. '71, (5098); How. 6652; C. L. '97, (467). Unchanged.

**(12810). Omission to Sign Decree or Record.**

**SEC. 21.** When any judge shall have failed or omitted to sign any decree by him passed, or any record or journal of a court held by him, his successor, or any other judge holding the same court, may sign such decree, record or journal, and with like force and effect as if the same had been signed by the judge who passed the decree, or held the court to which said record or journal belongs.

**HISTORY:** Re-enacts Sec. 1 of Act 148 of '61 being C. L. '71, (5687); How. 7255; C. L. '97, (556); see also Act 242 of '15, p. 429, Eff. Aug. 24, Compilers' Section (14564). Unchanged.

**(12811). Record Nunc Pro Tunc.**

**SEC. 22.** Any decree of the former court of chancery, or of the circuit court in chancery, that may have been duly passed and signed, and not reversed, vacated or annulled, and which may have failed to be recorded or enrolled, may be directed by the court having the legal custody of the files in the case in which such decree was pronounced, in its discretion, to be recorded and enrolled by the clerk of the court, nunc pro tunc; and when so recorded and enrolled the same shall be as effectual as if recorded and enrolled at the end of thirty days after its allowance.

**HISTORY:** Re-enacts Sec. 2 of Act 148 of '61, being C. L. '71, (5668); How. 7256; C. L. '97, (557). Unchanged.

**CONSTRUED:** Where a decree was signed in a divorce case and afterwards became lost or destroyed, without having been filed the administrator of the defendant's second wife was after his death, entitled to an order entering the decree nunc pro tunc. *Newton v. Newton*, 166 Mich. 421. See also as to the power of the court to enroll decrees nunc pro tunc, *Powell v. Pierce*, 168 Mich. 427; *In re Austin's Estate*, 173 Mich. 47-48, 56.

In *Newton v. Newton*, 166 Mich. 421, the Court says, p. 426; "the statutes—C. L. '97, (557) and (10276-80)—"appears to provide for doing nothing which courts of record have not inherent power to do. See *Drake v. Kinsell*, 38 Mich. 232, 235. Both statutes expressly give to the courts discretion to restore or not to restore lost records. The exercise of discretion is involved in the exercise of the inherent power possessed by the courts." That the courts have under this statute full

power and authority to order a decree of divorce to be recorded and enrolled nunc pro tunc, see *In re Austin's Estate*, 173 Mich. 47, 56.

CITED: *Hochgraef v. Hendrie*, 66 Mich. 561.

**(12812). Stay of Proceedings Upon Verdict or Judgment.**

SEC. 23. No stay of proceedings upon any verdict or judgment rendered in any circuit court in this state shall hereafter be granted or allowed for the purpose of moving for a new trial or settling a bill of exceptions in the case in which such verdict or judgment was rendered, for a longer period than twenty days, unless the party applying for such a stay, if judgment shall have been rendered against him, shall execute to the adverse party a bond with sufficient sureties in such sum as the circuit judge, before whom the cause was tried, shall designate, conditioned to pay such judgment if the same is not set aside or reversed and that if a writ of error is issued in said cause that the appellant shall prosecute his writ to effect and shall pay and satisfy such judgment as shall be rendered against him thereon. Notice of the time and place when said bond shall be presented to the circuit judge for approval shall be served upon the adverse party at least four days before the same shall be approved.

HISTORY: Re-enacts Sec. 1 of Act 276 of '87, being How. 7621c; As Am. '89, p. 36, Act 36, Eff. Oct. 2; As Am. '97, p. 142, Act 124, Eff. Aug. 30; C. L. '97, (10355). Unchanged.

CONSTRUED: Where a twenty day stay of proceedings has been allowed, an execution issued nineteen days after judgment and given to the sheriff the day following, is a valid writ. *Peterson v. Wayne Circuit Judge*, 108 Mich. 608. Rule prior to the enactment of this statute. *Howard v. Hess*, 63 Mich. 725. Since the enactment of this statute. *Ismond v. Scougale*, 119 Mich. 504. Failure to file a stay bond does not deprive the trial court of the power to extend the time to settle exceptions. *Harper v. Wayne Circuit Judge*, 155 Mich. 547; *Marshall v. Saginaw Circuit Judge*, 156 Mich. 289. This statute does not give the right to stay execution indefinitely. *Ismond v. Scougale*, 119 Mich. 504. After return to the writ of error, the supreme court only, can entertain a motion to file a stay bond. *Coeling v. Barnard*, 159 Mich. 634. Form of stay bond on appeal from a judgment for payment of a legacy. *Markham v. Kent Circuit Judge*, 121 Mich. 573.

The penalty of the bond "may not be less than double the amount of the judgment, and the circuit judge has no discretion to accept or approve a bond with a smaller penalty." *Hogle v. Wayne Circuit Judge*, 160 Mich. 573.

MANDAMUS STAY: Mandamus will not lie to compel a circuit judge to grant a stay of execution issued on a judgment rendered on Nov. 2nd, and the bond not being filed until Dec. 5th following. *Hatch v. Washtenaw Circuit Judge*, 200 Mich. 1.

FORMER LAW CITED: *TenHopen v. Taylor*, 103 Mich. 180; *Boyer*

v. Sowles, 109 Mich. 484; Luther v. Kent Circuit Judge, 151 Mich. 72; Hogle v. Wayne Circuit Judge, 160 Mich. 573; Small v. Barton, 187 Mich. 532.

**(12813). Stay Without Bond.**

SEC. 24. In case the party applying for such stay of proceedings shall be unable to give such bond by reason of poverty, the judge may, upon due proof of inability for such reason, grant such stay without requiring such bond for such reasonable time as the judge may determine.

HISTORY: Re-enacts Sec. 2 of Act 276 of '87, being How. 7621d; As Am. '89, p. 36, Act 36, Eff. Oct. 2; C. L. '97, (10356). Unchanged.

**(12814). Where Bond Filed.**

SEC. 25. The bond required by section twenty-three shall be filed with the clerk of the court in which such judgment is rendered.

HISTORY: Re-enacts Sec. 3 of Act 276 of '87, being How. 7621e; C. L. '97, (10357), making a necessary change in phraseology. Unchanged.

**(12815). No Further Bond Required.**

SEC. 26. No further or other bond shall be required to stay and supersede execution upon any writ of error issued out of the supreme court of this state by or on behalf of the party filing the bond mentioned and required in section twenty-three of this chapter: *Provided*, That where the judgment of the circuit court is against the defendant in an action to recover possession of lands, brought under chapter thirty of this act, the penalty of said bond shall be not less than double the amount of the annual rental value of said premises and with a further condition, that if plaintiff obtain restitution of the premises in said suit, the said defendant will forthwith pay all rent due or to become due, or the rental value thereof, during the time the same has been retained by the defendant, to the plaintiff for the premises described in the complaint, up to the time said plaintiff shall obtain possession thereof; together with the costs of suit in prosecuting said complaint and obtaining restitution of said premises; and if the plaintiff obtain restitution of said premises, he may, at his election, sue and recover on said bond, or bring his action against the defendant, under section twenty-three of chapter thirty of this act.

**HISTORY:** Re-enacts Sec. 4 of Act 276 of '87, as Added '89, p. 128, Act 114, Imd. Eff. May 29. How. 7621f; As Am. '95, p. 195, Act 87, Eff. Aug. 30; C. L. '97, (10358); making necessary changes in phraseology and also changing "complainant" to "plaintiff." Modified.

**FORMER LAW CITED:** TenHopen v. Taylor, 103 Mich. 180; Markham v. Kent Circuit Judge, 121 Mich. 576; Hogle v. Wayne Circuit Judge, 160 Mich. 574.

## CHAPTER XXIII. OF EXECUTIONS.

### (12816). Issue.

SECTION 1. Whenever judgment shall have been or may hereafter be rendered in any court of record, execution to collect the same may be issued to the sheriff, or other proper officer of any county of this state; and successive or alias executions may be issued one after another, upon the return of any execution unsatisfied in whole or in part, for the amount remaining unpaid upon any such judgment. Such executions shall be made returnable not less than twenty nor more than ninety days from the date thereof.

HISTORY: Re-enacts and combines Sec. 4, R. S. '46, Ch. 106; As Am. '49, p. 96, Act 95, Eff. Apr. 15, being C. L. '57 (4442); C. L. '71, (6079); How. 7664; C. L. '97, (10300); and Sec. 1 of Act 68 of '83, being How. 7664a; C. L. '97, (10354) Modified.

EXECUTION: Demandable as a matter of right. *Jenness v. Judge*, 42 Mich. 472. Not invalid on account of want of a seal; such want may be supplied by amendment. *Arnold v. Nye*, 23 Mich. 293.

ISSUE OF EXECUTION: This general statute provides for the issue of execution upon any judgment rendered in any court of record. *Union Dep. Co. v. Backus*, 103 Mich. 563. It cannot be considered as being issued until it is placed where it might have been executed and some efficient act done under it. It must be issued to the sheriff or other proper officer. *National Bank v. Dwight*, 83 Mich. 191. See also *Peterson v. Wayne Circuit Judge*, 108 Mich. 608; *Enbst v. Freeman's Estate*, 129 Mich. 271. Where execution was issued and levy made upon real estate less than five years before lifetime of judgment expired, the levy should not be set aside or sale restrained, although judgment is outlawed. *Mosher v. Borden*, 201 Mich. 106.

If judgment is entered for the plaintiff, then execution is to issue thereon. There is no authority in the law for issuing an execution or other process to a sheriff whose term of office has expired and whose right to execute process has ceased. *Fletcher v. Morell*, 78 Mich. 181. The provisions of this section, which allow executions to run into different counties, do not apply to a writ of return upon judgment in replevin, but only the ordinary executions upon money judgments, which are to be "collected" by execution. *Rathbun v. Ranney*, 14 Mich. 386. See *People v. Cicott*, 15 Mich. 328. Where judgment is rendered at or near the close of a term, so that there is no time during the same term to move for a new trial, or in arrest of judgment, and no such motion is made, the prevailing party is not required to wait until the following term, but may have execution at once. *Gibson v. Clerk*, 14 Mich. 169.

Execution cannot issue upon a judgment upon which action is barred by the statute of limitations. *Parsons v. Judge*, 37 Mich. 287;

Compilers' Section (12323). Sub. 1. See *Jerome v. Williams*, 13 Mich. 521. Execution issued after death of party. *Jenness v. Lapeer Circuit Judge*, 42 Mich. 469.

**WHEN RETURNABLE:** Execution may be made returnable at any time not less than 20 nor more than 90 days from the time such execution shall be issued. *National Bank v. Dwight*, 83 Mich. 190.

**ALIAS EXECUTION:** A second execution cannot properly issue, while a former one is outstanding, with a levy unaccounted for. *F. & M. Bank v. Kingsley*, 2 Doug. 389. An alias *fi. fa.* issued on return of a previous execution levied upon real estate, which remained unsold for want of bidders, is irregular merely, but not void. *Spafford v. Beach*, 2 Doug. 150. Where a levy on personal property has been unlawfully defeated by the owner and the execution therefor returned unsatisfied, a further execution may issue. *Nelson v. Ferris*, 30 Mich. 497. An alias execution may issue against the body, upon the return of a previous one "not found." *People v. Kehl*, 15 Mich. 330.

**PROTECTION OF OFFICERS:** See Compilers' Section (14340); and compare *Beach v. Botsford*, 1 Doug. 199; *LeRoy v. Railway*, 18 Mich. 239; *Adams v. Hubbard*, 30 Mich. 104; *Gidday v. Witherspoon*, 35 Mich. 369; *Stilson v. Gibbs*, 40 Mich. 42; *Andrews v. Smith*, 41 Mich. 683; *Wilson v. Martin*, 44 Mich. 509. The execution protects the officer against personal responsibility in serving it, but when he claims property under it, he must show that it was warranted by a valid judgment. *Id.* See *Miller v. Hahn*, 116 Mich. 607; and notes to Compilers' Section (2147).

### (12817). Execution on Justice's Transcript.

**SEC. 2.** Whenever a transcript of a judgment rendered by a justice of the peace shall have been filed and docketed by the clerk of the circuit court for the county, all executions thereon shall be issued out of and under the seal of such circuit court; and such execution shall be in the same form as near as may be, as other executions issued out of the circuit court.

**HISTORY:** Re-enacts in part and supersedes Sec. 180 of Act 173 of '55, being C. L. '57, (3832); C. L. '71, (5428); How. 6993; C. L. '97, (895). Modified.

**CONSTRUED:** *Davison v. Elliott*, 9 Mich. 252; *Hitchcock v. Hosmer*, 96 Mich. 300.

### (12818). Execution.

**SEC. 3.** Such execution may be either:

1. Against the goods and chattels, lands and tenements of the party against whom such judgment was recovered; or
2. Against the body of such party, in the cases authorized by law.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 106, being C. L. '57, (4444); C. L. '71, (6080); How. 7665; C. L. '97, (10301). Unchanged.



**LEVY:** An officer has no right to receive anything but money in settlement of a claim. See cases cited in note "Treasurer," to Compilers' Section (4039) and compare *Woodbury v. Lewis*, Walk. 256; *Heald v. Bennett*, 1 Doug. 513; *Welch v. Frost*, 1 Mich. 30; *People v. Land Com'r.*, 19 Mich. 481. Liability of officer for abuse of authority. *Stilson v. Gibbs*, 40 Mich. 42. See *Bringard v. Stellwagen*, 41 Mich. 54. A party's motives in making a levy are immaterial, if the levy is lawful. *Allen v. Kinyon*, 41 Mich. 284. A levy is not valid unless made before the writ is returnable; and it must be so made as to identify or give means of identifying the property levied on; there must be manual seizure or such assertion of control as can be made effectual. *Quackenbush v. Henry*, 42 Mich. 75. See *Blair v. Compton*, 33 Mich. 452-3. A levy effected by committing a trespass is bad. *Bailey v. Wright*, 39 Mich. 96.

**GOODS AND CHATTELS:** An order for the payment of money, or a promissory note, or any other such chose in action is not the subject of levy on execution. *People v. Wayne Co. Auditors*, 5 Mich. 224. The right in unpublished manuscripts is neither goods nor chattels subject to execution; so held of a set of abstract books. *Dart v. Woodhouse*, 40 Mich. 400. Fixtures attached to the realty are not subject to levy as goods and chattels. *McAuliffe v. Mann*, 37 Mich. 539. An execution against one member of a partnership cannot be levied upon specific articles of the partnership property. *Kunze v. Cox*, 113 Mich. 546, commenting on *Sirrine v. Briggs*, 31 Mich. 443; *Haynes v. Knowles*, 36 Mich. 410; *Hutchinson v. Dubois*, 45 Mich. 143.

**BILLS AND NOTES—CHOSSES IN ACTION:** Without express statutory authority, choses in action, bonds, and promissory notes are not the subject of seizure and sale under execution. *Jensen v. Oceana Circuit Judge*, 194 Mich. 405.

**LANDS AND TENEMENTS:** An equitable estate is not subject to levy and sale under an execution. *Gorham v. Arnold*, 22 Mich. 247; *Gorham v. Wing*, 10 Mich. 492. See *Thayer v. Arnold*, 32 Mich. 336; *Grover v. Fox*, 36 Mich. 459. A resulting trust, (existing prior to '46), is not subject to attachment or execution. *Trask v. Green*, 9 Mich. 358; *Maynard v. Hoskins*, 9 Mich. 485. See *Gorham v. Wing*, 10 Mich. 492; *Harwood v. Underwood*, 28 Mich. 431. The interest of a purchaser of primary school lands, holding by certificate, is liable to levy and sale under execution. *Kercheval v. Wood*, 3 Mich. 509. Levy on interest in land under contract of purchase. *Welsh v. Richards*, 41 Mich. 593. On interest of tenant in common. *Campau v. Godfrey*, 18 Mich. 27. The method of levying on lands is considered in *Campau v. Barnard*, 25 Mich. 383, and the court says: "It is certain that a levy cannot consist in any mere mental determination. It must be an act capable of being proved and clearly identified at the time when it is done."

**AGAINST THE BODY:** Our statutes nowhere specify or enumerate the particular cases in which an execution may issue against the body; but it is provided generally, by this section, that an execution may issue against the body "in cases authorized by law." The law by authority of which this may be done must be either an existing statute or the common law. We have no statute now in force which authorizes such an execution in an action of replevin. But, on the contrary, the only provisions of our statute on the subject seem to

refer to cases where the action may be commenced by a *capias* ad respondendum and the defendant held to bail. *Fuller v. Bowker*, 11 Mich. 210. But see Compilers' Section (14293), which authorizes an execution in justices' court against the body of a defendant in replevin. And see also *Tomlin v. Fisher*, 27 Mich. 524. See further as to executions against the body. *Metcalf v. Moore*, 128 Mich. 138; *Sink v. Oceana Circuit Judge*, 146 Mich. 122; *Lapham v. Oakland Circuit Judge*, 170 Mich. 564; *Forsythe v. Washtenaw Circuit Judge*, 180 Mich. 633.

**RECEIPTOR AND RECEIPT:** The receiptor's possession is that of the sheriff; seizure from the receiptor is seizure from the sheriff; replevin lies against a sheriff for goods actually held by a receiptor. *Mayhue v. Snell*, 37 Mich. 305. It is no defense to an action on a receipt that the receiptor had offered to turn out the property after the return day of the execution and the officer refused to accept it. *Bowen v. Culp*, 36 Mich. 224. A receipt need not be minute in details nor technically precise; the receiptor cannot question the judgment nor deny possession. *Burk v. Webb*, 32 Mich. 173.

**EXCESSIVE LEVY:** In case of an excessive levy, the remedy is by motion to the court, from which the execution issued, and before sale, to set it aside. Every court controls its own process. *Campau v. Godfrey*, 18 Mich. 44.

**IRREGULARITIES:** All irregularities must be complained of in due time, by motion, or they will be deemed waived. A motion to set aside an execution and proceedings under it for irregularity merely, made five years after sale, is too late. *Spafford v. Beach*, 2 Doug. 150.

**SATISFACTION OF JUDGMENT:** A levy on real estate is not a *prima facie* satisfaction of the debt. *Spafford v. Beach*, 2 Doug. 153. *Thurber v. Jewett*, 3 Mich. 303. But a levy on personal property by virtue of an execution is *prima facie* a satisfaction, while it remains in force. *Henry v. Gregory*, 29 Mich. 69; *Farmers & Mechanics' Bank v. Kingsley*, 2 Doug. 379; *Spafford v. Beach*, *Id.* 153. But one cannot claim that a judgment has been satisfied by a levy which he himself wrongfully defeated. *Nelson v. Ferris*, 30 Mich. 499.

**CITED:** *Rathbun v. Ranney*, 14 Mich. 386.

#### (12819). Against Body or Goods and Chattels.

**SEC. 4.** But such execution shall not issue against the body, nor against the goods and chattels, lands and tenements of any executor, administrator, heir, devisee or legatee, unless in those cases specially provided by law.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 106, being C. L. '57, (4445); C. L. '71, (6081); How. 7666; C. L. '97, (10302). Unchanged.

**CITED:** *Rathbun v. Ranney*, 14 Mich. 386; *In re Merrill*, 200 Mich. 244.

#### (12820). Sheriff to Indorse Time of Receipt.

**SEC. 5.** Upon the receipt of any execution it shall be the duty of the sheriff or other officer to indorse thereon the year, month, day and hour of the day, when he received the same.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 106, being C. L. '57, (4452); C. L. '71, (6088); How. 7673; C. L. '97, (10309). Unchanged.

**CONSTRUED:** *Shepard v. Schrutt*, 163 Mich. 490. See *Forsythe v. Washtenaw Circuit Judge*, 180 Mich. 635. This section is not mandatory and an execution should not be declared a nullity by reason of the sheriff's failure to indorse thereon the year, month, day and hour of day when he received the same. *Shepard v. Schrutt*, 163 Mich. 485, 491.

#### (12821). When Property Bound.

**SEC. 6.** Whenever an execution shall be issued against the property of any person, his goods and chattels, lands and tenements, levied upon by such execution, shall be bound from the time of such levy.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 106, being C. L. '57, (4455); C. L. '71, (6091); How. 7676; C. L. '97, (10312). Unchanged.

**SHALL BE BOUND:** This gives the creditor a lien on the debtor's attachable interest only, and in no way interferes with the previously acquired rights of third persons. *Columbia Bank v. Jacobs*, 10 Mich. 354-5. A mere levy does not give to the creditor any rights analogous to those of a bona fide purchaser. *French v. DeBow*, 38 Mich. 712, citing *Columbia Bank v. Jacobs*, 10 Mich. 349; *Mich. Paneling Mach. & M'fg. Co. v. Parsell*, 38 Mich. 475. Precedence of levy over prior contract of sale. *Webster v. Bafley*, 40 Mich. 641. A sheriff's lien and right of custody under an execution cannot be disturbed by a circuit court commissioner's order, on dissolving an attachment, to return the property to defendant. *State Bank of Fenton v. Whittle*, 41 Mich. 365. When execution debtor entitled to priority. *Campbell v. Keyes*, 130 Mich. 17; *First Nat. Bank v. Phillpotts*, 155 Mich. 331; *Mosher v. Borden*, 201 Mich. 110.

#### (12822). Precedence of Several Executions.

**SEC. 7.** If there be several executions issued out of a court of record, against the same defendant, that which shall have been first delivered to the officer to be executed shall have preference notwithstanding a levy may be first made under another execution, but if a levy and sale of any goods or chattels shall have been made under such other execution, before an actual levy under the execution first delivered, such goods or chattels shall not be levied upon or sold by virtue of such first execution.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 106, being C. L. '57, (4456); C. L. '71, (6092); How. 7677; C. L. '97, (10313). Unchanged.

#### (12823). Several Executions or Attachments.

**SEC. 8.** If there be one or more executions, and one or more attachments against the property of the same person, or if

there be several attachments, the same rule prescribed in the last section shall prevail in determining the preference of such execution or attachment.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 106, being C. L. '57, (4457); C. L. '71, (6093); How. 7678; C. L. '97, (10314). Unchanged.

**(12824). Executions or Attachment From Court Not of Record.**

**SEC. 9.** But any execution or attachment issued out of any court, not being a court of record, if actually levied, shall have preference over any other execution or attachment issued out of any court, whether of record of [or] not, which shall not have been previously levied.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 106, being C. L. '57, (4458); C. L. '71, (6094); How. 7679; C. L. '97, (10315). Unchanged.

**(12825). May be Issued to Sheriffs of Different Counties.**

**SEC. 10.** Executions, whether against the property of any person, or against the body of any person, for the collection of judgments and decrees of courts of record in this state, may be issued at the same time to sheriffs of different counties and enforced therein by them, but no execution against the body of any person shall issue, while there is an execution against his property not returned, nor shall an execution against the property of any person be issued while there is an execution against his body unreturned, unless by order of the court rendering such judgment or decree.

**HISTORY:** Re-enacts and supersedes Sec. 1 of Act 219 of '99, p. 339, Eff. Sept. 23, though such section is not expressly repealed by this Act. Unchanged.

**(12826). Sale.**

**SEC. 11.** In case of levies made on more than one of such executions provided for in the foregoing section, sale shall only be made on one execution at a time and under the direction of the plaintiff's attorney. And no more sales of the property shall be made than is necessary to satisfy such judgment or decree.

**HISTORY:** Re-enacts Sec. 2 of Act 219 of '99, p. 340, Eff. Sept. 23, omitting "or complainants solicitor." Unchanged.

**(12827). Command of Execution.**

**SEC. 12.** Executions to authorize the sale of real estate  
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shall command the officer to whom they are directed that of the goods and chattels of the person against whom such execution shall issue, in the county of such officer, he shall cause to be made the debt, damages or other sum of money, and costs, for which the judgment was rendered; and if sufficient goods and chattels cannot be found, that then he cause the amount of such judgment to be made of the real estate of the person against whom such judgment was rendered within such county.

**HISTORY:** Re-enacts Sec. 33, R. S. '46, Ch. 106, being C. L. '57, (4471); C. L. '71, (6107); How. 7692; C. L. '97, (10330). Unchanged.

**CONSTRUED:** Duty to seek for personal property before levy on real estate. *Johnson v. Crispell*, 39 Mich. 82. Sale of lands invalid, where the officer does not return that no goods and chattels could be found. *Atwood v. Bearss*, 45 Mich. 474.

See also *Vroman v. Thompson*, 51 Mich. 452.

**(12828). Against Partnership Associations.**

**SEC. 13.** Executions against partnership associations, and the individual members of such associations, shall be subject to the provisions of section two of act one hundred ninety-one of the Public Acts of eighteen hundred seventy-seven, the same being compilers' section six thousand eighty of the Compiled Laws of eighteen hundred ninety-seven.

**HISTORY:** New section. C. L. '97, (6080), above referred to, is Compilers' Section (7951).

**(12829). Execution for Balance.**

**SEC. 14.** If upon an appeal, a recovery for a debt or damages be had by one party, and costs be awarded to the other party, execution shall issue only in favor of the party to whom there shall be a balance due for the amount of such balance.

**HISTORY:** New section.

**(12830). Set Off of Executions.**

**SEC. 15.** Executions between the same parties may be set off one against another, if required by either party, in the manner, and subject to the provisions mentioned in the following sections.

**HISTORY:** Re-enacts Sec. 49, R. S. '46, Ch. 106, being C. L. '57, (4487); C. L. '71, (6123); How. 7708; C. L. '97, (10346). Unchanged.

**CONSTRUED:** A judgment assigned by a client to his attorney in compensation for services cannot be set off. *Wells v. Elsam*, 40 Mich.

218. Nor can a set-off be made where there has been a bona fide assignment of a portion of the first execution. *McRoberts v. Lyon*, 79 Mich. 25.

See *Carpenter v. Hood*, 172 Mich. 533.

**(12831). Second Execution Delivered to Same Officer.**

SEC. 16. When one of the executions is delivered to an officer to be served, the person who is the debtor therein may deliver his execution to the same officer, whether the second execution is directed to the same or any other officer, and the officer shall apply it, as far as it will extend, to the satisfaction of the first execution, and make an endorsement of such application on each of said executions, and the balance due on the larger execution may be collected and paid in the same manner as if there had been no set-off.

HISTORY: Re-enacts Sec. 50, R. S. '46, Ch. 106, being C. L. '57, (4488); C. L. '71, (6124); How. 7709; C. L. '97, (10347). Unchanged.

CONSTRUED: *Lyon v. Smith*, 66 Mich. 676; *McRoberts v. Lyon*, 79 Mich. 32; *Heald v. Bennett*, 1 Doug. 513.

**(12832). When Set-Off not Allowed.**

SEC. 17. Such set-off shall not be allowed in the following cases:

1. When the creditor in one of the executions is not the debtor in the other, in the same capacity and trust;

2. When the sum due on the first execution shall have been lawfully and in good faith, assigned to another person, before the creditor in the second execution became entitled to the sum due thereon;

3. When there are several creditors in one execution, and the sum due on the other is due from a part of them only;

4. When there are several debtors in one execution, and the sum due on the other is due to a part of them only;

5. Nor shall it be allowed as to so much of the first execution as may be due to the attorney in that suit, for his taxable fees and disbursements.

HISTORY: Re-enacts Sec. 51, R. S. '46, Ch. 106, being C. L. '57, (4489); C. L. '71, (6125); How. 7710; C. L. '97, (10348). Unchanged.

CONSTRUED: *Wells v. Elsam*, 40 Mich. 218; *Bennett v. Sheriff*, 91 Mich. 145; *Carpenter v. Hood*, 172 Mich. 533.

As to set-off of costs as affected by diversity of parties in different suits, see *Carpenter v. Hood*, 172 Mich. 533, 539.

**(12833). Indemnity by Judgment Creditor.**

SEC. 18. Whenever there shall be any reasonable doubt as

to the ownership by a judgment debtor of any goods or chattels, or as to their liability to be taken upon an execution, the officer holding such execution may require of the judgment creditor sufficient security to indemnify him for taking such goods and chattels thereon; and if such security be refused, such officer shall not be liable for omitting to take such goods or chattels.

**HISTORY:** Re-enacts Sec. 52, R. S. '46, Ch. 106, being C. L. '57, (4490); C. L. '71 (6126); How. 7711; C. L. '97, (10349). Unchanged.

**CONSTRUED:** An officer is entitled to indemnity before levying an attachment, under the same circumstances as when required to levy an execution. *Smith v. Cicotte*, 11 Mich. 383.

**(12834). Indorsement of Names of Defendants not Personally Served.**

**Sec. 19.** Where judgment is rendered in form against two or more joint defendants, if process was not served upon all of such defendants, the execution issued thereon shall have endorsed thereon the names of such defendants as were not served with process, and such execution shall not be served upon the person, nor shall it be levied upon the sole property of any such defendant, but it may be levied upon any personal property owned by him as a partner with the other defendants who were served, or with any of them.

**HISTORY:** Supersedes and merges Sec's. 3 and 4, R. S. '46, Ch. 107, being C. L. '57, (4504)-(4505); C. L. '71, (6148)-(6149); How. 7732-3; C. L. '97, (10373)-(10374). Changed.

**CONSTRUED:** Service of execution upon property of partner not served with process. *Ralston v. Chapin*, 49 Mich. 274; *Brooks v. McIntyre*, 4 Mich. 316. Levy not confined to property within the state when the judgment was rendered. *Ralston v. Chapin*, 49 Mich. 274. See *Welch v. Hull*, 73 Mich. 52.

**CITED:** *Gunsberg v. Miller*, 39 Mich. 80; *Smith v. Runnells*, 94 Mich. 619; *Rickman v. Rickman*, 180 Mich. 252; *Sheldon Axle Co. v. Landman*, 186 Mich. 61.

**(12835). Interest.**

**Sec. 20.** When execution shall be issued upon any judgment or decree, interest on the amount thereof from the time of entry of the same until such amount shall be paid, shall be collected at the rate of five per cent per annum: *Provided*, That on a judgment or decree rendered on any written instrument having a different rate, if such rate was legal at the date of the execution of such instrument, the interest shall be computed at the rate specified in such instrument.

**HISTORY:** Supersedes and merges Sec. 6, R. S. '46, Ch. 34; As Am. '55, p. 131, Act 62, Eff. May 15; C. L. '57, (1317); C. L. '71, (1635); How. 1597; C. L. '97, (4865); As Am. '03, p. 253, Act 179, Eff. Sept. 17; and Sec. 13, R. S. '46, Ch. 106, being C. L. '57, (4451); C. L. '71, (6087); How. 7672; C. L. '97, (10308). Changed.

**FORMER LAW:** The proviso to this section is taken from Sec. 6 of R. S. '46, Ch. 34, as amended. The word "on," where it first appears in the proviso, is not in the amendatory act of '55, (see history above) but is required by the context and appears in all four prior compilations. The amendment of '03, however, supplies the word omitted from the prior amendment.

**CONSTRUED:** C. L. '97, (10308), applies to decrees as well as judgments. *Warner v. Julf*, 38 Mich. 662; *Hayden v. Hefferman*, 99 Mich. 263. A judgment for costs is as much a judgment as any other. *Id.*

**INTEREST ON JUDGMENT:** Upon the affirmance of a justice's judgment in certiorari, costs before the justice invariably treated as a part of the judgment for the computation of interest. *Whelpley v. Nash*, 46 Mich. 27. Compound interest was properly allowed in a decree for an accounting by way of damages for persistently and wrongfully refusing to account. *Heath v. Waters*, 40 Mich. 472. In case of a report on an order of reference which must be confirmed, interest runs from the confirmation. *Match v. Hunt*, 38 Mich. 1, 9. Interest may be demanded upon claims allowed against the estate of deceased persons and C. L. '97, (4865), is broad enough to cover interest upon costs allowed an appellant from probate court. *Hayden v. Hefferman*, 99 Mich. 263.

**CITED:** (C. L. '97, 4865) *Wettlaufer v. Ames*, 133 Mich. 205.  
See U. S. Stat. at L., 1913, Sec. 1605.

#### (12836). Death of Officer Before Completion of Service.

**SEC. 21.** When an officer shall have begun to serve an execution and shall die, or be incapable of completing the service and return thereof, the same may be completed by any other officer who might by law have executed the same if originally delivered to him; and if the first officer shall not have made a certificate of his doings, the second officer shall certify whatever he shall find to have been done by the first, and shall add thereto a certificate of his own doings in completing the service.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 106, being C. L. '57, (4474); C. L. '71, (6110); How. 7695; C. L. '97, (10333). Unchanged.

**CONSTRUED:** Service commenced by sheriff and completed by successor. *Taylor v. Boardman*, 23 Mich. 317.

#### (12837). Completion of Service After Return Day.

**SEC. 22.** When an officer shall have begun to serve an execution issued out of any court of record, on or before the



return day of such execution, he may complete the service and return thereof after such return day.

**HISTORY:** Re-enacts Sec. 37, R. S. '46, Ch. 106, being C. L. '57, (4475); C. L. '71, (6111); How. 7696; C. L. '97, (10334). Unchanged.

**CONSTRUED:** A levy cannot be made after return day. *Blair v. Compton*, 33 Mich. 424. See *Studley v. Ann Arbor Savings Bank*, 112 Mich. 181; *Vroman v. Thompson*, 51 Mich. 459; *Blair v. Compton*, 33 Mich. 414, 424, 433; *Burk v. Webb*, 32 Mich. 182-3.

**(12838). When Defendant in Custody.**

**SEC. 23.** When any defendant at the time judgment shall be rendered against him, in any court of record, shall be in the custody of the sheriff or other officer, either upon process in the suit in which such judgment shall have been rendered, or upon being surrendered in discharge of his bail in such suit, the plaintiff in such judgment shall charge such defendant in execution thereon, within twenty days after such judgment shall have been obtained.

**HISTORY:** Re-enacts Sec. 43, R. S. '46, Ch. 107, being C. L. '57, (4544); C. L. '71, (6188); How. 7772; C. L. '97, (10411), excepting that the last clause changes the time in which the plaintiff shall charge the defendant in execution on judgment. Unchanged.

**DEFENDANT MUST BE CHARGED IN EXECUTION:** When any defendant is in custody at the time judgment is rendered against him, the plaintiff must charge such defendant in execution within twenty days after the rendition of judgment. If, after judgment rendered, defendant is in custody on a surrender by his bail, the plaintiff must charge such defendant in execution within twenty days after such surrender or if there is an outstanding execution against the property of defendant within twenty days after the return day of such execution.

**(12839). Surrender After Judgment.**

**SEC. 24.** When any defendant shall be in custody upon a surrender in discharge of his bail, made after a judgment obtained against him, and such bail shall be thereupon exonerated, the plaintiff in such judgment shall charge such defendant in execution thereon, within twenty days after such surrender, or if an execution against the property of such defendant shall have been issued, within twenty days after the return day of such execution.

**HISTORY:** Re-enacts Sec. 44, R. S. '46, Ch. 107, being C. L. '57, (4545); C. L. '71, (6189); How. 7773; C. L. '97, (10412), changing "three months" to "twenty days." Unchanged.

See note to section 23 under black letter title.

See notes to next section.

Under this and the following sections (C. L. '97, Secs. 10412-13)

good cause was shown, within the discretion of the lower court, for delay in issuing a body execution, where the attorneys for the parties were negotiating a settlement, and the attorney for the execution defendant gave assurance of a settlement. *Lapham v. Oakland Circuit Judge*, 170 Mich. 564. But in *Metcalf v. Moore*, 128 Mich. 138, the supreme court sustained the circuit judge in granting a supersedeas and in holding that pendency of chancery proceedings was not an excuse for delay, citing on p. 140, *Douglas v. Manistee Circuit Judge*, 42 Mich. 495 construing the above section. *La Branch v. Herbst*, 192 Mich. 129; 23 D. L. N. 427; 158 N. W. 211.

**(12840). Discharge of Defendant.**

SEC. 25. If any plaintiff shall neglect so to charge any defendant in execution, as required by the two last preceding sections, such defendant may be discharged from custody by a supersedeas, to be allowed by any judge of the court in which such judgment shall have been obtained, unless good cause to the contrary be shown; and after being so discharged, such defendant shall not be liable to be arrested upon any execution which shall be issued upon such judgment.

HISTORY: Re-enacts Sec. 45, R. S. '46, Ch. 107, being C. L. '57 (4546); C. L. '71, (6190); How. 7774; C. L. '97, (10413). Unchanged.

CONSTRUED: "Unless good cause to the contrary be shown." *Douglass v. Manistee Circuit Judge*, 42 Mich. 495; *Metcalf v. Moore*, 128 Mich. 138; *Lapham v. Oakland Circuit Judge*, 170 Mich. 564.

CITED: The defendant may be discharged from custody by a supersedeas unless good cause to the contrary be shown, and such imprisonment and discharge are no satisfaction of the judgment. *Porrett v. Lauer*, 184 Mich. 497; 22 D. L. N. 85; 151 N. W. 619. *La Branch v. Herbst*, 192 Mich. 131.

**(12841). When Execution Against Body to Issue.**

SEC. 26. In those cases in which bail shall have been taken on the arrest of a defendant, and the bail bond shall have been assigned to the plaintiff; and in those cases in which special bail shall have been filed, no execution shall issue against the body of the defendant in such action, until an execution against the goods and chattels, lands and tenements of such defendant, shall have issued to the sheriff or other proper officer of the county in which such defendant was arrested, and shall have been returned unsatisfied, in whole or in part.

HISTORY: Re-enacts Sec. 8, R. S. '46, Ch. 106, being C. L. '57, (4446); C. L. '71, (6082); How. 7667; C. L. '97, (10303). Unchanged.

CITED: *DeMyer v. McGonegal*, 32 Mich. 126; *Fish v. Barbour*, 43 Mich. 22; *Metcalf v. Moore*, 128 Mich. 140. *La Branch v. Herbst*, 192 Mich. 131.

**(12842). Defendant Imprisoned.**

SEC. 27. But if the defendant be imprisoned on execution in another cause, or upon process in the same action, or upon the surrender of such defendant in exoneration of his bail in such action, or if an execution shall have been returned unsatisfied in the cases mentioned in the last section, an execution may, in either case, issue against the body of such defendant.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 106, being C. L. '57, (4447); C. L. '71, (6083); How. 7668; C. L. '97, (10304). Unchanged.  
CITED: Metcalf v. Moore, 128 Mich. 140.

**(12843). Taking Body Invalidates other Executions.**

SEC. 28. When the body of a party shall have been taken on an execution issued for that purpose, no other execution can be issued against him or his property, except in cases especially provided for by law.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 106, being C. L. '57, (4449); C. L. '71, (6085); How. 7670; C. L. '97, (10306). Unchanged.  
CITED: Grosslight v. Wayne Circuit Judge, 127 Mich. 414.

**(12844). Escape.**

SEC. 29. But if any person who shall have been taken on an execution shall escape, he may be retaken by a new execution against his body, or an execution against his property may be issued, in the same manner as if no execution had been previously issued against the body or the property of such person.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 106, being C. L. '57, (4450); C. L. '71, (6086); How. 7671; C. L. '97, (10307). Unchanged.  
CITED: Grosslight v. Wayne Circuit Judge, 127 Mich. 414.

**(12845). Custody of Defendant.**

SEC. 30. Whenever any person shall be arrested by virtue of any execution issued upon any judgment, he shall be safely kept in secure custody, in the manner prescribed by law, at his own expense, until he shall satisfy the execution, or be discharged according to law.

HISTORY: Re-enacts Sec. 47, R. S. '46, Ch. 106, being C. L. '57, (4485); C. L. '71, (6121); How. 7706; C. L. '97, (10344). Unchanged.  
CUSTODY OF PRISONER: See Leach v. Whitbeck, 151 Mich. 327.

**(12846). Person Surrendered.**

SEC. 31. Every person surrendered in exoneration of his bail shall be kept in like manner, until he shall satisfy the judgment rendered against him, or be discharged according to law.

HISTORY: Re-enacts Sec. 48, R. S. '46, Ch. 106, being C. L. '57, (4486); C. L. '71, (6122); How. 7707; C. L. '97, (10345). Unchanged.

**(12847). Death of Person Taken.**

SEC. 32. If any person taken in execution against his body shall die while so charged, the judgment upon which such execution issued shall not be deemed to be extinguished, but may be certified to the judge of probate, and shall be paid in the course of administration in like manner as if no execution had issued on such judgment.

HISTORY: Re-enacts Sec. 34, R. S. '46, Ch. 106, being C. L. '57, (4472); C. L. '71, (6108); How. 7693; C. L. '97, (10331). Unchanged.

**(12848). Effect of Stay of Proceedings.**

SEC. 33. When an execution shall have been issued, an order to stay proceedings thereon, granted by a circuit court commissioner, shall not prevent a levy on property by virtue of such execution, but shall only suspend a sale thereon until the decision of the proper court upon the matter.

HISTORY: Re-enacts Sec. 7 of Act 204 of '81, being How. 7142; C. L. '97, (1070). Unchanged.

**(12849). Bond for Stay.**

SEC. 34. Nor shall any such commissioner grant any order to stay proceedings on any execution against the body of a defendant, unless such defendant shall have executed to the plaintiff, and delivered to such commissioner a bond for the use of such plaintiff in a penalty double the amount required to be collected by such execution, with two sufficient sureties, who shall swear that they are each worth the amount of such penalty, over and above all debts, and property exempt from execution, conditioned that such defendant shall be found within the county to which such execution was directed, so as to be arrested upon any execution that may be issued against his body upon the same judgment, within six months from the date of such bond.

**HISTORY:** Re-enacts Sec. 8 of Act 204 of '81, being How. 7143; C. L. '97, (1071). Unchanged.

**(12850). Filing of Bond.**

**SEC. 35.** Such bond shall be filed by the commissioner in the office of the clerk of the court from which such execution shall have issued, within twenty days after the same shall have been taken; and shall be delivered by such clerk to the person in whose favor the execution was issued, whenever the condition thereof shall be broken.

**HISTORY:** Re-enacts Sec. 9 of Act 204 of '81, being How. 7144; C. L. '97, (1072). Unchanged.

**(12851). What Stated in Order to Stay.**

**SEC. 36.** In every order to stay proceedings on an execution against the body, the fact of a bond having been given according to law shall be stated; and if not so stated, such order shall be void.

**HISTORY:** Re-enacts Sec. 10 of Act 204 of '81, being How. 7145; C. L. '97, (1073). Unchanged.

**(12852). Abstract Books and Papers Liable to Execution.**

**SEC. 37.** All abstract books, maps, plats, charts and other records owned or kept by any person, co-partnership or corporation for the purpose of furnishing abstracts or information concerning the title to lands in this state shall be liable to seizure and sale on execution in like manner as other personal property.

**HISTORY:** Re-enacts Act 197 of '99, p. 308, Eff. Sept. 23. Unchanged.

This statute changed the rule in *Dart v. Woodhouse*, 40 Mich. 399, in which it was held that abstract books were not subject to levy and sale on execution; but it does not make abstract books subject to taxation, *Loomis v. City of Jackson*, 130 Mich. 594.

**CITED:** *Loomis v. City of Jackson*, 130 Mich. 594.

**(12853). Gold or Silver Coin.**

**SEC. 38.** Current gold or silver coin may be taken in execution, and paid to the creditor as money collected, and shall not be exposed to sale thereon.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 106, being C. L. '57, (4459); C. L. '71, (6095); How. 7680; C. L. '97, (10316). Unchanged.

**(12854). Bills or Other Evidences of Debt.**

SEC. 39. Any bills or other evidences of debt, issued and circulated as money, may be taken in execution and paid to the creditor at their par value as money collected, if he will accept them, otherwise they shall be sold as other chattels.

HISTORY: Re-enacts Sec. 22, R. S. '46, Ch. 106, being C. L. '57, (4460); C. L. '71, (6096); How. 7681; C. L. '97, (10317), omitting "by any moneyed corporation." Unchanged.

CITED: *Black v. Ward*, 27 Mich. 194.

**(12855). Sale Subject to Lien.**

SEC. 40. When goods or chattels shall be pledged by way of mortgage or otherwise, for the payment of money, or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge, subject to the lien of the mortgage or pledge existing thereon; and the purchaser at such sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the terms and conditions of the pledge, at any time before the actual foreclosure of such mortgage or pledge, and on such payments or performance, or a full tender thereof, shall thereupon acquire all the right, interest and property which the defendant in execution would have had in such goods or chattels if such mortgage or pledge had not been made.

HISTORY: Re-enacts Sec. 23, R. S. '46, Ch. 106, being C. L. '57, (4461); As Am. '61, p. 452, Act 214, Eff. June 15; C. L. '71, (6097); How. 7682; C. L. '97, (10318). Unchanged.

CONSTRUED: C. L. '97, (10318), construed, in *Munger v. Sanford*, 144 Mich. 323, 327; *Kratzmer v. Detroit Lumber Co.*, 195 Mich. 575.

**(12856). Executions Against Corporations.**

SEC. 41. Executions against corporations, when levied upon any corporate property, shall be levied in the same manner as other executions are levied, except in cases otherwise provided by law.

HISTORY: Re-enacts Sec. 43, R. S. '46, Ch. 106, being C. L. '57, (4481); C. L. '71, (6117); How. 7702; C. L. '97, (10340). Unchanged.

CHATTEL MORTGAGED PROPERTY: Prior to the amendment of '61, such property could not be taken. See *Tannahill v. Tuttle*, 3 Mich. 104; *Eggleston v. Mundy*, 4 Mich. 295; *Bacon v. Kimmel*, 14 Mich. 206; *Haynes v. Leppig*, 40 Mich. 605. But levy of attachment and execution upon chattel mortgaged property is expressly authorized

by this statute and such levy may be made at any time before the foreclosure (*Nelson v. Ferris*, 30 Mich. 497; *Cary v. Hewitt*, 26 Mich. 228); the right continues till redemption is cut off (*Haynes v. Leppig*, 40 Mich. 605); it is only the right of redemption that can be taken (*Bayne v. Patterson*, 40 Mich. 659); this leviable right pertains to the whole property and is not apportionable (*Worthington v. Hanna*, 23 Mich. 534); and the whole interest may be taken on attachment for the purpose of making and perfecting the levy and it may be held at least a sufficient time for that purpose; and under an execution the officer has the right to take possession of the goods and chattels from the mortgagor, and detain them in safe and convenient custody, as against the mortgagee, for the time prescribed by law for bringing them to sale on the execution (*Cary v. Hewitt*, 26 Mich. 228). *Wilson v. Montague*, 57 Mich. 640. Levy may be made on chattels mortgaged or pledged. *Worthington v. Hanna*, 23 Mich. 533; *McMillan v. Larned*, 41 Mich. 521; *Smith v. Menominee Circuit Judge*, 53 Mich. 563; *Ganong v. Green*, 71 Mich. 7; *Mueller v. Provo*, 80 Mich. 481; *Anderson v. Cook* (note), 100 Mich. 623. Such property is attachable because the statute makes it so. But, unless the attaching creditor disputes the validity of the mortgage, the officer is under obligation to surrender possession to the mortgagee on demand, after his inventory and appraisal are completed. *King v. Hubbell*, 42 Mich. 604. If the officer does not recognize the right of the mortgagee he need not so levy, and the validity of the mortgage may be tested in a suit against the officer. *Williams v. Raper*, 67 Mich. 427. Replevin lies at once, and without demand, in favor of a mortgagee against an officer who attaches the mortgaged property in defiance of the mortgage, which he claims to be void as against the attaching creditor. *Merrill v. Denton*, 73 Mich. 628. See *Hyde v. Shank*, 77 Mich. 517; *Rosenfield v. Case*, 87 Mich. 295; *Walker v. White*, 60 Mich. 423. An officer who levies subject to a mortgage can afterwards change the levy. *Wallen v. Rossman*, 45 Mich. 333. An execution creditor, as soon as he has acquired a lien upon chattels by levy of execution, can redeem them from the mortgage, by payment of the amount due, and become subrogated to the rights of the mortgagee. *Lucking v. Wesson*, 25 Mich. 443. When an officer levies on mortgaged property and does not find it all together, he must have time after levying on part, to find and levy on the remainder, if within his bailiwick. *Baldwin v. Talbot*, 46 Mich. 19; *Harvey v. McAdams*, 32 Mich. 477.

**WHEN LEVY MAY BE MADE:** At any time before foreclosure. *Wilson v. Montague*, 57 Mich. 640; *Nelson v. Ferris*, 30 Mich. 497; *Cary v. Hewitt*, 26 Mich. 228; *Macomber v. Saxton*, 28 Mich. 516. Possession of the whole may be taken temporarily for the purposes of a levy. *Cary v. Hewitt*, 26 Mich. 228; *Macomber v. Saxton*, 28 Mich. 516; *Nelson v. Ferris*, 30 Mich. 497; *Haynes v. Leppig*, 40 Mich. 602; *Smith v. Menominee Circuit Judge*, 53 Mich. 563.

**ON MORTGAGOR'S INTEREST:** Only the mortgagor's interest, or right of redemption, can be taken. *Wilson v. Montague*, 57 Mich. 640; *Bayne v. Patterson*, 40 Mich. 659; *Munger v. Sanford*, 144 Mich. 327. The levy must be subordinate to the mortgagee's right. *Smith v. Menominee Circuit Judge*, 53 Mich. 563; *Worthington v. Hanna*, 23 Mich. 530.

**HOW SALE MADE:** If made without first paying off the mortgage,

the sale must be made of the goods in gross, subject to the mortgagee's lien. *Worthington v. Hanna*, 23 Mich. 530; *King v. Hubbell*, 42 Mich. 597; *Haynes v. Leippig*, 40 Mich. 602; *Baldwin v. Talbot*, 46 Mich. 19; *Laing v. Perrott*, 48 Mich. 298; *Smith v. Menominee Circuit Judge*, 53 Mich. 563; *Ganong v. Green*, 71 Mich. 7; *Harvey v. McAdams*, 32 Mich. 472; *Munger v. Sanford*, 144 Mich. 327. One who purchases property, while under a valid levy, is estopped from denying the levy. *Nelson v. Ferris*, 30 Mich. 499.

**(12857). Real and Personal Chattels.**

SEC. 42. All chattels, real or personal, and all other goods liable to execution by the common law, may be taken and sold thereon, except as is otherwise provided by law.

HISTORY: Re-enacts Sec. 25, R. S. '46, Ch. 106, being C. L. '57, (4463); C. L. '71, (6099); How. 7684; C. L. '97, (10320). Unchanged.

CONSTRUED: *Buhl v. Kenyon*, 11 Mich. 251. See notes to Compilers' Sections (11523)-(12897). See *Brown v. Weeks*, 195 Mich. 40.

**Exemptions.**

**(12858). What Property Exempt.**

SEC. 43. The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court:

1. All sewing machines, not exceeding one such machine for each family, all spinning wheels, weaving looms with the apparatus, and stoves put up and kept for use in any dwelling house;

2. A seat, pew or slip, occupied by such person or family, in any house or place of public worship;

3. All cemeteries, tombs and rights of burial, while in use as repositories of the dead;

4. All arms and accoutrements required by law to be kept by any person; all wearing apparel of every person or family;

5. The library and school books of every individual and family, not exceeding one hundred and fifty dollars, and all family pictures;

6. To each householder, ten sheep, with their fleeces, and the yarn or cloth manufactured from the same; two cows, five swine, and provisions and fuel for comfortable subsistence of such householder or family for six months;

7. To each householder, all household goods, furniture and utensils, not exceeding in value two hundred and fifty dollars;

8. The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things, to enable any person



to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars. The word team in this subdivision shall be construed to mean, either one yoke of oxen, a horse, or a pair of horses, as the case may be;

9. A sufficient quantity of hay, grain, feed and roots, whether growing or otherwise, for properly keeping for six months the animals in the several subdivisions of this section exempted from execution, and any chattel mortgage, bill of sale, or other lien created on any part of property above described, except such as is mentioned in the eighth subdivision of this section, shall be void, unless such mortgage, bill of sale or lien be signed by the wife (if he have any) of the party making such mortgage or lien.

**HISTORY:** Re-enacts and merges Sec. 27, R. S. '46, Ch. 106, and Sec. 1 of Act 185 of '49, being C. L. '57, (4465), As Am. '63, p. 286, Act 156, Imd. Eff. Mar. 19, (4493); C. L. '71, (6101)-(6130); How. 7686, 7715; C. L. '97, (10322)-(10323); and Sec. 1 of Act 143 of '61, being C. L. '71, (6132); How. 7717; As Am. '93, p. 45, Act 43, Eff. Aug. 28; C. L. '97, (10359). Modified.

**CONSTITUTIONALITY:** See notes to Constitution of '50, Art. XVI, Section 1.

**EXEMPTION:** Constitutional and statutory provisions exempting property from execution are remedial and are to be construed liberally and beneficially for the debtor. *Hutchinson v. Whitmore*, 90 Mich. 263; *Atvord v. Lent*, 23 Mich. 371; *Stewart v. Welton*, 32 Mich. 60; *Nelson v. Bartholomew*, 45 Mich. 43; *Rosenthal v. Scott*, 41 Mich. 633; *Skinner v. Shannon*, 44 Mich. 87; *Fischer v. McIntyre*, 66 Mich. 682. And these statutes are not to be frittered away by constructions which would destroy their value. *Rosenthal v. Scott*, 41 Mich. 633; *Skinner v. Shannon*, 44 Mich. 87. The question of exemption is determined by the condition of affairs at the time of, and previous to the levy. *O'Donnell v. Segar*, 25 Mich. 375; *King v. Moore*, 10 Mich. 542-3. Retrospective action of exemption laws. *Rockwell v. Hubbell's Adm'rs*, 2 Doug. 197; *Bronson v. Newberry*, Id. 38; *Breitung v. Lindauer*, 37 Mich. 229.

A person who is present at the time of levy, but asserts no claim of title, is estopped from thereafter claiming title. *Zuehlke v. Stone*, 148 Mich. 478. See also *Holmes v. Smith*, 149 Mich. 329. Where the owner of exempt property contracts to sell the same, the debt due from the purchaser is not subject to garnishment, *Cullen v. Harris*, 111 Mich. 20. A garnishee cannot raise the point that the fund is not subject to garnishment because the proceeds of exempt property, such defense being personal to the debtor. *Seltz v. Starks*, 136 Mich. 90.

Where the facts from which to determine, as a question of law, whether certain property is exempt, are undisputed, the question need not be submitted to the jury. *Fischer v. McIntyre*, 66 Mich. 681, citing *Rosenthal v. Scott*, 41 Mich. 632; *Toledo & A. A. R. Co. v. Johnson*, 55 Mich. 456. The requisites necessary to bring a debtor within the exemption privileges of this section are that he shall be a citizen of this

state, and that the property seized shall fall within some of the provisions of this section. *Wood v. Bresnahan*, 63 Mich. 614.

**EXEMPT PROPERTY:** Exempt property may be sold, and the mere fact of its being offered for sale will not deprive the owner of the exemption. But if he buys it and holds it, rather for sale or speculation than for the particular use which alone exempted it, and it is not, in fact, needed or kept for such use, it is not exempt. *O'Donnell v. Segar*, 25 Mich. 373. Creditors cannot attack the transfer of property which the law will not allow them to apply on their claim. *Anderson v. Odell*, 51 Mich. 492; *Rosenthal v. Scott*, 41 Mich. 632; *Freehling v. Bresnahan*, 61 Mich. 541; *Fischer v. McIntyre*, 66 Mich. 683; *Buckley v. Wheeler*, 52 Mich. 1; *Emerson v. Bacon*, 58 Mich. 527. A stranger whose goods are intermingled with those of the execution debtor should designate them to the officer making the levy, and if he fails to do so the latter may levy on the whole. *McCauley v. Hoek*, 159 Mich. 570.

A temporary suspension of business does not deprive a person of his exemption in a stock of goods, etc. *Harris v. Haynes*, 30 Mich. 140. See *O'Donnell v. Segar*, 25 Mich. 367. Property is still exempt while in transit from one place to another in this state. *O'Donnell v. Segar*, 25 Mich. 367. But a resident of Michigan who removes to a foreign state thereby loses the benefit of the Michigan exemption laws, as to any property which may be afterwards found within the state. *McHugh v. Curtis*, 48 Mich. 262. Property exempt from execution is also exempt from garnishee process, at the election of the debtor. *Wilson v. Bartholomew*, 45 Mich. 43. And also from the attachment. *Emerson v. Bacon*, 58 Mich. 526.

**WIFE'S INTEREST:** Special statutory rights of the wife in exempt property. *Smith v. Smith*, 52 Mich. 538; *Freehling v. Bresnahan*, 61 Mich. 540. The law gives the wife a remedy only when the husband fails to claim the exemption. *Harley v. Procunier*, 115 Mich. 53.

**MORTGAGING EXEMPT PROPERTY:** The husband cannot mortgage without his wife's consent, all the cows he owns, because two are exempt; but, since the claim of exemption rests with the husband, he can mortgage two out of five, such action being a selection of those which are not exempt. *Harley v. Procunier*, 115 Mich. 53.

The exemption of household property from sale or mortgage without consent of the wife does not prevent a sale or release of her interest by the wife to the husband or a division of property between husband and wife. *Carpenter v. Carpenter*, 154 Mich. 109.

One partner has a right to execute a chattel mortgage in the firm name to secure or pay partnership debts, and such mortgage is valid as against the exemptions provided for in this section, though some of the partners may not be aware of its execution. *Robards v. Waterman*, 96 Mich. 235, and cases cited. The husband may sell, mortgage or release to the execution creditor his right to the exemption under subd. 8. It is vested solely in him and he may use or dispose of it as he sees fit. *Betz v. Brenner*, 106 Mich. 89; *Charpentier v. Bresnahan*, 62 Mich. 362; *Miller v. Miller*, 97 Mich. 153-4. A sewing machine, though exempt from levy and sale on execution is not covered by the provision forbidding mortgaging, etc., *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639.

**SUBDIVISION 1:** The provision as to sewing machines was for-

merly contained in a separate act, C. L. '97, (10359), for a construction of which, see *Singer Manufacturing Co. v. Cullaton*, 90 Mich. 641.

SUBDIVISION 3: *Avery v. Forest Lawn Cemetery Co.*, 127 Mich. 128.

SUBDIVISION 4: The exemption of wearing apparel is absolute. *Elliott v. Whitmore*, 5 Mich. 536.

SUBDIVISION 6: Whether crops of corn and potatoes recently planted and just becoming visible above ground are exempted as "provisions," etc., *quaere*. *King v. Moore*, 10 Mich. 538; *Parsons v. Kimmel*, 206 Mich. 676.

See *Harley v. Procunier*, 115 Mich. 54; *Feenstra v. Tanis*, 145 Mich. 409.

SUBDIVISION 7: A boarding housekeeper is entitled to the same exemption of household furniture as any other person. *Vanderhorst v. Newton*, 38 Mich. 672. A piano cannot be classed as household goods, furniture or utensils within the meaning of the statute. *Kehl v. Dunn*, 102 Mich. 582.

See *Carpenter v. Carpenter*, 154 Mich. 103.

SUBDIVISION 8: The last sentence of Subdivision 8 was formerly contained in a separate amendatory act. (Sec. 1, Act 185 of '49, C. L. '97, (10323). Afterwards, the legislature in '63 amended this section, leaving Subdivision 8 to stand the same as it did prior to '49. But in '85 the legislature recognized and amended Section 2 of Act 185 of '49, C. L. '97, (10324). See *Boyle v. Walsh*, (note) 105 Mich. 238. The object of this exemption is to encourage men who may have become unfortunate, by preventing them from being deprived of the means of making an honest living. *Harris v. Haynes*, 30 Mich. 141-2; *Betz v. Brenner*, 106 Mich. 89. In order to be entitled to this exemption it must appear in what business the owner of the property was wholly or principally engaged. *Murphy v. Mulvena*, 108 Mich. 347.

When the debtor is carrying on several kinds of business, the exemption covers only such property as is essentially necessary to carry on that particular business in which he is wholly or principally engaged. *Morrill v. Seymour*, 3 Mich. 64; *Kenyon v. Baker*, 16 Mich. 376. The words "principally engaged" are not to be construed with reference to the productiveness or profit of one kind of business over another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party chiefly relies for a livelihood, and that engrosses the most of his time and attention. *Smalley v. Masten*, 8 Mich. 530. It is a somewhat too narrow construction of this statute to confine it to articles absolutely necessary to carrying on business. *Kenyon v. Baker*, 16 Mich. 376; *Stewart v. Welton*, 32 Mich. 59. It is not necessary that the property should in all cases be used, in the strict sense, by the debtor in his principal business in order to be exempt. *Stewart v. Welton*, 32 Mich. 59. Each member of a firm against which execution is levied may claim the exemption allowed. *Skinner v. Shannon*, 44 Mich. 86. See *Worman v. Giddey*, 30 Mich. 151; *Reed v. Gould*, 93 Mich. 359; *Rogers v. Raynor*, 102 Mich. 473.

The following property has been held exempted under this subdivision: A wagon made for sale during leisure, by one whose principal business was blacksmithing. *Stewart v. Welton*, 32 Mich. 56. A quantity of shingles and lumber, held by a carpenter about to build a

homestead. *Hutchinson v. Roe*, 44 Mich. 389. Dentist's tools. *Maxon v. Perrott*, 17 Mich. 332. Seed wheat necessary for a farmer. *Stillson v. Gibbs*, 46 Mich. 215. A two-year-old halter broken colt, kept by a farmer with reference to its use for farming purposes. *Tuningly v. Butcher*, 106 Mich. 35.

But an unbroken two year old colt, not used nor shown to be intended to be used in the business of the owner, who keeps two other horses, is not exempt from execution. *Hogan v. Neumeister*, 117 Mich. 498.

As "stock" a farmer can claim his exemption from "hay, oats, corn, a yearling steer, a heifer, two spring calves, some clover seed and a quantity of cornstalks." *Hutchinson v. Whitmore*, 90 Mich. 263. Machinery used in the manufacture of lumber and shingles. *Wood v. Bresnahan*, 63 Mich. 614. The following have been held not exempt: A horse and buggy purchased by a person engaged in the business of an inventor and in selling machines made under his inventions, for speculative purposes only and not necessary in his business and held by him for the purpose of sale. *Boyle v. Walsh*, 105 Mich. 237.

Where a business is conducted in violation of law, the owner is not entitled to exemptions to carry on the same. *McCarthy v. Payne*, 141 Mich. 571. A pool table is not an apparatus necessary to carry on the business of a saloon-keeper. *Groozen v. Phillips*, 49 Mich. 7. When a debtor abandons his business or occupation and absconds, the property used in his business or occupation is no longer exempt. *Miller v. Miller*, 97 Mich. 151; *Betz v. Brenner*, 106 Mich. 89; *J. L. Hudson Co. v. No-Name Hat Co.*, 174 Mich. 109. The cows kept for use on a farm, if the farmer is a householder, are exempt under both subdivisions 6 and 8. *Feenstra v. Tanis*, 145 Mich. 409. The right to set off \$250 worth of stock in trade is not an absolute right but a purely personal privilege, which must be exercised at the time of the levy. *J. L. Hudson Co. v. No-Name Hat Co.*, 174 Mich. 113. See *Burrows v. Brooks*, 113 Mich. 309. A heifer 14 months old and bred at the time of sale was a cow in the meaning of the exemption statute. *Parsons v. Kimmel*, 206 Mich. 676.

NOTE: See an exhaustive note on the decisions under Subdivision 8 in 105 Mich. 238-57.

SUBDIVISION 9: This exemption cannot extend beyond what is sufficient to keep such of the animals as the defendant may have at the time of the levy. This exemption is given to render that of the animals practically beneficial. *King v. Moore*, 10 Mich. 540. As to chattel mortgages, etc., see note to this section. "Mortgaging exempt property," and notes to Compilers' Section (12356). See also *Miller v. Miller*, 97 Mich. 153; *Harley v. Procunier*, 115 Mich. 54; *Holmes v. Smith*, 149 Mich. 327; *Parsons v. Kimmel*, 206 Mich. 677.

#### (12859). Certain Property not Exempt From Execution for Purchase Price.

SEC. 44. The property exempted in the eighth subdivision of the preceding section shall not be exempt from any execution issued upon a judgment rendered for the purchase money for the same property, and any sale of such property after the commencement of a suit to recover the purchase price thereof,

and the filing of the notice hereinafter required, shall be null and void as against such an execution: *Provided*, The plaintiff in any suit shall file or cause to be filed with the clerk of the city, village, or township in which the owner of such property resides, a notice in which he shall state the time when such suit was commenced, the amount claimed to be due, that the suit is brought to recover the purchase money for the property, a description of the property sought to be reached, and the name of the defendant. At the time of filing such notice the party filing the same shall pay to the clerk the sum of twenty-five cents, and said clerk shall endorse upon such notice the date of filing the same and make the same record as in case of chattel mortgages.

**HISTORY:** Re-enacts in substance Section 2 of Act 185 of '49; C. L. '57, (4494); C. L. '71, (6131); How. 7716; As Am. '85, p. 214, Act 159, Eff. Sept. 19; C. L. '97, (10324). See notes to sub-division 8 of the last preceding section. Unchanged.

**CONSTITUTIONALITY:** See *Roberts v. McGur*, 82 Mich. 225.

**CONSTRUED:** (a)—The vendee's right of alienation is not affected until the statutory notice is filed. (b)—The effect of the statute is to take the property out of the class of exempt property entirely, so far as the remedy of the vendor to collect the purchase price is concerned, and he may follow it into the hands of a fraudulent transferee, and subject it to the satisfaction of his judgment. (c)—The statute does not, in terms, require that the judgment shall recite that the recovery is for purchase money, and that question may be litigated whenever it arises, as between the parties or their privies. *Lillibridge v. Walsh*, 97 Mich. 459. The statute does not create a lien upon the property, but applies to the remedy only. *Id.* 104 Mich. 153. It is also construed as follows: (a)—The statute does not create a lien upon the property, but applies to the remedy for the recovery of the purchase money for which it was sold. (b)—The provision permitting notice to be filed after suit commenced is analogous to a *lis pendens* filed in other cases, and is designed to protect and preserve the status of the property pending suit. (c)—There is no reason why the statute should not apply to the remedy in cases where security is taken as well as where it is not. *Roberts v. McGur*, 82 Mich. 221. Only the vendor of the property can seize it under an execution on a purchase money judgment. *Shepard v. Cross*, 33 Mich. 96. Goods entering into a merchant's stock in trade are not exempt from attachment to satisfy claims for the purchase price. *Gottzman v. Chipman*, 125 Mich. 61. Cows, in addition to the two specifically exempt under subdivision 6 of the last preceding section, are exempt to the value of \$250 under subdivision 8 and may therefore be taken on execution for their purchase price. *Feenstra v. Tanis*, 145 Mich. 409. See *Vanderhorst v. Newton*, 38 Mich. 672. See note to subdivision 8 of the last preceding section. *Belding-Hall Mfg. Co. v. Smith*, 125 Mich. 60.

**EXEMPTION FOR FAMILY:** These exemptions are intended for

the benefit of the family, and not merely for some member of it. *Shepard v. Cross*, 33 Mich. 98.

**(12860). Building and Loan Shares.**

SEC. 45. The shares held by any member, being a householder, of any association incorporated under the provisions of act number seventeen of the Public Acts of nineteen hundred one, relating to mutual building and loan associations, shall be exempted from levy and sale on execution or attachment to the amount of one thousand dollars in such shares, at the par value thereof: *Provided*, That such exemption shall not apply to any person who shall have a homestead exempted under the general laws of this state.

HISTORY: This section follows the phraseology of Sec. 16 of Act 50 of '87, being How. 3981p; C. L. '97, (7589), and Compilers' Section (10010). Modified.

NOTE: Act 17 of '01, referred to in the above section, is amendatory of Act 50 of '87, (see history above); Compilers' Sections (9995) et seq.

CONSTRUED: Shares of building and loan stock to the amount of \$1,000 are exempt where the owners only homestead interest is that which he has in property owned by the wife and occupied jointly with her. *Morley Bros. v. National Loan & Investment Co.*, 120 Mich. 171.

**(12861). Inventory and Appraisal.**

SEC. 46. When a levy shall be made upon property of any class or species, which is exempt by law from execution to a specified amount or value, the officer levying such execution, shall make an inventory of so much of such property belonging to the person against whom the execution was issued, as shall be sufficient in the judgment of such officer, to cover the amount of such exemptions, and satisfy the execution, and cause the same to be appraised at its cash value, by two disinterested freeholders of the township or city where the property may be, on oath to be administered by him to such appraisers.

HISTORY: Supersedes and re-enacts in part Sec. 28, R. S. '46, Ch. 106, being C. L. '57, (4466); C. L. '71, (6102); How. 7687; C. L. '97, (10325). Modified.

LEVY UPON EXEMPT PROPERTY: Heretofore when a levy was made upon property of a class or species which was exempt by law from execution to a specified amount or value, it has been required that the officer levy upon all the property of the defendant belonging to such class, and the officer must inventory and appraise the same. In case the judgment debtor had a large amount of such property in comparison to the size of the judgment, this was a hardship upon both plaintiff and defendant. It is now provided that the officer shall

levy upon and make an inventory of so much of such property as shall be sufficient in his judgment to cover the amount of such exemptions and satisfy the execution. Subsequent proceedings are the same as heretofore.

**INVENTORY AND APPRAISAL:** If the officer would protect himself against the consequences of an action for seizing exempt goods, he should cause an inventory and appraisal to be made, and a selection therefrom. *Elliott v. Whitmore*, 5 Mich. 536-7; *Wyckoff v. Wyllis*, 8 Mich. 49; *Ostrander v. Packer*, 35 Mich. 430; *Vanderhorst v. Bacon*, 38 Mich. 669; *Sheldon v. Rounds*, 40 Mich. 427; *Stilson v. Gibbs*, 53 Mich. 282; *Hutchinson v. Whitmore*, 90 Mich. 262; *Parker v. Canfield*, 116 Mich. 94. The levy is invalid if the inventory is not made and the defendant allowed to make his selection. *Town v. Elmore*, 38 Mich. 305. When the officer fails to make such inventory and appraisal, and thereby deprives the debtor of the opportunity to make selection before sale, he may elect, to take the property sold, and sue for its value. *Stilson v. Gibbs*, 53 Mich. 282; *Wyckoff v. Wyllis*, 8 Mich. 48; *Town v. Elmore*, 38 Mich. 305. Where it is important to the debtor's business to have the benefit of his exemptions, the officer is bound to act promptly in setting them off to him. *Handy v. Clippert*, 50 Mich. 355. As to the delay in making inventory or appraisal. *King v. Moore*, 10 Mich. 545. An interested party cannot be made an appraisor. *Bayne v. Patterson*, 40 Mich. 658. The proper place for making the inventory and appraisal is where the goods are found. *Vanderhorst v. Bacon*, 38 Mich. 673. When the statute is fully complied with. *Jones v. Peek*, 101 Mich. 389. As to the necessity of searching for goods of the same species in other counties. *Alvord v. Lent*, 23 Mich. 369. It is not alone sufficient that the property belongs to a species made exempt, but the defendant's status must also be such as to entitle him to the exemption. *Ferguson v. Washer*, 49 Mich. 390. It is not necessary for the debtor to claim the property as exempt when the levy is made; the statute is all the notification the officer needs. *Vanderhorst v. Bacon*, 38 Mich. 672. See *Williams v. Brown*, 137 Mich. 574. The provisions as to inventory, appraisal and selection are equally applicable to justice and circuit courts. *Michels v. Stork*, 44 Mich. 4. Control of assignee in bankruptcy over exempt property. *Sheldon v. Rounds*, 40 Mich. 425.

**CITED:** *Murphy v. Mulvena*, 108 Mich. 349.

#### (12862). Selection of Exemption.

**SEC. 47.** Upon such inventory and appraisal being completed the defendant in execution, or his authorized agent, may select from such inventory an amount of such property not exceeding, according to such appraisal, the amount or value exempted by law from execution; but if neither such defendant nor his agent shall appear and make such selection, the officer shall make the same for him.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 106, being C. L. '57, (4467); C. L. '71, (6103); How. 7688; C. L. '97, (10326). Unchanged.

**SELECTION:** See notes to the preceding section. *Bendetson v. Moody*, 100 Mich. 557. The debtor may make his own selection of property under Subd. 8, Compilers' Section (12858). *Town v. Elmore*,

38 Mich. 305. Wyckoff v. Wyllis, 8 Mich. 49. A married woman who supports her family, or contributes to its support by the employment of a team may claim the benefit of the exemption of a team. McHugh v. Curtis, 48 Mich. 262. Right of selection when part of the property is encumbered. Bayne v. Patterson, 40 Mich. 658; Baldwin v. Talbot, 43 Mich. 11. The execution debtor is not precluded from making his selection, because he may happen to have property elsewhere which is not levied on. Baldwin v. Talbot, 43 Mich. 13. A party claiming exemptions or an adverse interest in property levied upon must act in good faith and should, if present, inform the officer as to such interest. Zuehlke v. Stone, 148 Mich. 478; McCausey v. Hoek, 159 Mich. 578. See also McCormick v. Kistler, 175 Mich. 425. If several partners claim the same property, the officer setting aside the exempt property may select for them. Skinner v. Shannon, 44 Mich. 86. The statute is fully complied with when the appraisal has been made, and defendant is served with the inventory and tendered the use of the appraisal to make his selection. Jones v. Peek, 101 Mich. 391. If the execution debtor is absent when the levy is made, the officer may make the selection. Murphy v. Mulvena, 108 Mich. 349. Where no duty of selection is imposed upon the officer, the debtor waives the exemption if he fails to demand it. Williams v. Brown, 137 Mich. 574. See Vanderhorst v. Bacon, 38 Mich. 672.

CITED: McCormick v. Kistler, 175 Mich. 425.

#### (12863). Compensation of Appraisers.

Sec. 48. The appraisers mentioned in the forty-sixth section of this chapter, shall be entitled to two dollars per day each for their services, and six cents per mile for traveling, in going only, for which the plaintiff in execution shall be liable to them, and the amount of their travel and fees shall be collected upon the execution.

HISTORY: Re-enacts Sec. 30, R. S. '46, Ch. 106, being C. L. '57, (4468); C. L. '71, (6104); How. 7689; C. L. '97, (10327), changing the phraseology slightly and also the amount of the fees. Modified.

#### (12864). Selection of Exempt Animals.

Sec. 49. Whenever the defendant in an execution shall have cows, sheep, swine, or other animals or articles, some of which are exempt by law from sale on execution, and some of which are not so exempt, the officer may take all such horses, cows, sheep, swine or other animals or articles into his possession, and the defendant or his authorized agent may, immediately, on being notified of the levy, select so many thereof as are exempt by law from execution, but if the defendant be absent, or neglect to make such selection on being notified, the officer shall make the same for him.

HISTORY: Re-enacts Sec. 31, R. S. '46, Ch. 106, being C. L. '57, (4469); C. L. '71, (6105); How. 7690; C. L. '97, (10328). Unchanged.



CONSTRUED: Zuehlke v. Stone, 148 Mich. 478; Feenstra v. Tanis, 145 Mich. 410; Murphy v. Mulvena, 108 Mich. 349; King v. Moore, 10 Mich. 541-2. See notes to Compilers' Sections (12861)-(12862).

**(12865). Payment of Exemption in Money.**

**SEC. 50.** Whenever a levy is made upon any article, belonging to a class or species which is exempt from execution to a specified amount or value, and the value thereof as determined by the appraisal, shall be in excess of the amount of the exemption allowed therein to the defendant in execution, levy and sale thereof may be made under the execution in the ordinary way, and unless the amount of the exemption shall have been claimed or set off in other property or waived, the officer shall pay to the defendant in execution, the amount of such exemption, in money from the proceeds of the sale, and the balance of such proceeds shall be applied towards the satisfaction of the execution. If at the sale no bid shall be made for such property, in excess of the amount of the exemption allowed therein, such property shall not be sold, but shall be returned to the defendant. If the defendant in execution shall before such sale, pay to the officer the difference between the appraised value of such property, and the amount of the exemption therein, not to exceed the amount due on such execution with costs of such levy, to be applied upon the execution, such property shall not be sold, but shall be returned to the defendant: *Provided*, That if after such officer shall have completed the levy upon such property, the defendant in execution shall give to such officer a sufficient bond to be approved by him, conditioned that said defendant will deliver said property to such officer or before the time of sale, pay to him the difference between the appraised value of such property, and the amount of his exemption, not to exceed the amount due on such execution with costs accrued, then such officer may permit such defendant to have possession of such property during the period intervening between the making of the levy and the time of sale.

**HISTORY:** New section.

**LEVY UPON ARTICLE BELONGING TO EXEMPT CLASS:** No provision has heretofore existed directing the method of procedure, when a levy is made upon an article of personalty belonging to an exempt class, but worth more according to the appraisal than the amount of the exemption. A procedure has been provided in such cases substantially uniform with the procedure with reference to levy upon homesteads worth more than \$1,500.00.

**(12866). Notice of Sale.**

**SEC. 51.** No sale of any goods or chattels shall be made by virtue of any execution, unless at least ten days previous notice of such sale shall have been given, by fastening up written or printed notices thereof, in three public places in the city or township where such sale is to be had, and specifying the time and place where the same is to be had.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 106, being C. L. '57, (4462); C. L. '71, (6098); How. 7683; C. L. '97, (10319), inserting "city or." Unchanged.

**CONSTRUED:** As to officer's discretion in holding property before sale, expense of keeping, etc., see *Bird v. Perkins*, 33 Mich. 28, 32. An officer has large discretion as to time, place and manner of sale. *Stilson v. Gibbs*, 40 Mich. 42. But cannot materially change the form of the property to fit it for market, as to thresh wheat. *Id.* A sale prematurely made is invalid. *Wienskawski v. Wisner*, 114 Mich. 271. No title can be gained on execution sale, to property not levied upon nor included in the notice of sale. *Dallavo v. Morse*, 114 Mich. 675.

**(12867). Selling of Personal Property.**

**SEC. 52.** No personal property shall be exposed for sale on execution, unless the same be present and within the view of those attending such sale; and it shall be offered for sale in such lots and parcels as shall be calculated to bring the highest price.

**HISTORY:** Re-enacts Sec. 32, R. S. '46, Ch. 106, being C. L. '57, (4470); C. L. '71, (6106); How. 7691; C. L. '97, (10329). Unchanged.

**SALE:** The property must be present and exposed to the view of those attending the sale. *Tannahill v. Tuttle*, 3 Mich. 114; *Perkins v. Spaulding*, 2 Mich. 157; *Winfield v. Adams*, 34 Mich. 437. If made without the sheriff's bailiwick, and not in view of the bidders, the sale conveys no title. *Baker v. Casey*, 19 Mich. 220. It is the officer's duty to sell the property in such lots or parcels as to command the highest price; if he wilfully sacrifices it, he is liable to the party injured. But he has large discretion and is not required to sell each particular article separately. *Perkins v. Spaulding*, 2 Mich. 161. Irregularities in the sale must be corrected by application to the court issuing the writ, to set the sale aside. *Cavanaugh v. Jakeway*, Walk. 344. Also for a sale for an inadequate price. *Blair v. Compton*, 33 Mich. 414. A party complaining of an excessive levy should move, before sale, to have it set aside. *Campau v. Godfrey*, 18 Mich. 27. Fraudulent sale. *Aldrich v. Maitland*, 4 Mich. 205. A sheriff has no right to continue to sell goods, on which he has levied, after the execution is satisfied. *Allen v. Kinyon*, 41 Mich. 281. A sheriff who attempts to sell goods covered by a writ of replevin, previously served upon himself or his receptor, becomes a wrongdoer. *Mayhue v. Snell*, 37 Mich. 305.

**(12868). Postponement of Sale.**

SEC. 53. If, at the time appointed for the sale of any real or personal property on execution, the officer shall deem it expedient, and for the interest of all persons concerned, to postpone the sale for want of purchasers or other sufficient cause, he may postpone the same from time to time until the sale shall be completed; and in every such case he shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement be for a longer time than twenty-four hours, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

HISTORY: Re-enacts Sec. 35, R. S. '46, Ch. 106, being C. L. '57, (4473); C. L. '71, (6109); How. 7694; C. L. '97, (10332). Unchanged.

**(12869). Refusal to Take Property.**

SEC. 54. If the highest bidder for any article at any sale on execution shall refuse to take and pay for it, the officer shall sell the same again at the same time, or within ten days thereafter, giving notice of the second sale, and he shall account from what he shall receive on the second sale, and for any damages that may be recovered of the first bidder, for any loss on the resale, as for so much received on the execution.

HISTORY: Re-enacts Sec. 53, R. S. '46, Ch. 106, being C. L. '57, (4491); C. L. '71, (6127); How. 7712; C. L. '97, (10350). Unchanged.

**(12870). Growing Grain or Unharvested Crops.**

SEC. 55. When a levy shall be made upon grain while growing, or on any unharvested crops, by virtue of any execution, the officer making such levy shall file a notice of said levy in the office of the township clerk of the township, or city clerk or recorder of the city where such grain or crops are at the time of making such levy; and such clerk or recorder shall file said notice in his office, in the same manner as he is required by law to file a chattel mortgage; and such notice shall be constructive evidence to all persons of the interest of the plaintiff in the execution, and shall be entitled to the same fees therefor, to be paid by the plaintiff in the execution, and shall be collected as costs in the case, and no sale of said crops or grain shall be made until the same shall be ripe or fit to be harvested, and any levy thereon by virtue of an ex-

ecution issued from a circuit court, shall be continued beyond the return day thereof, if necessary, and remain in life, and the execution thereof may be completed at any time within thirty days after such grain or other unharvested crops shall be ripe or fit to be harvested.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 106, being C. L. '57, (4464); C. L. '71, (6100); As Am. '79, p. 172, Act 184, Eff. Aug. 30; How. 7685; C. L. '97, (10321); with a slight change in phraseology and also omitting, "or by a justice of the peace" in relation to the continuation beyond the return day.

**CONSTRUED:** Growing crops, though part of the realty, are treated as personalty for the purposes of levy and sale on execution. *Preston v. Ryan*, 45 Mich. 174. A debtor cannot, by a fraudulent sale of the land, deprive a creditor of the right to levy upon the growing crops. *Pierce v. Hill*, 35 Mich. 194. See also *Friyer v. McNaughton*, 110 Mich. 22.

#### (12871) Perishable Property.

**SEC. 56.** Whenever the sheriff of any county shall, by virtue of any execution, issued by a court of record, levy upon any peaches, blackberries, raspberries, strawberries, or other perishable property, he shall proceed to sell the same at such time, place or manner as he may deem most beneficial for the interest of the defendant.

**HISTORY:** Re-enacts Sec. 1 of Act 143 of '61, being C. L. '71, (6134); How. 7718; As Am. '83, p. 95, Act 102, Imd. Eff. May 18; C. L. '97, (10360); As Am. '01, p. 90, Act 59, Eff. Sept. 5; As Am. '13, p. 103, Act 70, Eff. Aug. 14; omitting "attachment or." Modified.

*Jones v. Bloomgarden*, 143 Mich. 330.

#### (12872). Order of Court for Sale.

**SEC. 57.** No sale shall be made under the provisions of the preceding section, except upon the written order of the court, from which process shall have been issued, authorizing such sale at such time, place and manner as said court shall decree most beneficial for the benefit of defendant: *Provided*, That the court shall direct that notice be given to the defendant, or his agent, of the time and place of such sale, and the court shall direct how the notice shall be given.

**HISTORY:** Re-enacts Sec. 3 of Act 107 of '71; As Added '01, p. 90, Act 59, Eff. Sept. 5 (this section, however, was not referred to or included in the title of such Act of '01; As Am. '13, p. 103, Act 70, Eff. Aug. 14, with a slight change in phraseology. Unchanged.

**Levy on Corporate Shares, Except as Expressly Exempted by Law.**

**(12873). How Taken.**

**Sec. 58.** Any share or interest of any stockholder in any corporation, that is or may be incorporated under the authority of any law of this state, unless expressly exempted by law, may be attached or taken in execution and sold in the manner hereinafter provided.

**HISTORY:** Supersedes Sec. 38, R. S. '46, Ch. 106, being C. L. '57, (4476); C. L. '71, (6112); How. 7697; As Am. '93, p. 148, Act 109, Eff. Aug. 28; C. L. '97, (10335); As Am. '03, p. 347, Act 219, Eff. Sept. 17. Modified.

**CONSTRUED:** Shares of corporate stock are at the common law intangible entities and not leviable. They cannot be subjected to legal process without specific legislation prescribing in substance all necessary procedure. *VanNorman v. Jackson* Circuit Judge, 45 Mich. 208. Stock issued by an association for "yachting, hunting," etc., under Compilers' Sections (10098)-(10104) are not subject to levy and sale under this section. *Lyon v. Denison*, 80 Mich. 371. A certificate of stock in possession of one holding the same for the owner is subject to garnishment. *Old Second Nat'l Bank v. Williams*, 112 Mich. 567. Shares of stock in which the debtor has only a beneficial interest are not subject to attachment. *Bank v. Supervisors*, 97 Mich. 631. See also *Blair v. Compton*, 33 Mich. 425; *Newberry v. Iron Co.*, 17 Mich. 141.

**NOTED:** (C. L. '97, 10335) *Feige v. Burt*, 118 Mich. 247; *Scripps v. Crawford*, 123 Mich. 178.

**(12874). Certificate of Shares to be Furnished.**

**Sec. 59.** The officer of any company who is appointed to keep a record or account of the shares or interest of the stockholders therein or in whose office there is required to be kept any list or statement showing the stockholders of such corporation and the number of shares held by each or their interest therein, shall upon exhibiting to him the attachment or execution be bound to give the officer a certificate of the number of shares or amount of the interest held by the defendant named in such attachment or the judgment debtor.

**HISTORY:** This section re-enacts Sec. 40, R. S. '46, Ch. 106, being C. L. '57, (4478); C. L. '71, (6114); How. 7699; As Am. '93, p. 148, Act 109, Eff. Aug. 28; C. L. '97, (10337), changing "the company" to "any company." Modified.

**CONSTRUED:** *Blair v. Compton*, 33 Mich. 435; *VanNorman v. Jackson* Circuit Judge, 45 Mich. 209.

**(12875). Copy of Execution on Stock to be Left With Clerk.**

**Sec. 60.** Whenever any corporate shares of stock shall be

attached or taken in execution, the officer shall leave a copy of the attachment or execution certified by him with the clerk, treasurer, cashier, or agent of the corporation if there be any such officer, and if not then with any officer or person who has, at the time, the custody of the books and papers of the corporation within this state. No attachment or levy upon the shares of stock for which a certificate is outstanding, shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined, or restrained.

**HISTORY:** Re-enacts part of and supersedes Sec. 39, R. S. '46, Ch. 106, being C. L. '57, (4477); C. L. '71, (6113); How. 7698; As Am. '93, p. 148, Act 109, Eff. Aug. 28; C. L. '97, (10336), and Sec. 13 of Act 106 of '13, p. 183, Eff. Aug. 14. Modified.

**RESTRAINING ORDER IN A LEVY UPON SHARES OF STOCK:** The negotiable instruments law provides that no levy upon shares of stock shall be valid until such certificate is actually seized by the officer, making the levy or surrendered to the corporation, which issued it, or its transfer by the holder enjoined. This provision of the negotiable instruments law has been retained in the new act and it has been provided that any court *at law* or equity from which any attachment or execution may be issued shall have full power and authority, upon motion and without notice, to make an order restraining the transfer of any such shares of stock, and upon the service of a certified copy of such order, the same shall be as effectual for all purposes, as though it were an injunction issued by a court of equity.

**POSSESSION OF CERTIFICATE:** Prior to '13 it was not necessary for the officer making the levy to obtain possession of the stock certificates, but before a lawful sale could be made the stock had to be obtained and identified. *Blair v. Compton*, 33 Mich. 425. See Sections 13-14 of Act 106 of '13, Compilers' Sections (11932-3).

**CITED:** (C. L. '97, 10336) *VanNorman v. Jackson* Circuit Judge, 45 Mich. 209; *Feige v. Burt*, 118 Mich. 247.

#### (12876). Restraint of Transfer of Stock.

Sec. 61. Any court of law or equity from which any attachment or execution may have issued, shall have full power and authority upon motion, and without notice, to make an order restraining the transfer of any such shares of stock, and upon the service of a certified copy of such order, the same shall be as effectual for all purposes as though it were an injunction issued by a court of equity. This section shall not be construed to in any way abrogate or limit the jurisdiction of courts of equity as heretofore existing.

**HISTORY:** New section.

See note to Section 60 under black letter title.

**EQUITY JURISDICTION:** See *VanNorman v. Jackson* Circuit Judge, 45 Mich. 204.

**(12877). Purchaser of Shares Entitled to Certificate.**

**Sec. 62.** A copy of the execution and the return thereon, certified by the officer executing the same, shall, within fourteen days after the sale be left with the officer of the company whose duty it may be to keep a record of the transfer of shares; and the purchaser shall thereupon be entitled to a certificate or certificates of the shares bought by him, upon paying the fees therefor, and for recording the transfer.

**HISTORY:** Re-enacts Sec. 41, R. S. '46, Ch. 106, being C. L. '57, (4479); C. L. '71, (6115); How. 7700; C. L. '97, (10338). Unchanged.

**CONSTRUED:** A person proceeding to levy upon stock and sell it upon execution is bound within a reasonable time to have his title perfected, by transfer upon the books of the company, and a party who delays for several years to have such transfer recorded, is estopped, where new interests have intervened, from setting up such claim. *Newberry v. Iron Co.*, 17 Mich. 141.

**CITED:** *VanNorman v. Jackson* Circuit Judge, 45 Mich. 210.

**(12878). Dividends.**

**Sec. 63.** If the shares or interest of the judgment debtor shall have been attached in the suit in which the execution is issued, the purchaser shall be entitled to all the dividends which shall have accrued after the levying of the attachment.

**HISTORY:** Re-enacts Sec. 42, R. S. '46, Ch. 106, being C. L. '57, (4480); C. L. '71, (6116); How. 7701; C. L. '97, (10339). Unchanged.

**CITED:** *VanNorman v. Jackson* Circuit Judge, 45 Mich. 210.

**(12879). When New Execution to Issue.**

**Sec. 64.** If an execution shall be returned satisfied in whole or in part, by the sale of any property which shall afterwards appear not to have belonged to the judgment debtor, or not to have been liable to execution, and if any damages shall be recovered against the judgment creditor, or the officer who served the execution, on account of the seizure and sale of the property, the court may on the application of such judgment creditor, order a new execution to be issued on such judgment, for the amount then remaining justly and equitably due thereon.

**HISTORY:** Re-enacts Sec. 44, R. S. '46, Ch. 106, being C. L. '57, (4482); C. L. '71, (6118); How. 7703; C. L. '97, (10341).

See *Campau v. Detroit Driving Club*, 135 Mich. 575.

**Executions Against Corporations Authorized to Receive Toll.****(12880). Franchise of Toll Companies.**

**SEC. 65.** When any judgment shall be recovered against any turnpike or other corporation authorized to receive toll, the franchise of such corporation, with all the rights and privileges thereof, together with all their corporate property, both real and personal, may be taken on execution, and sold at public action [auction].

**HISTORY:** Re-enacts and supersedes Sec. 9, R. S. '46, Ch. 55, being C. L. '57, (2151); C. L. '71, (3436); How. 4868; C. L. '97, (8535); though such section is not expressly repealed by this act. Unchanged.

**SALE ON EXECUTION:** The authority to sell the franchises of a plank road corporation on execution is derived entirely from the statute, and the sale can be made in no other mode than that pointed out by the statute. *James v. Pontiac & G. P. R. Co.*, 8 Mich. 91. Though the language of this section would seem to authorize a sale of all the franchises of the corporation, yet it is manifest from the twelfth and thirteenth sections (Compilers' Sections (12883)-(12884) that nothing is sold or conveyed but the right to the possession of the road and its fixtures and the right or franchise of receiving the tolls for the time agreed upon. *Joy v. Jackson & M. P. R. Co.*, 11 Mich. 169.

**AUTHORIZED TO RECEIVE TOLL:** A street railway company is a "corporation authorized to receive toll," within the meaning of this section. *McKee v. Grand Rapids St. Ry. Co.*, 41 Mich. 274.

**OTHER CORPORATIONS:** These words mean other corporations having toll-houses and toll-gates, and do not refer to a different character of corporations to which other provisions of this chapter relate. *Ripley v. Evans*, 87 Mich. 228.

**(12881). Proceedings of Officer.**

**SEC. 66.** The officer having such execution against any corporation mentioned in the preceding section, shall, thirty days, at least, before the day of sale of the franchise, or other corporate personal property, give notice of the time and place of sale, by posting up a notice thereof in any township in which the clerk, treasurer, or any one of the directors of such corporation may dwell, and also by causing an advertisement of the sale, expressing the name of the creditor, the amount of the execution, and the time and place of sale, to be inserted three weeks successively in some newspaper published in any county in which either of the aforesaid officers may dwell, if any such there be, and if no newspaper be published in any such county, then in a paper published in an adjoining county.

**HISTORY:** Re-enacts and supersedes Sec. 10, R. S. '46, Ch. 55, being C. L. '57, (2152); C. L. '71, (3437); How. 4869; C. L. '97, (8536).



changing "the State paper" to "a paper published in an adjoining county," though such action is not expressly repealed by this act. Unchanged.

**CONSTRUED:** At common law the franchises of a corporation could not be sold on execution and could be reached only by a proceeding in equity. *James v. Pontiac & G. P. R. Co.*, 8 Mich. 91.

See also *Joy v. Jackson & M. P. R. Co.*, 11 Mich. 169.

**(12882). Adjournment of Sale.**

**SEC. 67.** The officer who may levy any execution, as prescribed in the preceding section, may adjourn the sale from time to time as may be necessary, until the sale shall be completed.

**HISTORY:** Re-enacts and supersedes Sec. 11, R. S. '46, Ch. 55, being C. L. '57, (2153); C. L. '71, (3438); How. 4870; C. L. '97, (8537), though such section is not expressly repealed by this act. Unchanged.

**(12883). Who Considered Highest Bidder for Franchise.**

**SEC. 68.** In the sale of the franchise of any corporation, the person who shall satisfy the execution, with all legal fees and expenses thereon, and shall agree to take such franchise for the shortest period of time, and to receive during that time all such toll as the said corporation would by law be entitled to demand, shall be considered as the highest bidder.

**HISTORY:** Re-enacts and supersedes Sec. 12, R. S. '46, Ch. 55, being C. L. '57, (2154); C. L. '71, (3439); How. 4871; C. L. '97, (8538), though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** *Detroit v. Detroit City Railway Co.*, 76 Mich. 427-8. As to the nature of this sale on execution, see *James v. Pontiac & G. P. R. Co.*, 8 Mich. 93; *Joy v. Jackson & M. P. R. Co.*, 11 Mich. 169; *Hackley v. Mack*, 60 Mich. 604.

**(12884). What Transferred by Officer's Return.**

**SEC. 69.** The officer's return on such execution shall transfer to the purchaser all the privileges and immunities which by law belong to such corporation, so far as relates to the right of demanding toll; and the officer shall, immediately after such sale, deliver to the purchaser possession of all the toll houses and gates belonging to such corporation, in whatever county the same may be situated; and the purchaser may thereupon demand and receive all the toll which may accrue during the time limited by the terms of his purchase, in the same manner, and under the same regulations, as such corporation was before authorized to demand and receive the same.

**HISTORY:** Re-enacts and supersedes Sec. 13, R. S. '46, Ch. 55, being C. L. '57, (2155); C. L. '71, (3440); How. 4872; C. L. '97, (8539), though such section is not expressly repealed by this act. Unchanged.

Joy v. Jackson & M. P. R. Co., 11 Mich. 169.

**(12885). Recovery of Penalties for Injury to Franchise.**

**SEC. 70.** Any person who may have purchased, or shall hereafter purchase under the provisions of this chapter the franchise of any turnpike or other corporation, and the assignees of such purchaser, may recover, in an action on the case, any penalties imposed by law for an injury to the franchise, or for any other cause, and which such corporation would have been entitled to recover during the time limited in the said purchase of the franchise; and during that time the corporation shall not be entitled to prosecute for such penalties.

**HISTORY:** Re-enacts and supersedes Sec. 14, R. S. '46, Ch. 55, being C. L. '57, (2156); C. L. '71, (3441); How. 4873; C. L. '97, (8540), though such section is not expressly repealed by this act. Unchanged.

**(12886). Powers, Duties and Liabilities of Corporation.**

**SEC. 71.** The corporation whose franchise shall have been sold as aforesaid shall, in all other respects retain the same powers and be bound to the discharge of the same duties, and liable to the same penalties and forfeitures, as before such sale.

**HISTORY:** Re-enacts and supersedes Sec. 15, R. S. '46, Ch. 55, being C. L. '57, (2157); C. L. '71, (3442); How. 4874; C. L. '97, (8541); though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** This section clearly indicates that no franchise essentially and exclusively a corporate franchise is authorized to be sold. Joy v. Jackson & M. P. R. Co., 11 Mich. 169.

**(12887). Redemption.**

**SEC. 72.** Such corporation may, at any time within three months after such sale, redeem the franchise, by paying or tendering to the purchaser thereof the sum that he shall have paid therefor, with interest thereon, but without any allowance for the toll which he may have received; and upon such payment or tender, the said franchise, and all the rights and privileges thereof, shall revert and belong to said corporation, as if no such sale had been made.

**HISTORY:** Re-enacts and supersedes Sec. 16, R. S. '46, Ch. 55, being C. L. '57, (2158); C. L. '71, (3443); How. 4875; C. L. '97, (8542);

omitting "ten per cent," though such section is not expressly repealed by this act. Unchanged.

### Exemption of Homesteads.

#### (12888). Homestead Consists of What.

SEC. 73. A homestead, consisting of any quantity of land not exceeding forty acres, and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any recorded town plat or city or village, or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one lot, being within a recorded town plat or city or village, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of this state, not exceeding in value fifteen hundred dollars, shall not be subject to forced sale on execution, or any other final process from a court, for any debt or debts growing out of or founded upon contract, either express or implied. This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by the widow or minor child or children of any deceased person, who was, when living, entitled to the benefits of this section.

HISTORY: Re-enacts Sec. 1 of Act 109 of '48; As Am. '50, p. 135, Act 144, Imd. Eff. Mar. 25; C. L. '57, (4495); C. L. '71, (6137); How. 7721; C. L. '97, (10362); inserting, however, the Fifteen Hundred dollar limitation and making other changes in phraseology. Unchanged.

CONSTITUTIONALITY: See Const. XIV 2, also notes to Const. '50, XVI 2.

CONSTRUED: A person cannot have two homesteads at the same time. *Wheeler v. Smith*, 62 Mich. 376; *LaPlant v. Lester*, 150 Mich. 339. Land not occupied as a homestead is *prima facie* subject to levy and sale. *Bowles v. Hoard*, 71 Mich. 150. The exemption extends to levy and sale on all judgments, whether founded in tort or in contract. *Mertz v. Berry*, 101 Mich. 32. Not to exceed forty acres. *Halley v. Horton*, 164 Mich. 33. A homestead may include two city lots. *Geiges v. Geiner*, 68 Mich. 153; *Barkume v. Phelps, Brace & Co.*, 141 Mich. 545; *Averill v. Bank*, 143 Mich. 307; *Holley v. Horton*, 164 Mich. 33; See also *Geney v. Maynard*, 44 Mich. 578. The acquisition or retention of homestead rights, though the party lives elsewhere, is possible. *Reske v. Reske*, 51 Mich. 541; *Karn v. Hanson*, 59 Mich. 381; *Earl v. Earl*, 60 Mich. 30; *Deville v. Widoe*, 64 Mich. 593; *Bowles v. Hoard*, 71 Mich. 150; *Hoffman v. Buschman*, 95 Mich. 540; *Kaeding v. Joachinthal*, 98 Mich. 78; *Myers v. Weaver*, 101 Mich. 477; *Hitchcock v. Misner*, 111 Mich. 180; *Gadsbey v. Monroe*, 115 Mich. 282; *Lawrence v. Morse*, 122 Mich. 271; *Smith v. Kidd*, 123 Mich. 193; *Carey v. Waldo*, 126 Mich. 706; *Canney v. Canney*, 131 Mich. 367; *Burkhart v. James Walker & Son*, 132 Mich. 95; *Ware v. Hall*, 138 Mich. 70; *Swift v. Kleckner*, 146 Mich. 91; *LaPlant v. Lester*, 150 Mich. 336; *Bovine v.*

Selden, 155 Mich. 556. It may be claimed in land held by a tenancy in common, if the whole does not exceed in quantity and value, the homestead limit. *Hooper v. McAllister*, 115 Mich. 174; *Sherrid v. Southwick*, 43 Mich. 515; *Cleaver v. Bigelow*, 61 Mich. 47; *Bank v. Elliott*, 53 Mich. 256; *King v. Welborn*, 88 Mich. 186; *Lawrence v. Morse*, 112 Mich. 271. See also *Amphlett v. Hibbard*, 29 Mich. 300. The whole of a house built for two families is not not exempt. *Dyson v. Sheley*, 11 Mich. 527. One member of a firm cannot acquire a homestead interest in partnership property. *Mich. Trust Co. v. Chapin*, 106 Mich. 384. A wife can claim a homestead exemption in a farm owned by her and upon which she lives with her husband, even though he is the head of the family and manages the farm. *Kruger v. Le Blanc*, 75 Mich. 424. The husband cannot claim as against a judgment creditor, a homestead in an undivided one-eighth interest in land, the remainder of which is owned by his wife, the whole tract exceeding \$1,500 in value. *McBride v. Putnam*, 99 Mich. 469. The exemption may be claimed in premises occupied by the owner exclusively for hotel purposes, if his family have no other home. *King v. Welborn*, 83 Mich. 195. And in any premises used partly for business purposes and partly as a dwelling. *Id.*; citing *Orr v. Shraft*, 22 Mich. 260; *Skinner v. Shannon*, 44 Mich. 87; *Stanton v. Hitchcock*, 64 Mich. 328. A lessee of lands, who erects a dwelling house thereon and actually occupies the lands, is entitled to a homestead exemption. *Maata v. Kippola*, 102 Mich. 116. Homestead interest in land held under a contract of purchase. *Converse v. Barnard*, 114 Mich. 622; *Corey v. Waldo*, 126 Mich. 706; *Gardner v. Gardner*, 123 Mich. 673; *Fowler v. Bray*, 124 Mich. 250.

**FOR WIFE AND FAMILY:** The homestead, so selected and exempted under our laws, is not for the benefit of the husband alone, but for the use and protection of the wife and children as well. *Evans v. Railroad Co.*, 68 Mich. 610; *Riggs v. Sterling*, 60 Mich. 643. The wife's homestead rights will be protected in whatever form they may come in question, whether at law or in chancery. *Dikeman v. Arnold*, 71 Mich. 656. The wife has an equal right with her husband to protect the homestead interests of herself and family, either at law or in equity. *Armitage v. Toll*, 64 Mich. 412. Compare *Fournier v. Chisholm*, 45 Mich. 417; *Zoellner v. Zoellner*, 53 Mich. 620; *Converse v. Barnard*, 114 Mich. 622.

A wife does not lose homestead rights by being driven away by the cruelty of her husband. *Rogers v. Day*, 115 Mich. 664. Homestead rights are not lost by the desertion of husband or wife. *Pardo v. Bettorf*, 48 Mich. 275; *Earll v. Earll*, 60 Mich. 30; *Rogers v. Day*, 115 Mich. 664; *Gardner v. Gardner*, 123 Mich. 673; *LaPlant v. Lester*, 150 Mich. 336. But where a wife had deserted her husband and after being divorced had died before the trial, and there were no minor children to be protected, the husband was denied homestead rights. *Trout v. Rumble*, 82 Mich. 204. Homestead rights to widow and children, see *Griffin v. Johnson*, 37 Mich. 92; *Drake v. Kinsell*, 38 Mich. 232; *Showers v. Robinson*, 43 Mich. 502; *Dei v. Habel*, 41 Mich. 88; *Robinson v. Baker*, 47 Mich. 619; *Louden v. Martindale*, 109 Mich. 240; *Gerber v. Upton*, 123 Mich. 607; *Ware v. Hall*, 138 Mich. 70.

**NON-RESIDENT:** Where a wife lives separate and apart from her husband in another state, and never resided in Michigan, she has no homestead rights in this state. *Standard v. Jewell*, 206 Mich. 61.

**TO BE SELECTED:** It has never yet been held in this state that a selection of a homestead must be made in writing and recorded, or that any other particular formality must be gone into, in order to fix or preserve this right to a man and his family. The occupancy of the parcel by the placing of the dwelling house thereon, and living within it, making the home there, is sufficient of itself to declare it a homestead and is notice to all of its selection. *Evans v. Railroad Co.*, 68 Mich. 609-10; *Riggs v. Sterling*, 60 Mich. 643. But land under attachment cannot be brought within the exemption merely by occupying it before the levy of execution. *Avery v. Stephens*, 48 Mich. 246. Present intention of occupancy as a homestead, with present action to carry the intention into effect, constitutes a homestead in law. *Mills v. Hobbs*, 76 Mich. 122.

**ENFORCEMENT OF HOMESTEAD RIGHTS:** Equity will set aside a levy on homestead property. *Burkhart v. James Walker & Son*, 132 Mich. 94, and cases cited. The burden of proving a homestead is on the one claiming the same. *Amphlett v. Hibbard*, 29 Mich. 304; *Hoffman v. Buschman*, 95 Mich. 539-40.

**CITED:** *Bunker v. Paquette*, 37 Mich. 80. See also *Walcott v. Tweddle*, 133 Mich. 389; *Allen v. Crane*, 152 Mich. 380; *Chamberlain v. Eddy*, 154 Mich. 605. As to mortgage or conveyance of homestead see notes to next section. A homestead exemption is an absolute right and not a mere privilege personal to the owner. *Eagle v. Smylie*, 126 Mich. 616. As to abandonment of homestead, see *Smith v. Kidd*, 123 Mich. 194. For other cases, see *McAllister v. Des Roches*, 132 Mich. 386; and *Morley Bros. v. National Loan & Inv. Co.*, 120 Mich. 173.

**(12889). Alienation Invalid Without Wife's Signature.**

**SEC. 74.** Such exemption shall not extend to any mortgage thereon lawfully obtained, but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same, unless such mortgage shall be given to secure the payment of the purchase money or some portion thereof.

**HISTORY:** Re-enacts Sec. 2 of Act 109 of '48; As Am. '50, p. 135, Act 144, Imd. Eff. Mar. 25, being C. L. '57, (4496); C. L. '71, (6133); How. 7722; C. L. '97, (10363). Unchanged.

**CONSTITUTIONALITY:** See Const. XIV, 2, and notes to Const. '50, XVI 2.

**MORTGAGE:** A mortgage given by a married man will not bind the homestead, unless it is in writing; nor a mechanic's lien, if it does not identify the premises by written description. *Hammond v. Wells*, 45 Mich. 11. Must have the signature of the wife. *Dikeman v. Arnold*, 71 Mich. 656. The constitutional provision, requiring the signature of a wife to a mortgage of the homestead, does not require such mortgages to be construed on principles different from those which govern other conveyances similarly signed; and defective descriptions therein may be corrected as in other mortgages. *Beychlag v. Van Wagoner*, 46 Mich. 91. No lien for anything but purchase money can be established without the wife's signature. *Girzl v. Carey*, 53 Mich. 447. Compare *Martin v. Platt*, 64 Mich. 629; *J. I. Case*

Thresh. Mach. Co. v. Mitchell, 74 Mich. 679; Hooper v. McAllister, 115 Mich. 174; Bank v. Elliott, 53 Mich. 256.

Fournier v. Chisholm, 45 Mich. 417. Where the wife, who was secretly married to the mortgagor, did not join in the mortgage, it was nevertheless valid. Hall v. Marshall, 139 Mich. 123. See also Trout v. Rumble, 82 Mich. 202. Mechanics lien on homestead, see note "Homestead," to Compilers' Section (14797).

**ALIENATION:** See notes to Const. '50, XVI 2. A conveyance of a homestead is valid as against creditors. Dickey v. Converse, 117 Mich. 457; Eagle v. Smylie, 126 Mich. 612; Palmer v. Bray, 136 Mich. 85. Rights growing out of an oral contract cannot affect homesteads. Klett v. Klett, 175 Mich. 224. Conveyance of homestead rights by wife through duress. Clement v. Mercantile Co., 172 Mich. 243. When once selected, the homestead cannot be abandoned or alienated by the husband without the consent of the wife. Evans v. Grand Rapids, L. & D. Railroad Co., 68 Mich. 610; Mertz v. Berry, 101 Mich. 37; Smith v. Rumsey, 33 Mich. 183.

A life lease of a homestead, the title to which is in the husband, is valid and effective if signed and acknowledged by the husband and wife, though the husband's name only appears as lessor in the body of the instrument. Barrett v. Cox, 112 Mich. 220. The homestead rights of minor children cannot be conveyed by the mother; Gerber v. Upton, 121 Mich. 598.

**WITHOUT WIFE'S SIGNATURE:** A deed of a homestead without the wife's signature is void. Ring v. Burt, 17 Mich. 471; Gadsby v. Monroe, 115 Mich. 282; Rogers v. Day, 115 Mich. 666; Webster v. Warner, 119 Mich. 462; Lott v. Lott, 146 Mich. 580. A contract for sale of lands occupied as a homestead not executed by the wife, is a nullity, Hall v. Loomis, 63 Mich. 709; Phillips v. Stanch, 20 Mich. 369; but see Bovine v. Selden, 155 Mich. 556. Conveyance of a homestead interest held by virtue of a land contract is void if without wife's signature. H. Stern Jr. & Bros. v. Wing, 135 Mich. 332. Without the wife's signature a lease of a homestead is void. Mallnot v. Turner, 157 Mich. 167; Tp. of Jasper v. Martin, 161 Mich. 336.

A deed of a homestead to a third person, to be transferred to the wife, is good without her signature, the whole transaction being but a conveyance from husband to wife. Stevens v. Castel, 63 Mich. 120. Where a tenant at will erects a house on the leased land and occupies it as a home, an assignment of his leasehold interest, with the assent of the lessors, is void if not signed by the wife. Maata v. Kippola, 102 Mich. 116.

A deed of a homestead by a husband in trust for his wife and children, is inoperative if not signed by the wife. Sirr v. Miller, 121 Mich. 598. An action for breach of a contract to convey homestead property not signed by the grantor's wife cannot be maintained. Lawrence v. Vinkemulder, 157 Mich. 294. See also Way v. Root, 174 Mich. 420; Bovine v. Selden, 155 Mich. 556. Where a homestead consists of a part of a larger tract, all of which is conveyed by the husband alone, if it is impossible to set off the homestead, the grantees title to the entire tract must fail. Engle v. White, 104 Mich. 18; Sammon v. Wood, 107 Mich. 511. Where wife never lived in Michigan. See case of Standard v. Jewell, 206 Mich. 61.

**CITED:** Stephens v. Leonard, 122 Mich. 129. See notes to last preceding section.

**(12890). Selection of Homestead.**

**SEC. 75.** Whenever a levy shall be made upon, or any circuit court commissioner shall advertise for sale under any decree upon the foreclosure of any mortgage not valid as against the homestead and so stated in such decree, the lands and tenements of a householder whose homestead has not been platted and set apart by metes and bounds, such householder shall notify the officer at the time of making such levy or at the time of such advertising for sale what he regards as his homestead, with a description thereof, within the limits above prescribed, and the remainder alone shall be subject to sale under such levy or decree. If at the time of such levy or advertising for sale such householder shall fail or neglect to notify the officer making the levy or advertising such property for sale, what he regards as his homestead with a description thereof, the officer making the levy or advertising such property for sale, shall call upon such householder to make his selection of a homestead out of said land, describing the same minutely. If after such notice the owner of the land shall fail to select his homestead, such officer may select the homestead out of said land for him, and the remainder over and above that part selected by the officer or by the owner of the land, as the case may be, alone shall be subject to sale under such levy or decree: *Provided*, That in making this selection of the homestead out of the lands levied upon or advertised for sale, if such selection is made by the officer making the levy or advertising for sale, he shall select lands in compact form, which lands so selected by him as the homestead of the owner shall include the dwelling house and its appurtenances thereon.

**HISTORY:** Re-enacts Sec. 3 of Act 109 of '48, being C. L. '57, (4497); As Am. '61, p. 540, Act 248, Eff. June 15; C. L. '71, (6139); How. 7723; C. L. '97, (10364); As Am. '99, p. 338, Act 218, Eff. Sept. 23. Unchanged.

**SALE ON EXECUTION:** A deed of a homestead cannot be avoided as in fraud of creditors. The holder is free to dispose of it. *Rhead v. Hounson*, 46 Mich. 247. See *Pulte v. Geller*, 47 Mich. 560; *O'Connor v. Boylan*, 49 Mich. 209; *Anderson v. Odell*, 51 Mich. 492; *Vermont State Bank v. Elliott*, 53 Mich. 256; *Meigs v. Dibble*, 73 Mich. 101; *Armitage v. Toll*, 64 Mich. 412. Temporary absence from the homestead does not subject it to levy and sale. *Karn v. Hanson*, 59 Mich. 380; *Earll v. Earll*, 60 Mich. 30; *Hoffman v. Buschman*, 95 Mich. 540; *Hitchcock v. Misner*, 111 Mich. 180; *Kalding v. Joachimsthal*, 98 Mich. 78. See *Myers v. Weaver*, 101 Mich. 477. The exempt character of property must be determined upon the facts as they exist when the levy is made. *Bowles v. Hoard*, 71 Mich. 150.

CITED: *Dye v. Mann*, 10 Mich. 291; *Bank of Constantine v. Jacobs*, 50 Mich. 342; *Zoellner v. Zoellner*, 53 Mich. 626; *Riggs v. Sterling*, 60 Mich. 657; *Kruger v. LeBlanc*, 75 Mich. 425. See *Herschfeldt v. George*, 6 Mich. 468; *McKee v. Wilcox*, 11 Mich. 358; *Dyson v. Sheley*, 11 Mich. 527; *Comstock v. Comstock*, 27 Mich. 103; *Mertz v. Berry*, 101 Mich. 32; *Brown v. O'Donnell*, 123 Mich. 100.

Chancery has jurisdiction, in a suit brought by the executor to set aside conveyances of his property by the decedent, to order a sale of the homestead subject to the rights of the widow, for this statute does not apply. *Hamilton v. Wilcox*, 167 Mich. 551. For an instance where proceedings should have been taken under this statute—see *Averill v. State Savings Bank*, 143 Mich. 306.

### (12891). Survey.

SEC. 76. If the plaintiff in execution or in said decree shall be dissatisfied with the quantity of land selected and set apart as aforesaid either by the owner of the land or by the officer making the levy or advertising the land for sale, he shall cause the same to be surveyed, beginning at a point to be designated by the owner or by the officer making the levy or advertising for sale, and set off land in compact form including the dwelling house and its appurtenances, to the amount specified in the first section of this chapter; and the expense of such survey shall be chargeable on the execution or decree and collected thereupon.

HISTORY: Re-enacts Sec. 4 of Act 109 of '48, being C. L. '57, (4498); As Am. '61, p. 540, Act 248, Eff. June 15; C. L. '71, (6140); How. 7724; C. L. '97, (10365); As Am. '99, p. 339, Act 218, Eff. Sept. 23, omitting "complainant" and changing "of this act" to "of this chapter." Unchanged.

NOTE: The reference to the first section of this chapter is evidently an error and should refer to Section 73, (*supra*) of this chapter.

CITED: *Riggs v. Sterling*, 60 Mich. 657; *Kruger v. LeBlanc*, 75 Mich. 425; *Averill v. Bank*, 143 Mich. 307; *Hamilton v. Wilcox*, 167 Mich. 557.

### (12892). Sale of Property.

SEC. 77. After the survey shall have been made, the officer may sell the property levied upon or included in the decree, and not included in the set-off, in the same manner as provided in other like cases for the sale of real estate; and in giving a deed of the same he may describe it according to the original levy or as described in the decree, excepting therefrom by metes and bounds, according to the certificate of the survey, the quantity as set off as aforesaid.

HISTORY: Re-enacts Sec. 5 of Act 109 of '47, being C. L. '57,



(4499); As Am. '61, p. 540, Act 248, Eff. June 15; C. L. '71, (6141); How. 7725; C. L. '97, (10366). Unchanged.

CITED: Averill v. Benzie County State Sav. Bank, 143 Mich. 307.

**(12893). House on Leased Land.**

SEC. 78. Any person owning and occupying any house on land not his own, and claiming said house as a homestead shall be entitled to the exemption aforesaid.

HISTORY: Re-enacts Sec. 6 of Act 109 of '48, being C. L. '57, (4500); C. L. '71, (6142); How. 7726; C. L. '97, (10367). Unchanged.

CITED: McKee v. Wilcox, 11 Mich. 360; Bunker v. Paquette, 37 Mich. 80.

**(12894). Not Exempt from Taxation.**

SEC. 79. Nothing in this chapter shall be considered as exempting any real estate from taxation or sale for taxes.

HISTORY: Re-enacts Sec. 7 of Act 109 of '48, being C. L. '57, (4501); C. L. '71, (6143); How. 7727; C. L. '97, (10368), changing "act" to "chapter." Unchanged.

**(12895). When Property Exceeds \$1,500 in Value.**

SEC. 80. Whenever the homestead of any debtor in any such case, shall exceed in value the amount of fifteen hundred dollars, the debtor shall not for that reason lose the benefit intended to be secured to him or her by this chapter; but in all such cases, when in the opinions of the creditors or officer holding an execution or decree as aforesaid, against such householder, the premises claimed by him as exempt are worth more than fifteen hundred dollars, such officer shall summon six persons qualified to act as jurors, who shall upon oath, to be administered to them by said officer, appraise the said premises; and in case the value thereof shall be more than fifteen hundred dollars, and cannot be divided, they shall make and sign an appraisal of its value, and deliver the same to the officer, who shall deliver a copy thereof to the debtor, or to some of his family of suitable age to understand the nature thereof, with a notice thereto attached, that unless the said debtor shall pay the said officer the surplus, over and above the fifteen hundred dollars, or the amount due on said execution or decree, within sixty days thereafter, that such premises will be sold.

HISTORY: Supersedes, (omitting "and Act"), Section 2 of Act 248 of '61, p. 541, Eff. June 15; C. L. '71, (6144); How. 7728; C. L. '97,

(10369); the same being amendatory of Act 109 of '48, by the addition of a new section. It was numbered Section 2 consecutively with the enacting section of the act and not with the section of the act to which it was added. It should have been section 8. Unchanged.

CONSTITUTIONALITY: See Const. XIV, 2, and notes to Const. '50, XVI 2.

CITED: First Nat'l Bank v. Jacobs, 50 Mich. 341-2; Zoellner v. Zoellner, 53 Mich. 626; Riggs v. Sterling, 60 Mich. 651; Toll v. Davenport, 74 Mich. 394; Kruger v. LeBlanc, 75 Mich. 427; McAllister v. DesRochers, 132 Mich. 384; Flynn v. Kalamazoo Circuit Judge, 136 Mich. 24; Lieblien v. Hansen, 178 Mich. 16. See Savings Bank v. Elliott, 53 Mich. 256, 259; Yale State Bank v. Fletcher, 173 Mich. 585; Beecher v. Baldy, 7 Mich. 488.

#### (12896). Sale of Premises.

SEC. 81. In case such surplus, or the amount due on said execution or decree, shall not be paid within the sixty days, it shall be lawful for the officer to proceed to advertise and sell the said premises, and out of the proceeds of said sale to pay such debtor the said sum of fifteen hundred dollars, which shall be exempt from execution for one year thereafter, and apply the balance on said execution: *Provided, however,* That no sale shall be made in the case last mentioned, unless a greater sum than fifteen hundred dollars shall be bid therefor, in which case the officer may return said execution for want of property, or report the facts to the court in which said decree was rendered, as the case may require.

HISTORY: Re-enacts Sec. 3 of Act 109 of '48, as Added '61, p. 541, Act 248, Eff. June 15, C. L. '71, (6145); How. 7729; C. L. '97, (10370), omitting, however, the last proviso in the old section. See history to the preceding section as to the section numbering of the former act. Modified.

CITED: Bunker v. Paquette, 37 Mich. 80; Zoellner v. Zoellner, 53 Mich. 620; Kruger v. LeBlanc, 75 Mich. 425.

#### (12897). All Real Estate Subject to Payment of Debts.

SEC. 82. All the real estate of any debtor, including legal and equitable interests in lands acquired by the parties to contracts for the sale and purchase of lands, whether in possession, reversion or remainder, including lands fraudulently conveyed, with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned, shall be subject to the payment of his debts, liabilities and obligations, and may be levied upon and sold on execution as hereinafter provided. *In all suits begun or hereafter to be begun by the filing of bills in aid of execution, the complain-*

*ant shall make a prima facie case by introducing in evidence the judgment against the principal defendant the execution with the levy or levies thereon indorsed and proof of the conveyance or conveyances complained of. The burden of proof shall then be upon the judgment debtor, or the person or persons claiming through or under him, or the person or persons whom it is claimed are holding property in trust for said judgment debtor to show that the transaction or transactions are in all respects bona fide or that such person or persons are not holding as a trustee or trustees of said judgment debtor.* When any sale, by virtue of any execution, shall become absolute, as hereinafter provided, the purchaser at such sale shall acquire all the rights and interests that the debtor had in and to the lands so sold at the time of the levy by virtue of the execution; or if the levy was made by virtue of an attachment, said purchaser shall acquire all the rights and interests that the debtor had in and to the lands so sold at the time of the levy by virtue of said attachment, including in either case the right to enforce specific performance of any contract hereinbefore mentioned, upon performing the conditions thereof, as stipulated therein by said debtor: *Provided, That this section shall not be construed so as to make liable to levy and sale on execution any amount of land not exceeding the amount now exempted by law from levy and sale on execution, and which would be exempt from levy and sale on execution if owned by the debtor occupying the same. That in case of a levy upon the equitable interest of a judgment debtor, the judgment creditor may, before the sale, institute proceedings in aid of said execution, to ascertain and determine the rights and equities of said judgment debtor in the premises so levied upon, and that in case of a sale of said premises, without having ascertained and determined the interest of said judgment debtor in the premises so levied upon and sold, he shall within one year institute proceedings to ascertain and determine the same, and to settle the rights of the parties in interest therein.*

Approved May 10, 1917.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 79, being C. L. '57, (3119), As Am. '67, p. 132, Act 95, Eff. June 27; C. L. '71, (4628). How. 6108; C. L. '97, (9167), as amended by P. A. '17, Act No. 215, p. 465, Eff. Aug. 12, being modified only by the last amendment.

**CONSTITUTIONALITY:** Former laws. Act 27 of '41, (see note, "Former Laws," to this section) was declared unconstitutional. Willard v. Longstreet, 2 Doug. 172.

**FORMER LAWS:** Act of Apr. 12, '27, Terr. Laws, vol. 2, p. 487; R. L. '27, p. 235; Act of July 3, '28, Terr. Laws, vol. 2, p. 703; Act of July 28, '30, Terr. Laws, vol. 3, p. 827; Act of Apr. 20, '33, Terr. Laws, vol. 3, p. 1073; R. L. '33, pp. 423, 434; R. S. '38, p. 323; Act 26 of '39, p. 22; Act 115 of '39, p. 220, sec. 15; Act 27 of '41, p. 45; Act 51 of '41, p. 134; Act 64 of '41, p. 150; Act 88 of '42, p. 135; Act 75 of '43, p. 155. As to sales under acts of '41 and '42. *Crane v. Hardy*, 1 Mich. 56.

**SALE UPON TRANSCRIPT JUDGMENT:** Void if the transcript was made within five days after the entry of judgment. *Vroman v. Thompson*, 42 Mich. 145; *O'Brien v. O'Brien*, 42 Mich. 15. Also, if the transcript is not officially signed by the justice; or, if no affidavit is filed with the clerk of the circuit court, as required. *Bigelow v. Booth*, 39 Mich. 622.

**IRREGULAR SALES:** The purchaser is not concerned with anything but the judgment, levy and sale. *Crane v. Hardy*, 1 Mich. 65. Compare *Palmer v. Oakley*, 2 Doug. 433. Irregularities in an execution sale must be corrected by applying to the court, out of which the writ issued, to set the sale aside. *Cavanaugh v. Jakeway*, Walk. 344; *Campau v. Godfrey*, 18 Mich. 44; *Blair v. Compton*, 33 Mich. 422. Irregularity is not sufficient to give a court of chancery jurisdiction; there must be fraud. *Id.*; *Blair v. Compton*, 33 Mich. 422. A motion to set aside a sale for irregularity must be promptly made. *Spafford v. Beach*, 2 Doug. 150; *Barnes v. Baker*, 2 Mich. 379; *Campau v. Godfrey*, 18 Mich. 44. See *People v. Judge*, 1 Doug. 417; *Stinton v. Kent Circuit Judge*, 37 Mich. 286; *Wilkie v. Judge*, 52 Mich. 641. Unless there is a plain legal right, a sale will not be set aside and a resale ordered. *McCarthy v. Judge*, 36 Mich. 276. An attack on a judicial sale where the court had jurisdiction cannot be made collaterally, but only in direct proceedings. *Osman v. Traphagen*, 23 Mich. 80; *Crawford v. Tuller*, 35 Mich. 57; *Griffin v. Johnson*, 37 Mich. 87; *Toll v. Wright*, 37 Mich. 93; *Dexter v. Cranston*, 41 Mich. 448. An execution sale of land in one parcel which should have been sold in separate parcels is voidable only and cannot be attacked in collateral proceedings. *Brown v. O'Donnell*, 123 Mich. 100.

**WHAT INTERESTS MAY BE SOLD:** Interests under land contract. See Compilers' Section (12955). Lands of a deceased person attached before his death may be sold after his death. *Smith v. Jones*, 15 Mich. 281; *Bradford & Co. v. Baxter*, 203 Mich. 240.

**LEASEHOLD INTERESTS IN LANDS:** See notes to Compilers' Sections (11523), (12956-61) and (12857). Chattel interests in land are to be sold as personal property on execution and an estate for years cannot be sold as real estate. *Buhl v. Kenyon*, 11 Mich. 249; *Gorham v. Arnold*, 22 Mich. 247; *Grover v. Fox*, 36 Mich. 453.

**HOMESTEAD EXEMPTION:** See Constitution, Article XIV, Section 2, and Compilers' Section (12888-96).

**EQUITIES AND RIGHTS OF REDEMPTION:** See Compilers' Sections (12936)-(12939). Lands fraudulently conveyed to hinder or delay creditors. See Compilers' Section (11998) and notes. Lands conveyed by gift with intent to defraud creditors will be liable to levy. *Doak v. Runyan*, 33 Mich. 75; *Matson v. Melchor*, 42 Mich. 477; *Fellows v. Smith*, 40 Mich. 689; *Purcell v. Armstrong*, 37 Mich. 326.

**HUSBAND AND WIFE'S ESTATE:** An estate granted to husband and wife is an entirety. (*Fisher v. Provin*, 25 Mich. 347). They both take the same estate and it cannot be separated. The husband's in-

terest cannot be taken and sold on execution. *Vinton v. Beamer*, 55 Mich. 559. See, also, notes to Compilers' Section (11563).

**EQUITABLE INTERESTS IN LANDS:** In *Trask v. Green*, 9 Mich. 358, it was settled conclusively that the real estate, under this section, upon which a creditor can levy his execution, is the legal estate and not a mere equity; nor can real estate held in trust be levied upon by the creditor. This doctrine was followed in *Gorham v. Wing*, 10 Mich. 486; *Gorham v. Arnold*, 22 Mich. 247; *Thayer v. Arnold*, 32 Mich. 336; *Lee v. Enos*, 97 Mich. 281. And rights to land, which a court of law can neither protect or enforce, are not within the purview of this statute. *Kercheval v. Wood*, 3 Mich. 512. Lands held by a debtor in trust cannot be reached on execution against him. *Loomis v. Smith*, 37 Mich. 595. Sheriff's certificate and deed settle the question of purchaser's title and not as return of an execution. Proof of notice, therefore, not necessary as part of record. Validity of sale may be tried in summary proceedings. *Grand Rapids Nat'l Bank v. Critzer*, 116 Mich. 688. Mortgagee's interest is an equitable one, and statute applies, but bill must be filed within one year. *Gordon v. Twp. of Burley*, 153 Mich. 493. Deed given as mortgage does not divest legal titles, but leaves it subject to levy and sale subject to lien of the mortgage and purchaser on execution is not obliged to file bill in aid of execution. *Flynn v. Holmes*, 145 Mich. 610.

**LEVIES UPON EQUITABLE INTERESTS:** This section authorizing the filing of bills in aid of execution includes equitable as well as legal interests in lands, and covers a partially paid up land contract assigned in fraud of creditors; said assignor having at least an equitable interest with the right to obtain the absolute title upon full payment. *Cutcheon v. Buchanan*, 88 Mich. 595. Where in good faith, a vendee in land contracts forfeits and surrenders, a levy against the interest of vendee must fail, but if vendor took back only by agreement without a forfeiture, he took subject to the rights acquired by third parties. *Welsh v. Richards*, 41 Mich. 593. If an assignment of interest is a shift to prevent levy, then under this statute it might be levied upon and a bill filed to settle the question of fraud. *Corey v. Smalley*, 106 Mich. 257.

**WITHIN ONE YEAR:** Judgment creditor must proceed within one year and institute proceedings to ascertain and determine the rights and equities of the judgment debtor. *Edsell v. Nevins*, 80 Mich. 151; *Grover v. Fox*, 36 Mich. 453; *Messmore v. Huggard*, 46 Mich. 558; *Cranson v. Smith*, 47 Mich. 191; *Jensen v. Rankin*, 57 Mich. 52. An execution creditor who desires to attack a conveyance as fraudulent must file his bill before sale and within one year after levy. *Daniel v. Palmer*, 124 Mich. 337. Failure to file bill in aid of execution in time under this statute is fatal. *Kunze v. Solomon*, 126 Mich. 291; *Tiedeman v. Kroll*, 144 Mich. 309; *Gordon v. Twp. of Burley*, 153 Mich. 493; *Rohrabacher v. Walsh*, 170 Mich. 59. But where a bill can be treated as a creditor's bill, the one year statute does not apply. *Rohrabacher v. Walsh*, 170 Mich. 59. Jurisdiction in attachment against a non-resident debtor may be acquired by levy of the writ on lands alleged to have been fraudulently conveyed by him. *Archer v. Laidlaw*, 129 Mich. 198; *Avery v. Stevens*, 48 Mich. 246; *Trask v. Green*, 9 Mich. 368. That bill was not filed in time cannot be raised in supreme court for the first time. *Cleland v. Clark*, 123 Mich. 181.

**BILL FOR DOUBLE PURPOSE:** A bill may be filed for the double purpose of aiding an execution and to reach property not open to execution. Under certain circumstances, bill need not show execution returned unsatisfied. *Wilson v. Addison*, 127 Mich. 681.

**BETTERMENTS:** Allowance for betterments should be based on the enhanced value of premises, not on cost of improvements. Holder of title by quit claim deed may recover for betterments as against judgment creditor if there was an honest belief of the occupant in his right or title. *Cleland v. Clark*, 123 Mich. 181.

**WHEN PROPERTY CEASES TO BE EXEMPT:** *Freehling v. Bresnahan*, 61 Mich. 540; *McHugh v. Curtis*, 48 Mich. 262.

**DECREE NOT WARRANTED UNDER THIS STATUTE:** *Connor v. Jochen*, 171 Mich. 69.

**BILL IN AID OF EXECUTION:** As to proceedings by bill in aid of execution at law, see notes to Subdivision 6 of Compilers' Section (12302), where the subject is discussed and the authorities cited.

**INTEREST OF EXECUTION PURCHASER:** The execution purchaser acquires all the interest which the debtor had at the time of the levy. *Fells v. Barbour*, 58 Mich. 54. But not any after-acquired title or interest of the debtor. *McArthur v. Oliver*, 60 Mich. 611. An execution purchaser who buys land subject to a mortgage can have no equities against the mortgage, and it does not concern him how the owner disposes of it. *Youmans v. Loxley*, 56 Mich. 197. See further, as to purchaser's title, *Newberry v. Detroit*, 17 Mich. 157; *Campau v. Godfrey*, 18 Mich. 37; *Clark v. Stillson*, 36 Mich. 482; *French v. DeBow*, 38 Mich. 712; *Kinyon v. Young*, 44 Mich. 339; *First Nat. Bank v. McAllister*, 46 Mich. 397; *Burt v. Gamble*, 98 Mich. 407.

On a bill filed to quiet title to lots belonging to defendant, a judgment debtor, which lots had been sold at execution sale to complainant and the recording of notice of such levy and execution preceded the recording of a deed by said defendant to his wife, also a defendant, which deed was claimed to have been made prior to such recording of notice of the execution levy, complainant was entitled, under C. L. '97, Sec. (9224), to have his title quieted, even though such deed was made when claimed, unless complainant had actual notice thereof prior to recording notice of such execution levy. *Lachelt v. McInerney*, 185 Mich. 413; 22 D. L. N. 245; 152 N. W. 86.

See *Lipp v. Jacobs*, 198 Mich. 363.

**VOID TRANSFER:** A creditors's bill can only reach equitable assets not subject to execution, and would not be the appropriate remedy to set aside a conveyance in fraud of creditors. *Newcomb v. Montague*, 194 Mich. 74.

**(12898). Notice of Levy to be Filed with Register of Deeds.**

**Sec. 83.** No levy by execution on real estate shall be valid against bona fide conveyances made subsequent to such levy, until a notice thereof, containing the names of the parties to the execution, a description of the premises levied upon, and the date of such levy, shall be filed by the officer making the same, in the office of the register of deeds of the county where the premises are situated, and such levy shall be a lien thereon from the time when such notice shall be so deposited; and

the lien thus obtained, shall, from the filing of such notice, be valid against all prior grantees and mortgagees of whose claims the party interested shall not have actual nor constructive notice. And such register shall thereupon enter on such notice a minute of the time of receiving the same, and shall record the same in a book to be kept for that purpose, and shall make an index to such record in such manner as shall be convenient for public reference, of the names of the parties to the execution, as stated in said notice, and such officer shall receive for making and filing the notice as aforesaid, the sum of fifty cents, and such register of deeds shall receive for recording the same the same fees as are allowed by law for recording notices of the pendency of suits in chancery, which fees the said officer shall add to the costs to be collected by such execution, and shall in like manner collect the same; and when such execution shall be fully paid, satisfied or discharged, it shall be the duty of the clerk of the court that issued such execution to give to the defendant a certificate, under the seal of the court, that the same is satisfied or discharged, and such certificate may be recorded in the same manner as is provided for the recording of such notice.

**HISTORY:** Re-enacts Act 11 of '62; As Am. '63, p. 176, Act 120, Eff. June 22; C. L. '71, (4684); As Am. '75, p. 3, Act 5, Eff. Aug. 3; How. 6173; As Am. '89, p. 337, Act 227, Eff. Sept. 28; C. L. '97, (9224), omitting "made after this act shall take effect."

**NOTICE OF LEVY:** *Davis Sew. Mach. Co. v. Whitney*, 61 Mich. 521; *Luton v. Sharp*, 94 Mich. 202. This notice, being an official act, required by law and intended for the very purpose of enabling all persons to know what levies have been made, is primary evidence of the levy, which, as to purchasers, at least, must be held conclusive proof that nothing was levied on which was not described in it. *Campau v. Barnard*, 25 Mich. 383. Notice of levy filed and recorded as required by the amendment of '75. *Ward v. Citizens' Bank*, 46 Mich. 332. The description of the premises must be sufficiently definite and certain in the notice to inform the public what particular land has been levied upon. *Burrowes v. Gibson*, 42 Mich. 124-5.

Absence of levy being endorsed on writ does not invalidate the execution if notice of levy is duly recorded. Sheriff can sell property after his term if levy was made in lifetime of writ and during his official term. *Vroman v. Thompson*, 51 Mich. 452.

**FEES:** Sheriff cannot make valid agreement with execution debtor for additional fees. *Burk v. Webb*, 32 Mich. 182. Sheriff not allowed percentage. *Peck v. City Nat'l Bank*, 51 Mich. 356.

**PRIORITIES:** The purpose of the amendment by Act 227, Public Acts of '89, was to change the rule which had previously existed and to give a levy under execution the same priority accorded to a conveyance duly recorded. *First Nat'l Bank v. Phillpotts*, 155 Mich. 336. Notice of levy filed with the register of deeds is a claim upon the

property sold upon execution from the time of such filing, and the lien thus obtained is valid against all grantees and mortgagees of whose claims the lienors shall not have actual or constructive notice. *Id.* Notice of lien by filing will not take priority over the rights of one in actual possession under an unrecorded contract of purchase as such possession is constructive notice. *Corey v. Smalley*, 106 Mich. 257. Priority of enforceable title by virtue of trust. *Uhl v. Weiden*, 122 Mich. 639. An attachment levy is a lien only upon the interest in the land owned by the debtor at the time of the attachment, and is not entitled to priority over an unrecorded mortgage which is recorded before execution levy. *Campbell v. Keys*, 130 Mich. 130. The above case declares the conflicting language of *Campbell v. Bane*, 119 Mich. 40, to be dictum. See *Gardner v. Mason*, 130 Mich. 436, where the party interested had no notice or knowledge that prior deed had been executed at the time execution was levied, and there was nothing to indicate change of title. See also *First Nat'l Bank v. Phillpotts*, 155 Mich. 336. Where a purchaser makes a part payment on real estate and afterwards a notice of levy is filed, such notice puts the purchaser upon inquiry before making final payment. *L. Starks Co. v. Eppink*, 185 Mich. 233. Constructive notice that the ownership of real estate has been transferred is of no avail where such notice is received after notice of levy has been filed. *Lachelt v. McInerney*, 185 Mich. 413. *First Nat. Bank v. State Savings Bank*, 130 Mich. 332; *Atkinson v. Akin*, 197 Mich. 294; *Schmidt v. Steinbach*, 193 Mich. 644; *Mosher v. Borden*, 201 Mich. 110.

**REMEDY:** A bill to quiet title may be maintained to set aside an execution levy upon land of husband and wife owned by entireties where execution issued upon a judgment against the husband. *Monroe v. Carter*, 167 Mich. 327.

**LEVY HELD BAD IN CASE OF INCORRECT EXECUTION:** *Savidge v. Seager*, 175 Mich. 51.

**CITED:** *Johnson v. Cook*, 179 Mich. 126.

### (12899). When Lien of Levy to Cease.

**Sec. 84.** Each and every levy by execution on real estate heretofore or hereafter made, shall cease to be a lien on such real estate, and shall become and be void at and after the expiration of five years from the making of such levy, unless such real estate be sooner sold thereon.

**HISTORY:** Re-enacts in substance Sec. 1 of Act 35 of '89, being How. 6173a; C. L. '97, (9233). Unchanged.

**CONSTRUED:** Until the enactment of this statute no limitation was placed upon the existence of the lien by execution levy. *Lude-man v. Hirth*, 96 Mich. 19; *Mosher v. Borden*, 201 Mich. 110.

An injunction restraining the sale of real property levied upon interrupts the running of the statute of limitation. *Steele v. Bliss*, 166 Mich. 593. A deed made under a levy after the expiration of five years will not defeat the title obtained under a deed executed by the execution debtor subsequent to the levy. *Bliss v. Slate*, 144 Mich. 649. See further, *Bigelow v. Shehan*, 156 Mich. 515.



### Manner of Selling Real Estate.

#### (12900). Giving Notice of Sale.

Sec. 85. Previous to the sale of any real estate taken on execution, notice of the time and place of holding such sale shall be given as follows:

1. A written or printed notice thereof shall be fastened up in three public places in the township or city where such real estate shall be sold, six weeks previous to the sale, and if such sale be in a township or city different from that in which the premises to be sold are situated, then such notice shall also be fastened up in three public places in the township in which the premises are situated;

2. A copy of such notice shall be published once in each week, for six successive weeks, in a newspaper printed in the county in which such real estate is to be sold, if there be one;

3. If there be no newspaper printed in such county, then such notice shall be published once in each week, for six successive weeks, in some newspaper printed in an adjoining county.

The sheriff or other officer making such sale shall have power to adjourn the same from time to time, for a reasonable cause, and if such adjournment be for more than one week he shall give notice thereof in the newspaper in which the original notice was printed, and immediately following the same, and shall continue a publication of such notices during the time for which such sale shall be adjourned, but shall not be required to post any notice of such adjourned sale except at the place where said sale is to be made.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 79, being C. L. '57, (3120); C. L. '71, (4629); How. 6109; As Am. '85, p. 228, Act 166, Eff. Sept. 19; C. L. '97, (9168). Unchanged.

**CONSTRUED:** Irregularities in the officer's proceedings to sell, and when objection should be made. See *Spafford v. Beach*, 2 Doug. 150; *Barnes v. Baker*, 2 Mich. 378, 379. The statutory notices of sale are indispensable, and strict proof thereof must appear of record. *N. Y. Baptist Union v. Atwell*, 95 Mich. 241. Defective notice. *Atwood v. Bearss*, 45 Mich. 473. As to notice, see *Wagar v. Briscoe*, 38 Mich. 593.

As to publication of notice, see *Brewer v. Landis*, 111 Mich. 217. Estoppel from claiming a defective notice of sale. *Ganong v. Green*, 64 Mich. 488. Proof of notice not necessary as part of record where actually made. *Grand Rapids National Bank v. Kritzer*, 116 Mich. 688. Notice to parties necessary in application to chancery court for execution to enforce payment of money decreed in divorce suit. *Dewey v. Dewey*, 151 Mich. 586.

**(12901). Description of Real Estate.**

SEC. 86. In every such notice, the real estate to be sold shall be described with common certainty, by setting forth the name or number of the township in which it is situated, and the number of the lot, or by some other appropriate description of the premises.

HISTORY: Re-enacts Sec. 3, R. S. '46, Ch. 79, being C. L. '57, (3121); C. L. '71, (4630); How. 6110; C. L. '97, (9169). Unchanged.

CONSTRUED: Description of premises. *Burrowes v. Gibson*, 42 Mich. 121. Misdescription. *Beyschlag v. Van Wagoner*, 46 Mich. 91; *Savidge v. Seager*, 175 Mich. 53.

**(12902). When and Where Sale to be Held.**

SEC. 87. The sale of real estate by virtue of any execution shall be at public vendue, between the hour of nine o'clock in the morning and the setting of the sun, at the court house, or place of holding the circuit court, in the county in which such estate is situated.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 79, being C. L. '57, (3122); C. L. '71, (4631); How. 6111; C. L. '97, (9170). Unchanged.

CONSTRUED: Sale may be made by successor of officer who may levy. See Compilers' Section (12836), and note. Full and free competition implies that all parties have equal knowledge of the state of the title; and the policy of the law is defeated if some one party may bid with such advantages as render competition impossible. *Messmore v. Huggard*, 46 Mich. 563; *Ledyard v. Phillips*, 32 Mich. 13. Purchasers at public judicial sales usually buy at their own risk of the regularity of the title. *McGoren v. Avery*, 37 Mich. 122.

A lien upon real estate by virtue of a levy under an execution is not lost by delay in proceeding to sale where no fraudulent purpose is shown on the part of the judgment creditor. *Ludeman v. Hirth*, 96 Mich. 17; *Ward v. Bank*, 46 Mich. 332.

**(12903). Penalty for Sale Otherwise.**

SEC. 88. Any officer who shall sell any real estate, without the previous notices herein directed, or otherwise than in the manner herein prescribed, shall be liable therefor to the party injured, in the sum of five hundred dollars damages, in addition to any actual damages which such party may prove on the trial of an action brought for the recovery of the same.

HISTORY: Re-enacts Sec. 5, R. S. '46, Ch. 79, being C. L. '57, (3123); C. L. '71, (4632); How. 6112; C. L. '97, (9171). Unchanged.

CONSTRUED: Sheriff's certificate and deed settle question of purchaser's title and not his return of an execution. *Grand Rapids National Bank v. Kritzer*, 116 Mich. 688.

*Cook v. Knowles*, 38 Mich. 322. The penalty for selling without notice will not be imposed if the sale is void for other reasons. *Willard v. Longstreet*, 2 Doug. 172, 176.

**(12904). Removal or Defacement of Notice.**

SEC. 89. If any person shall take down or deface any notice of a sale of real estate, put up by any officer, previous to the day of sale therein specified, unless upon satisfaction of the execution by virtue of which such notice shall have been given, or upon the consent of the party suing out such execution, and of the defendant therein, such person shall be liable therefor to the party in whose favor such execution was issued, in the sum of fifty dollars damages.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 79, being C. L. '57, (3124); C. L. '71, (4633); How. 6113; C. L. '97, (9172). Unchanged.

**(12905). Omission or Defacement not to Invalidate Sale.**

SEC. 90. The omission of any officer to give the notice of sale required in this chapter, or the taking down or defacing any such notice when put up, shall not affect the validity of any sale made to a purchaser in good faith, without notice of such omission, taking down or defacing.

HISTORY: Re-enacts Sec. 7, R. S. '46, Ch. 79, being C. L. '57, (3125); C. L. '71, (4634); How. 6114; C. L. '97, (9173). Unchanged.

CONSTRUED: An innocent purchaser will not be prejudiced by the officer's failure to give notice. *Cook v. Knowles*, 38 Mich. 322.

Proof of service not necessary part of record where notice actually given. *Grand Rapids National Bank v. Kritzer*, 116 Mich. 688.

**(12906). Officers not to Purchase.**

SEC. 91. The sheriff or other officer to whom any execution shall be directed, and the deputies of such officers, shall not directly or indirectly, purchase or be interested in the purchase of any real estate, at any sale by virtue of such execution.

HISTORY: Re-enacts Sec. 8, R. S. '46, Ch. 79, being C. L. '57, (3126); C. L. '71, (4635); How. 6115; C. L. '97, (9174). Unchanged.

CONSTRUED: Officer not to purchase. See notes to Compilers' Section (14011). The sheriff merely exercises a power in the interest of the party whose writ he executes; and the purchaser stands in privacy with such party and not with the sheriff. *McKay v. Kilburn*, 42 Mich. 614.

**(12907). Sale by Lots and Tracts.**

**SEC. 92.** When any real estate offered for sale by virtue of any execution, shall consist of several known lots, tracts, or parcels, such lots, tracts, or parcels, shall be separately exposed for sale, and the defendant may direct which piece or parcel shall be first exposed for sale; and no more of such tracts or parcels shall be exposed for sale than shall appear necessary to satisfy the execution, with the costs and expenses of such sale.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 79, being C. L. '57, (3127); C. L. '71, (4636); How. 6116; C. L. '97, (9175). Unchanged.

**SALE BY PARCELS:** The requirement that the sale shall be made in parcels is in the interest of the party or parties entitled to redeem, and to protect their right to redeem each parcel separately. *Clark v. Stilson*, 36 Mich. 485; *Macomb v. Prentis*, 57 Mich. 228. As to sales by parcels, see *Lee v. Mason*, 10 Mich. 403; *Osman v. Traphagen*, 23 Mich. 80; *Grover v. Fox*, 36 Mich. 466-7; *Larzelere v. Starkweather*, 38 Mich. 96. This provision is not formal, but material, and a sale in violation if it is wrong. *Udell v. Kahn*, 31 Mich. 198. As to sale of distinct parcels as a whole, where there are no bidders for separate parcels, see *Weed v. Terry*, 2 Doug. 439; *Udell v. Kahn*, 31 Mich. 198. But such sale cannot be allowed to deprive the owner of the right to redeem each parcel by itself. *Id.* 31 Mich. 198. Where a building covers one village lot and part of an adjoining one the whole should be sold as one. *Geney v. Maynard*, 44 Mich. 578. This provision is merely directory and a non-compliance therewith is an irregularity only, and will not avoid the sale. *Cavanaugh v. Jakeway*, Walk. 345; *Hoffman v. Buschman*, 95 Mich. 540; *Blair v. Compton*, 33 Mich. 422; *Campau v. Godfrey*, 18 Mich. 44. See note, "Irregular sales," to *Compilers' Section 12897*. Bill in chancery to remove a cloud from title because not sold in parcels is not proper remedy. Should apply to court wherein judgment was rendered to set aside sale. *Rhode v. Hassler*, 113 Mich. 57; *Holton v. Moody*, 117 Mich. 322. Failure to follow statute is an irregularity which will not be fatal in collateral proceedings. *Holton v. Moody*, 117 Mich. 322. This statute contemplates a sale of land by lots or government additions. *Id.* Sale in one parcel which should have been in separate parcels is voidable only and cannot be attacked collaterally. *Brown v. O'Donnell*, 123 Mich. 100.

**SEVERAL EXECUTIONS:** Where several executions issued and levied at the same time cover the same property, it may be sold at one time and on the same bid. *Geney v. Maynard*, 44 Mich. 582-3.

**(12908). Certificates of Sale.**

**SEC. 93.** Upon the sale of any real estate by virtue of an execution, the officer making the same shall make and subscribe as many certificates as may be necessary, of such sale, containing:

1. A particular description of the premises sold;

2. The price bid for each distinct lot or parcel sold;
  3. The consideration money paid for each lot or parcel;
- and
4. The time when such sale shall become absolute, and the purchaser or purchasers will be entitled to a deed, as hereinafter provided, and shall indorse on each of said certificates the rate of interest borne by the judgment upon which said execution issued.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 79, being C. L. '57, (3128); As Am. '63, p. 390, Act 228, Eff. June 22; C. L. '71, (4637); How. 6117; C. L. '97, (9176). Unchanged.

**CERTIFICATE:** *People v. Aud. Gen.*, 7 Mich. 98. It is not the purpose of the certificate to pass the title. It is necessary as written evidence to satisfy the statute of frauds, as well as to preserve the evidence which is to entitle the purchaser to a deed, when the time of redemption has expired. *Gorham v. Wing*, 10 Mich. 493. The certificate and not the sheriff's return is the evidence of title. *Spafford v. Beach*, 2 Doug. 150. See *Udell v. Kahn*, 31 Mich. 198.

**DESCRIPTION:** See *Holton v. Moody*, 117 Mich. 322.

**DEED:** As to time within which deed must be given, see *Compilers' Section* (12934).

#### (12909). Where Filed.

**SEC. 94.** One of the said certificates shall, within ten days after such sale, be filed by the officer making the sale, in the office of the register of deeds of the county in which the sale was made, and one such certificate shall be delivered to each purchaser at said sale.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 79, being C. L. '57, (3129); C. L. '71, (4638); How. 6118; C. L. '97, (9177). Unchanged.

**CONSTRUED:** The sheriff's neglect to file the certificate within this period will not affect the purchaser's title, unless the execution debtor or innocent third parties have been misled to their prejudice. *Taylor v. Gladwin*, 40 Mich. 232.

#### (12910). Record of Certificate.

**SEC. 95.** Such certificate shall be recorded in a book to be kept for that purpose by the register of deeds, in whose office the same are filed, and the original certificate, or the record thereof, or a transcript of such record, duly certified by the register of deeds, shall be prima facie evidence of the facts therein set forth, and of the regularity of the sale and all proceedings in the cause anterior thereto.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 79, being C. L. '57, (3130); C. L. '71, (4639); As Am. '75, p. 154, Act 123, Eff. Aug. 3; How. 6119; C. L. '97, (9178). Unchanged.

**CONSTRUED:** *Spafford v. Beach*, 2 Doug. 150; *Crane v. Hardy*, 1 Mich. 56; *Gorham v. Wing*, 10 Mich. 493. Prior to amendment. *Woods v. Love*, 27 Mich. 308; *Columbia Bank v. Jacobs*, 10 Mich. 349; *Millar v. Babcock*, 25 Mich. 138; *Atwood v. Bearss*, 45 Mich. 471-2. Under the amendment, purchasers under an execution are "purchasers" within the meaning of the registry laws, even though they have not yet received deeds. *Atwood v. Bearss*, 45 Mich. 469. And a properly recorded certificate is entitled to the same privileges as other conveyances. *Drake v. McLean*, 47 Mich. 102. If the holder of a prior unrecorded deed seeks to set such certificate aside, the burden is upon him to show himself a bona fide purchaser for the value. *Atwood v. Bearss*, 45 Mich. 474. Where the sale is invalid, the assignment of the certificate carries no interest in the judgment. *McGoren v. Avery*, 37 Mich. 120. Record as cloud on title removed. *Gordon v. Twp. of Burleigh*, 153 Mich. 493. Title of good faith purchaser as affected by new trial. *Cook v. Judge*, 70 Mich. 94. Right of prior grantee without notice. *Luton v. Sharp*, 94 Mich. 202. Occupancy as notice. *Brady v. Sloman*, 156 Mich. 423.

**(12911). Redemption.**

**SEC. 96.** Within one year from the time when such sale shall have been made, the real estate so sold or any distinct lot, tract or portion that may have been separately sold, may be redeemed by payment to the purchaser, his personal representatives or assigns, or to the officer who made such sale, or to the register of deeds in whose office such certificate is filed, for the use of such purchaser, of the sum of money which was bid on the sale of such lot or tract, together with the interest on that sum from the time of sale, computed at the rate per cent per annum borne by the judgment under which such sale was made.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 79, being C. L. '57, (3131); As Am. '63, p. 391, Act 228, Eff. June 22; C. L. '71, (4640); How. 6120; C. L. '97, (9179). Unchanged.

**REDEMPTION:** Must be within one year. *Youmans v. Loxley*, 56 Mich. 198. Day of sale excluded in computation of time. *Gorham v. Wing*, 10 Mich. 496. Where a party through gross negligence or ignorance of the law fails to redeem within the time allowed, he has no relief in equity. *Campau v. Godfrey*, 18 Mich. 27. See *Cameron v. Adams*, 31 Mich. 426. This statutory redemption, being exceptional, has never been allowed, except in conformity to the statute and within the statutory period. *Whiting v. Butler*, 29 Mich. 144. Payment to redeem must be made in money; the officer can receive nothing else. *Woodbury v. Lewis*, Walk. 256; *Heald v. Bennett*, 1 Doug. 513; *Welch v. Frost*, 1 Mich. 30; *People v. Land Com'r*, 19 Mich. 481. *Smith v. Mich. State Bank*, 102 Mich. 5. Right to redeem after expiration of year not allowed unless such showing of facts as warrant the relief. *Lieloff v. Woodruff*, 171 Mich. 5; *Pellston Planing Mill & Lbr. Co. v. Van Wormer*, 198 Mich. 648.

**(12912). By Whom Made.**

**SEC. 97.** Such redemption may be made:

1. By the person against whom the execution was issued, and whose right and title were sold in pursuance thereof; or

2. If such person be dead, by his devisee of the premises sold, if the same shall have been devised; and if the same shall not have been devised, by the executor or administrator with the approbation of the judge of probate, or by the heirs of such person; or

3. By any grantee of such person, who shall have acquired an absolute title by deed, sale under mortgage, or under an execution, or by any other means, to the premises sold, or to any lot, tract, parcel or portion which shall have been separately sold;

4. By the purchaser of the title and right of redemption of the person against whom the execution issued

**HISTORY:** Re-enacts Sec. 14 of R. S. '46, Ch. 79, As Am. '48, p. 313, Act 206, Eff. June 2; C. L. '57, (3132); C. L. '71, (4641); How. 6121; C. L. '97, (9180). Unchanged.

**CONSTRUED:** Transfer that amounted to a redemption. *Smith v. Mich. State Bank*, 102 Mich. 5; *Pellston Planing Mill & Lbr. Co. v. Van Wormer*, 198 Mich. 648.

**(12913). \*Redemption by Heir or Devisee.**

**SEC. 98.** Any heir or devisee of the person against whom the execution was issued and any grantee of such person who shall have acquired an absolute title to a portion of the estate sold, or to a portion of any lot, tract or parcel that shall have been separately sold, or the executor or administrator of such person, with the approbation of the judge of probate, may redeem the lot, tract or parcel so sold, on the same terms and in the same manner as if he were grantee of the whole lot, tract or parcel, and shall have the same remedy to enforce contribution from those who shall own the residue of such lot, tract or parcel, as if the sum required to be paid by him to effect such redemption had been collected by a sale of the portion belonging to such grantee.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 79, being C. L. '57, (3133); C. L. '71, (4642); How. 6122; C. L. '97, (9181). Unchanged.

**(12914). Joint Tenants in Common.**

**SEC. 99.** If there be several persons having undivided shares, as joint tenants, or tenants in common, in the premises sold,

or in any particular lot or tract sold, each person having such title may redeem the share or interest belonging to him, by paying to the purchaser, or to the officer, as herein directed, a sum that will bear the same proportion to the whole purchase money bid for such premises, or for such particular lot or tract, as the share proposed to be redeemed bears to the whole number of shares of such premises, or lot or tract, together with the interest on such sum.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 79, being C. L. '57, (3134); C. L. '71, (4643); How. 6123; C. L. '97, (9182). Unchanged.

**(12915). Sale and Certificate Avoided by Redemption.**

**SEC. 100.** Upon such payment being made by any person so entitled to redeem any real estate so sold, as provided in the preceding sections of this chapter, the sale of the premises so redeemed, and the certificate of such sale, to the extent of the premises or shares so redeemed, shall be null and void.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 79, being C. L. '57, (3135); C. L. '71, (4644); How. 6124; C. L. '97, (9183). Unchanged.

**(12916). Acquiring Interest of Purchaser.**

**SEC. 101.** In case the persons entitled as hereinbefore provided, shall omit to redeem the premises so sold, or any part of them, within the year above prescribed, then the interest vested in the purchaser by such sale may be acquired within three months after the expiration of such year, by the persons, and on the terms hereinafter prescribed.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 79, being C. L. '57, (3136); C. L. '71, (4645); How. 6125; C. L. '97, (9184). Unchanged.  
Pellston Planing Mill & Lbr. Co. v. Van Wormer, 198 Mich. 656.

**(12917). How May Creditor Acquire Rights of Purchaser.**

**SEC. 102.** Any creditor of a person against whom such execution issued, having in his own name, or as assignee, representative, trustee or otherwise, a decree in chancery, or a judgment at law, under which execution shall have been issued and levied upon the real estate so sold, or a decree which shall be a lien without execution and levy, at any time before the expiration of fifteen months from the time of such sale, by paying the sum of money which was paid on the sale of such premises, together with the interest thereon, computed at the rate borne by the judgment under which such sale was made,



from the time of such sale, shall thereby acquire all the rights of the original purchaser, subject to be defeated in the manner hereinafter mentioned.

**HISTORY:** Re-enacts Sec. 19 of R. S. '46, Ch. 79; As Am. '48, p. 313, Act 206, Eff. June 2; being C. L. '57, (3137); As Am. '63, p. 391, Act 228, Eff. June 22; C. L. '71, (4646); How. 6126; C. L. '97, (9185). Unchanged.

**CONSTRUED:** Creditors as intervening petitioners. *Campau v. Detroit Driving Club*, 130 Mich. 417. Same case, 135 Mich. 579. Purchaser by deed dated before levy but recorded after levy and before execution sale held not to be a creditor but purchaser at execution sale held to have had sufficient notice so he should have filed bill in aid of execution before sale. *Spring v. Raymond*, 134 Mich. 84. Where intervening petitioners had right to redeem from prior sales but redemption from an illegal sale would be unsafe, they had a right to petition to set aside sale. While property is in hands of receiver a sale on execution, without leave of court, is a contempt, illegal and void. *Campau v. Detroit Driving Club*, 130 Mich. 422. A creditor in redeeming puts himself in a position where wife of debtor was entitled to subrogation. *Freud v. Ruhl*, 126 Mich. 130. See further *Burt v. Gamble*, 98 Mich. 407; *People v. Fralick*, 12 Mich. 239.

#### (12918). Rights Acquired by Creditor.

**SEC. 103.** If the execution so levied as contemplated in the last section, or such decree be a lien upon any lot, tract or parcel that shall have been separately sold, the creditor having the same by paying as before provided the sum which shall have been bid for such lot, tract, or parcel, with interest as above mentioned, shall thereby acquire all the rights of the original purchaser to such lot, tract, or parcel, subject to be defeated as hereinafter provided.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 79, being C. L. '57, 3138; As Am. '63, p. 391, Act 228, Eff. June 22; C. L. '71, (4647); How. 6127; C. L. '97, (9186). Unchanged.

#### (12919). Execution Lien on Part of Lot.

**SEC. 104.** If the execution so levied, or such decree, be a lien only on a specific portion of a lot, tract or parcel so sold, the creditor having the same may acquire the title of the purchaser to the whole of such lot, tract or parcel, in the same manner as if such lien extended to the whole.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 79, being C. L. '57, (3139); As Am. '63, p. 392, Act 228, Eff. June 22; C. L. '71, (4648); How. 6128; C. L. '97, (9187). Unchanged.

See *Freud v. Ruhl*, 126 Mich. 130.

**(12920). Execution Lien on Undivided Interest.**

SEC. 105. Any such creditor having such decree or execution so levied, which is a lien upon any undivided share or interest in any real estate sold under execution, may, within the same time, on the same terms, and in the same manner, acquire the title of the original purchaser to such share or interest by paying such part of the whole purchase money of such real estate as shall be in just proportion to such share or interest.

HISTORY: Re-enacts Sec. 22, R. S. '46, Ch. 79, being C. L. '57, (3140); As Am. '63, p. 392, Act 228, Eff. June 22; C. L. '71, (4649); How. 6129; C. L. '97, (9188). Unchanged.

**(12921). Purchase by Other Creditors.**

SEC. 106. Whenever any such creditor shall have acquired the title of the original purchaser, pursuant to the foregoing provisions, any other creditor who might have acquired such title according to such provisions may become a purchaser thereof from the first creditor who acquired the same, upon the following conditions:

1. By reimbursing to such first creditor, his personal representatives or assigns, the sum which may have been paid by him to acquire such title, together with interest thereon, computed as hereinbefore provided, from the time of such payment to the time of such reimbursement;

2. If the levy under the execution or decree, by virtue of which the first creditor acquired the title of the original purchaser, be prior to the levy or decree of such second creditor, then such second creditor shall also pay to such first creditor the amount due on his judgment or decree;

3. But if such levy under the execution, or the decree of the first creditor, at the time of his acquiring the title of the original purchaser, shall have ceased to be a lien as against such second creditor, it shall not be necessary to pay the amount thereof.

HISTORY: Re-enacts Sec. 23, R. S. '46, Ch. 79, being C. L. '57, (3141); As Am. '63, p. 392, Act 228, Eff. June 22; C. L. '71, (4650); How. 6130; C. L. '97, (9189). Unchanged.

CONSTRUED: *People v. Fralick*, 12 Mich. 239; *Pellston Planing Mill & Lbr. Co. v. Van Wormer*, 198 Mich. 656.

**(12922). Third and Other Creditors.**

SEC. 107. In the same manner any third or other creditor, who might, according to the foregoing provisions, acquire the

title of the original purchaser, may become a purchaser thereof, from the second, third, or any other creditor, who may have become such purchaser from any other creditor, upon the same terms and conditions specified in the preceding section.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 79, being C. L. '57, (3142); C. L. '71, (4651); How. 6131; C. L. '97, (9190). Unchanged.  
**CONSTRUED:** *People v. Fralick*, 12 Mich. 239.

**(12923). Original Purchaser Being Creditor.**

**SEC. 108.** If the original purchaser of any premises so sold, shall also be a creditor of the defendant against whom the execution issued, and as such might acquire the title of any purchaser, according to the preceding provisions, he may avail himself of his decree or judgment in the same manner, and on the same terms herein prescribed, to acquire the title which any creditor may have obtained.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 79, being C. L. '57, (3143); C. L. '71, (4652); How. 6132; C. L. '97, (9191). Unchanged.

**(12924). Right of Execution Plaintiff.**

**SEC. 109.** The plaintiff under whose execution any real estates shall have been sold, shall not be authorized to acquire the title of the original purchaser, or of any creditor, to the premises so sold, by virtue of the decree or judgment on which such execution issued; but if he have any other decree or judgment which would entitle him to acquire such title, according to the preceding provisions, he may avail himself of such other decree or judgment, in the same manner, and on the same terms as any other creditor.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 79, being C. L. '57, (3144); C. L. '71, (4653); How. 6133; C. L. '97, (9192). Unchanged.

**(12925). Payments Required.**

**SEC. 110.** The sums required to be paid by the foregoing provisions, to acquire the title of the original purchaser, or to become a purchaser from any creditor, may be paid to such purchaser or creditor, his representatives or assigns, or to the officer who made the sale, or to the register of deeds in whose office the certificate of sale is filed, for the use of the purchaser or creditor entitled to the same.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 79, being C. L. '57, (3145); C. L. '71, (4654); How. 6134; C. L. '97, (9193). Unchanged.

**(12926). Effect of Payment.**

SEC. 111. Upon such payment being made, the title of the original purchaser shall be thereby transferred to the creditor acquiring the same pursuant to the foregoing provisions, and from such creditor to any other creditor becoming a purchaser thereof as hereinbefore provided.

HISTORY: Re-enacts Sec. 28, R. S. '46, Ch. 79, being C. L. '57, (3146); C. L. '71, (4655); How. 6135; C. L. '97, (9194). Unchanged.  
CONSTRUED: *People v. Fralick*, 12 Mich. 239.

**(12927). Evidence of Right of Creditor to Purchase.**

SEC. 112. To entitle any creditor to acquire the title of the original purchaser, or to become a purchaser from any other creditor pursuant to the preceding provisions, he shall present to and leave with such purchaser or creditor, or the officer who made the sale, or with said register, the following evidence of his right:

1. A certified copy of the judgment or decree under which he claims the right to purchase;
2. A true copy of all the assignments of such judgment or decree, which are necessary to establish his claim, verified by his affidavit, or the affidavit of some witness thereto;
3. An affidavit by such creditor, his agent or attorney, of the true sum due on such judgment or decree, at the time of claiming such right to purchase.

HISTORY: Re-enacts Sec. 29, R. S. '46, Ch. 79, being C. L. '57, (3147); C. L. '71, (4656); How. 6136; C. L. '97, (9195).

CONSTRUED: Where the application to redeem is made to the execution purchaser himself, if evidences are produced that are satisfactory to him, that is sufficient; but, when the application is made to the register of deeds, the statutory proofs must be produced. *People v. Fralick*, 12 Mich. 234.

SUBROGATION: *Freud v. Ruhl*, 126 Mich. 130; *Pellston Planing Mill & Lbr. Co. v. Van Wormer*, 198 Mich. 650.

**(12928). When Legal Estates to Vest.**

SEC. 113. The right and title of the person against whom the execution was issued, to any real estate which shall be sold thereby, shall not be divested by such sale, until the expiration of fifteen months from the time of such sale; but if such real estate shall not be redeemed as herein provided, and a deed shall be executed in pursuance of a sale, the grantee in such deed shall be deemed vested with the legal estate from

the time of the sale on such execution, for the purpose of maintaining an action for any injury to such real estate.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 79, being C. L. '57, (3148); C. L. '71, (4657); How. 6137; C. L. '97, (9196). Unchanged.

**CONSTRUED:** Relation of sheriff's deed back to levy for protection of title. *Whipple v. Farrar*, 3 Mich. 447. Actions for the protection of the purchaser's interest. *Whiting v. Butler*, 29 Mich. 143; *M., H. & O. R. R. Co. v. Atkinson*, 44 Mich. 166; *Ward v. Carp River Iron Co.*, 47 Mich. 65; 50 Mich. 522. See *Stout v. Keyes*, 2 Doug. 184. Until the statutory proceeding has been completed to vest the title in the purchaser, the judgment debtor may remain in the use and occupation of the premises without being accountable. *Whipple v. Farrar*, 3 Mich. 447. Neither at common law nor by the statutes is the execution purchaser entitled to the rents and profits before his title becomes absolute. The judgment debtor has the right to these and he may make the customary use of the lands himself or rent them. *Ward v. Carp River Iron Co.*, 47 Mich. 68. See *Gorham v. Wing*, 10 Mich. 493-4; *Whiting v. Butler*, 29 Mich. 128. The mere purchase and certificate of sale alone, either before or after the redemption period, does not confer any right to possession or beneficial use of the premises. *Pike v. Halpin*, Sept., '15, 188 Mich. 447. See further, *Trask v. Green*, 9 Mich. 370; *Pellston Planing Mill & Lbr. Co. v. Van Wormer*, 198 Mich. 648.

**CERTIFICATE VOID IN TEN YEARS:** See Compilers' Section (12934).

#### (12929). Actions for Waste.

**SEC. 114.** If at any time after a sale of real estate on execution, and before a deed shall be executed in pursuance thereof, the defendant in such execution or any other person, shall commit any waste thereon or shall remove therefrom any buildings, fences, or other fixtures belonging to the land, and which would pass to the grantee by a deed of conveyance of the same, the purchaser of such real estate, or any creditor or other person having acquired the rights of such purchaser, may have and maintain against the person doing such injury, and against any other person who shall have any such buildings, fences or fixtures in his possession after such removal, the same actions which such purchaser, creditor or other person might sustain, if he were the absolute owner of the premises so sold.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 79, being C. L. '57, (3149); C. L. '71, (4658); How. 6138; C. L. '97, (9197). Unchanged.

**CONSTRUED:** Action of waste by execution purchaser. *Moyer v. Scott*, 30 Mich. 347. For relative rights of purchaser and judgment debtor in the premises, see cases cited under the preceding section.

**(12930). For Whose Benefit Actions Prosecuted.**

SEC. 115. After the commencement of any such action as mentioned in the preceding section, if any other creditor shall acquire the rights of the purchaser at such sale in pursuance of the provisions of this chapter, such action shall not thereby be abated or in any way affected; but the same may be prosecuted in the name of the plaintiff therein to final judgment, for the benefit of the person acquiring such rights after the commencement of the action, if he shall choose to prosecute the same, and if not, such plaintiff may continue the same for his own benefit.

HISTORY: Re-enacts Sec. 32, R. S. '46, Ch. 79, being C. L. '57, (3150); C. L. '71, (4659); How. 6139; C. L. '97, (9198). Unchanged.

CONSTRUED: Moyer v. Scott, 30 Mich. 347.

**(12931). Making of Conveyance.**

SEC. 116. After the expiration of fifteen months from the time of the sale of any real estate, if any part of the premises sold shall remain unredeemed by the person against whom the execution issued, or by any person entitled to redeem the same within one year from the time of such sale, according to the provisions of this chapter, the officer making such sale, or his successor in office, shall complete the same, by executing, in due form of law, a conveyance of the premises so remaining unredeemed, either to the original purchaser or to the creditor who may have acquired the title of such original purchaser, or to the assigns of such purchaser, or to the creditor who may have purchased such title from any other creditor, as the case may be; which conveyance shall be valid and effectual to convey all the right, title and interest which was sold on such execution.

HISTORY: Re-enacts Sec. 33 of R. S. '46, Ch. 79; As Am. '51, p. 68, Act 61, Imd. Eff. Mar 31, being C. L. '57, (3151); C. L. '71, (4660); How. 6140; C. L. '97, (9199). Unchanged.

CONSTRUED: As to rights of execution creditor, see note, "Attachment and execution creditors," to Compilers' Section (11721). As to interest of execution purchaser, see note, "Interest of execution purchaser," to Compilers' Section (12897).

The certificate and deed are the evidence of the purchaser's title. *Spafford v. Beach*, 2 Doug. 150; *Cook v. Knowles*, 38 Mich. 322. A party having a legal right to a deed under the sale can compel the execution of it by mandamus, but an equitable right thereto must be enforced in chancery. *Whipple v. Farrar*, 3 Mich. 444. The sheriff's successor may execute the deed. *Johnson v. Crispell*, 39 Mich. 83-4. It is the deed that passes the title. *Gorham v. Wing*, 10 Mich. 493.

Until the execution of the deed, the sale must be looked upon as incomplete and inchoate only, whether the time of redemption has expired or not. *Id.* 494; *Whipple v. Farrar*, 3 Mich. 445; *Cook v. Knowles*, 38 Mich. 322-3; Agreement to include in mortgage additional claims valid as against a secured judgment creditor. *Burt v. Gamble*, 98 Mich. 407. If the deed is executed before the time of redemption has expired, it is invalid. *Gorham v. Wing*, 10 Mich. 486. The deed and possession thereunder cut off subsequent liens and encumbrances, as well as the title of the debtor. *Higman v. Stewart*, 38 Mich. 521. And is prima facie evidence of the regularity of the proceedings. *Johnson v. Crispell*, 39 Mich. 83. See *Crane v. Hardy*, 1 Mich. 64. A certificate or deed of land not lawfully levied upon can convey no title. *Campau v. Barnard*, 25 Mich. 384. But the title of the purchaser will not be affected by the insufficiency of the sheriff's return. *Spafford v. Beach*, 2 Doug. 150. See *Crane v. Hardy*, 1 Mich. 65. And an execution sale will be presumed regular until a prima facie showing to the contrary is made. *Vroman v. Thompson*, 51 Mich. 452. As to the waiver of right to deed, see *Whiting v. Butler*, 29 Mich. 122. The rights secured by an execution purchaser at the sale are inchoate before the sheriff's deed is given, and it is necessary for the execution purchaser to procure a deed in order to complete title. *Pike v. Halpin*, Sept. 1915, 188 Mich. 447. For time when sheriff's certificate shall expire unless deed be given and recorded. See *Compilers' Section* (12934).

#### (12932). Conveyance to Executor.

SEC. 117: In case the person who, by the provisions of the preceding sections, would be entitled to a conveyance of any real estate sold by virtue of an execution, shall die before the execution of the conveyance, the officer shall execute and deliver such conveyance to the executor or administrator of the person so deceased: *Provided*, That in any case under this or the preceding section, where the rights of the person or persons entitled to such real estate, or any interest therein, shall render it necessary, the circuit court of the county in which the officer who made the sale resided, on a hearing of the parties interested, properly brought before it by bill or petition, may direct the conveyance to be made to the person or persons equitably entitled thereto, in such manner as shall be just; and such conveyance shall have the same effect as provided in the preceding section.

HISTORY: R-enacts Sec. 34 of R. S. '46, Ch. 79; As Am. '51, p. 68, Act 61, Imd. Eff. Mar. 31, being C. L. '57, (3152); C. L. '71, (4661); How. 6141; C. L. '97, (9200). Unchanged.

CONSTRUED: *Whipple v. Farrar*, 3 Mich. 436.

#### (12933). Real Estate to be Held in Trust.

SEC. 118. The real estate so conveyed to any such executor

or administrator shall be held in trust for the use of the heirs of such deceased person, subject to the dower of his widow, if there be any; but the same may be sold for the payment of debts and legacies, in the same manner as lands whereof the deceased died seized.

**HISTORY:** Re-enacts Sec. 35, of R. S. '46, Ch. 79; As Am. '51, p. 69, Act 61, Imd. Eff. Mar. 31, being C. L. '57, (3153); C. L. '71, (4662); How. 6142; C. L. '97, (9201). Unchanged.

**(12934). When Certificate Holder Entitled to Deed.**

**SEC. 119.** When the premises mentioned in any sheriff's certificate of sale of real estate under execution shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within ten years from the expiration of the time of redemption. When such deed is not taken and recorded within the time limited by this chapter the certificate of purchase shall become and be null and void.

**HISTORY:** Re-enacts in part Act 63 of '01, p. 95, Eff. Sept 5, omitting, however, the second sentence in such act. Modified.

**CONSTITUTIONALITY:** This section does not deprive the execution purchaser of property without due process of law. *Pike v. Halpin*, Sept., '15, 188 Mich. 447.

**(12935). Disposing of Surplus.**

**SEC. 120.** If, after any sale of real estate, made as herein prescribed there shall remain in the hands of the officer any surplus money after satisfying the writ or writs of execution on which such real estate was sold, with the interest thereon, the officer shall pay over such surplus to the judgment debtor or his legal representatives, on demand.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 79, being C. L. '57, (3154); C. L. '71, (4663); How. 6143; C. L. '97, (9202). Unchanged.

**(12936). Sale and Redemption of Equities.**

**SEC. 121.** All rights of redeeming mortgaged real estate and real estate sold on execution, may be sold on execution in the manner herein prescribed for the sale of other real estate on execution, excepting in the case hereinafter specified; and such equity of redemption may be redeemed, and the rights of any purchaser may be acquired, in the same manner, and upon the same terms and conditions as other real estate sold on execution.



**HISTORY:** Re-enacts Sec. 37, of R. S. '46, Ch. 79; As Am. '48, p. 314, Act 206, Eff. June 2, being C. L. '57, (3155); C. L. '71, (4664); How. 6144; C. L. '97, (9203). Unchanged.

**EQUITY OF REDEMPTION:** Is an interest in land. *Rawdon v. Dodge*, 40 Mich. 697. Has always, under our law, been regarded as practically a legal estate. *Hoffman v. Harrington*, 33 Mich. 394; *Gorham v. Arnold*, 22 Mich. 250. And is subject to levy and sale on execution. *Id.* 22 Mich. 250. But as to the mere right to redeem from an execution sale, see *Whiting v. Butler*, 29 Mich. 128, 129. What is deemed a sale of the debtor's equity of redemption only. *Messmore v. Hugard*, 46 Mich. 558. See *Gorham v. Wing*, 10 Mich. 493.

**(12937). Payment of Mortgage by Purchaser of Equity.**

**SEC. 122.** If the purchaser of any such equity of redemption, or any creditor having acquired the rights of such purchaser, shall pay the debt due on the mortgage, or the amount of any sale of said premises sold on execution, or any part thereof, the amount so paid on the mortgage or execution sale shall be paid, with interest, to such purchaser or creditor, in redeeming the premises, or purchasing the rights of such purchaser or creditor, as the case may be according to the provisions of this chapter.

**HISTORY:** Re-enacts Sec. 38, of R. S. '46, Ch. 79; As Am. '48, p. 314, Act 206, Eff. June 2, being C. L. '57, (3156); C. L. '71, (4665); How. 6145; C. L. '97, (9204). Unchanged.

**(12938). Fees and Charges Added.**

**SEC. 123.** The lawful fees and charges of the sale upon any execution in the manner prescribed in this chapter, shall, in all cases, be added to the amount due on the execution, and be considered as a part thereof for all the purposes mentioned in this chapter.

**HISTORY:** Re-enacts Sec. 39, R. S. '46, Ch. 79, being C. L. '57, (3157); C. L. '71, (4666); How. 6146; C. L. '97, (9205). Unchanged.

**(12939). When Equity Not to be Sold.**

**SEC. 124.** When a judgment shall be recovered for a debt secured by mortgage of real estate, or for any part of such debt, it shall not be lawful for the sheriff or other officer to sell the equity of redemption of the mortgagor, his heirs or assigns in such estate, by virtue of any execution upon such judgment.

**HISTORY:** Re-enacts Sec. 40, R. S. '46, Ch. 79, being C. L. '57, (3158); C. L. '71, (4667); How. 6147; C. L. '97, (9206). Unchanged.

**CONSTRUED:** Equity of redemption not to be sold. *Clark v. Stillson*, 36 Mich. 487; *Gale v. Hammond*, 45 Mich. 147; *Preston v. Ryan*,

45 Mich. 174. But growing crops on mortgaged premises may be sold on execution for the mortgage debt. *Id.* 45 Mich. 174. Sale of land on execution for its purchase price; effect of. *Clark v. Stilson*, 36 Mich. 482. The doctrine that if a debtor is appointed executor of the will of his creditor, and accepts, the debt is thereby released, does not operate to discharge a lien by which the debt is secured. *Crow v. Conant*, 90 Mich. 247.

**(12940). Indorsement of Description of Premises.**

SEC. 125. Whenever any execution against the property of the defendant shall be issued upon such judgment as is mentioned in the preceding section, the plaintiff or his attorney shall endorse on such execution a brief description of the premises mortgaged, with a direction to the officer not to levy such execution upon the said premises, or any part thereof.

HISTORY: Re-enacts Sec. 41, R. S. '46, Ch. 79, being C. L. '57, (3159); C. L. '71, (4668); How. 6148; C. L. '97, (9207). Unchanged.

**(12941). Return Unsatisfied.**

SEC. 126. If such execution shall not be collected of the other property of the defendant, the officer shall return the same unsatisfied, in whole or in part, as the case may require.

HISTORY: Re-enacts Sec. 42, R. S. '46, Ch. 79, being C. L. '57, (3160); C. L. '71, (4669); How. 6149; C. L. '97, (9208). Unchanged.

**(12942). Assignments to be Acknowledged and Recorded.**

SEC. 127. Before any assignee, or his personal representative, shall be entitled to a deed under the provisions of this chapter, every assignment under which he claims title, shall be executed and acknowledged or proved, in the same manner that deeds are required to be executed and acknowledged or approved, to entitle the same to be recorded, and such assignee shall cause the same to be recorded in the office of the register of deeds, in the county where the real estate so sold is situated.

HISTORY: Re-enacts Sec. 43, R. S. '46, Ch. 79, being C. L. '57, (3161); C. L. '71, (4670); How. 6150; C. L. '97, (9209). Unchanged.

CONSTRUED: *Whiting v. Butler*, 29 Mich. 143; *McGoren v. Avery*, 37 Mich. 120.

**(12943). Recovery by Purchaser in Case of Eviction.**

SEC. 128. If the purchaser of any real estate, sold by virtue of an execution, his heirs or assigns, shall be evicted from the

possession of such real estate, or if in an action for the recovery thereof, judgment shall be rendered against him or them, in consequence:

1. Of any irregularity in the proceedings concerning such sale; or
  2. Of the judgment upon which such execution issued being vacated or reversed;
- such purchaser, his heirs or assigns, may recover of the party for whose benefit such real estate was sold, the amount paid on the purchase thereof, with interest.

**HISTORY:** Re-enacts Sec. 44, R. S. '46, Ch. 79, being C. L. '57, (3162); C. L. '71, (4671); How. 6151; C. L. '97, (9210). Unchanged.

**CONSTRUED:** Campau v. Detroit Driving Club, 135 Mich. 585. Effect of new trial. Cook v. Kent Circuit Judge, 70 Mich. 94.

**(12944). Further Execution in Case of Irregularity.**

SEC. 129. The party for whose benefit such real estate was sold, and his personal representatives, upon such recovery being had against him in consequence of any irregularity in the proceedings concerning the sale, may have further execution upon the judgment by virtue of which such sale was made, to levy the amount paid on such sale, with interest.

**HISTORY:** Re-enacts Sec. 45, R. S. '46, Ch. 79, being C. L. '57, (3163); C. L. '71, (4672); How. 6152; C. L. '97, (9211). Unchanged.

**CONSTRUED:** Campau v. Detroit Driving Club, 135 Mich. 585.

**(12945). When Valid and Effectual.**

SEC. 130. Such judgment shall be deemed valid and effectual for the purpose specified in the preceding section, against the defendant therein, his personal representatives, heirs and devisees, but not against any purchaser in good faith, or any incumbrancer by mortgage, judgment or otherwise, whose title or incumbrance shall have accrued before the levy of such further execution.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 79, being C. L. '57, (3164); C. L. '71, (4673); How. 6153; C. L. '97, (9212). Unchanged.

**CONSTRUED:** Campau v. Detroit Driving Club, 135 Mich. 585.

**(12946). Contribution.**

SEC. 131. When lands and tenements, in the hands of several persons, shall be liable to satisfy any judgment, and the whole of such judgment, or more than a due proportion thereof, shall be levied upon the lands of one or more of such per-

sons, the persons so aggrieved, or their personal representatives, may compel a just and equal contribution by all the persons whose lands and tenements ought to contribute to the satisfaction of such judgment.

**HISTORY:** Re-enacts Sec. 47, R. S. '46, Ch. 79, being C. L. '57, (3165); C. L. '71, (4674); How. 6154; C. L. '97, (9213). Unchanged.

**(12947). Order of Contribution.**

**Sec. 132.** Such lands and tenements shall be liable to contribution in the following order:

1. If they were conveyed by the defendant in the execution, they shall be liable in succession, commencing with the lands last conveyed;

2. If they were sold under execution against the defendant, they shall also be liable in succession, commencing with the lands sold under the last and youngest judgment;

3. If there be lands so liable, which were conveyed by the defendant in the execution, and also lands which have been sold under execution against such defendant, they shall respectively be liable in succession, according to the order hereinbefore prescribed.

**HISTORY:** Re-enacts Sec. 48, R. S. '46, Ch. 79, being C. L. '57, (3166); C. L. '71, (4675); How. 6155; C. L. '97, (9214). Unchanged.

**(12948). Enforcement of Contribution in Chancery.**

**Sec. 133.** If a bill be filed in chancery to enforce such contribution, the person aggrieved shall be entitled to use the original judgment, and by virtue thereof, to pay the amount which ought to be contributed by the lands and tenements subject to such judgment; and for that purpose, such judgment shall remain a lien and charge upon such lands and tenements, for the term of five years after a certified copy thereof shall have been filed and entered in the office of the register of deeds in the county where the lands are situated, to the extent of the sum which ought to be so contributed, notwithstanding such sum or any part thereof, may have been paid by the party seeking such contribution.

**HISTORY:** Re-enacts Sec. 49, R. S. '46, Ch. 79, being C. L. '57, (3167); C. L. '71, (4676); How. 6156; C. L. '97, (9215). Unchanged.

**(12949). Lien of Original Judgment.**

**Sec. 134.** But such original judgment shall not remain a

lien upon any lands, nor shall they be subject to an execution as herein provided, unless the person aggrieved shall file an affidavit with the register of deeds in whose office a certified copy of such judgment shall have been filed and entered, stating the sum paid, and his claim to use such judgment for the reimbursement thereof, or of some portion of the same.

**HISTORY:** Re-enacts Sec. 50, R. S. '46, Ch. 79, being C. L. '57, (3168); C. L. '71, (4677); How. 6157; C. L. '97, (9216). Unchanged.

**(12950). Tenant in Common.**

**SEC. 135.** On the filing of such affidavit, the register of deeds shall make an entry in the margin of the entry of the certified copy of such judgment, stating the sum so paid, and that such judgment is claimed to be a lien to that amount.

**HISTORY:** Re-enacts Sec. 51, R. S. '46, Ch. 79, being C. L. '57, (3169); C. L. '71, (4678); How. 6158; C. L. '97, (9217). Unchanged.

**(12951). Right of Mortgagee of Lands Sold.**

**SEC. 136.** Any creditor having a mortgage of any lands sold on execution, his representatives or assigns, where the mortgage was executed subsequent to the levy in pursuance of which the mortgaged premises were sold, shall have the right to acquire the interest vested in the purchaser at the sale, on the terms provided in section one hundred two of this chapter, for creditors having a decree in chancery, or judgment at law.

**HISTORY:** Re-enacts Sec. 54 of R. S. '46, Ch. 79; As Added '61, p. 134, Act 104, Eff. June 15; being C. L. '71, (4681); How 6161; C. L. '97, (9220), with a necessary change in phraseology. Unchanged.

**CONSTRUED:** *People v. Fralick*, 12 Mich. 239.

**(12952). Defeating Interest of Original Purchaser.**

**SEC. 137.** The interest of the original purchaser acquired by such mortgagee, his representatives or assigns, shall be subject to be defeated in the same manner as the same right acquired by other creditors, except that unless an execution has been issued on his judgment or decree, and a levy made by virtue thereof on the mortgaged premises, previous to the execution of the mortgage, any creditor acquiring the right of the original purchaser from such mortgagee, his representatives or assigns, shall pay to said mortgagee, his representatives or assigns, the amount due on the mortgage, and be thereby subrogated to the rights of the owner thereof; such cred-

itor shall also reimburse, with interest, the amount paid by such mortgagee, his representatives or assigns, to acquire the rights of the original purchaser.

**HISTORY:** Re-enacts Sec. 55 of R. S. '46, Ch. 79; As Added '61, p. 135, Act 104, Eff. June 15, being C. L. '71, (4682); How. 6162; C. L. '97, (9221), omitting "at ten per cent per annum." Unchanged.

**(12953). Acquisition of Rights of Original Purchaser.**

**SEC. 138.** Creditors shall be allowed to acquire the right of the original purchaser in the order of their liens.

**HISTORY:** Re-enacts Sec. 56 of R. S. '46, Ch. 79; As Added '61, p. 135, Act 104, Eff. June 15, being C. L. '71, (4683); How. 6163; C. L. '97, (9222). Unchanged.

**(12954). Tenant in Common.**

**SEC. 139.** When any judgment debtor shall have or own an undivided interest or estate as tenant, in common or otherwise, with the same parties in several pieces or parcels of land, the sheriff to whom any execution issued on any judgment against said debtor may be directed, may levy said execution upon any such undivided interest or estate, and in case of an existing levy thereon may advertise and sell, as a single parcel, the interest of such judgment debtor in any or all of such undivided and unpartitioned tracts or parcels in his bailiwick, and the same may be redeemed only on payment of the sum bid, with interest at the rate borne by the judgment under which such sale was made. Certificates, setting forth a description of the premises in which such interest may have been sold, the sum bid, and the time when such sale will become absolute and the purchaser entitled to a deed, shall be made, delivered to the purchaser, and filed in the office of the register of deeds, in the same manner and with like effect as in other cases of sales of real estate on execution.

**HISTORY:** Re-enacts Sec. 57 of R. S. '46, Ch. 70; As Added '67, p. 97, Act 69, Eff. June 27, being C. L. '71, (4684); How. 6164; C. L. '97, (9223). Unchanged.

**CONSTRUED:** Sale on execution of the undivided interest of a tenant in common in part of the lands held in common, prior to this statute. *Campau v. Godfrey*, 18 Mich. 27; *Whiting v. Butler*, 29 Mich. 122. It may be sold. *Butter v. Roys*, 25 Mich. 53. Certificates, etc. See notes to Compilers' Section (12910).

**(12955). Payments on Contracts may be Deposited with Register of Deeds.**

**SEC. 140.** When any real estate shall be sold on execution

which shall have been previously contracted to be sold by the owner thereof in writing, by a valid agreement, and when such agreement in writing shall be existing at the time of such sale, it shall be lawful for the person holding such contract to make any payment thereon which may become due previously to the expiration of the time for the redemption of said real estate, and previously to a redemption thereof by the debtor, to deposit such payment with the register of deeds, in whose office the certificate of sale is required to be filed, taking such register's receipt therefor, and in case such premises are redeemed by the debtor or his assignee, the payment or payments so deposited, shall be by said register delivered to said debtor or his assignee; but in case such real estate shall not be so redeemed, the payment or payments shall be delivered to the person acquiring said real estate, under such sale, and such payment so made and deposited with said register, shall have the same effect for the benefit of the person so making the same under his said contract, as if made to either of said parties entitled thereto when the same was deposited with said register.

**HISTORY:** Re-enacts Sec. 1 of Act 274 of '65, being C. L. '71, (4686); How. 6155; C. L. '97, (9225). Unchanged.

**LANDS UNDER CONTRACT:** Vendee's interest under contract of purchase. *Welsh v. Richards*, 41 Mich. 593. A debtor's title to lands which he has contracted to convey may be sold on execution and the purchaser will take subject to the contract. *Doak v. Runyan*, 33 Mich. 75. The interest of a purchaser of primary school land, under certificate of purchase, is subject to levy. *Kercheval v. Wood*, 3 Mich. 509. One who buys land on execution sale, knowing it to be under contract before judgment, is not a bona fide purchaser as against the contract purchaser. *Kinyon v. Young*, 44 Mich. 339.

#### (12956). Leashold Interests.

**SEC. 141.** Leasehold interests in lands shall be subject to levy and sale upon execution. Proceedings to and including the sale shall be the same in all respects as in the case of real estate sold on execution: *Provided*, That if such leasehold consists of a farm lease, the debtor shall have the right to select from the crops growing on said farm, any of such crops to the extent provided for in subdivisions six, eight and nine of section forty-three of this chapter as exemptions.

**HISTORY:** Supersedes and merges Sec's. 1 and 2 of Act 69 of '79, being How. 6166-7; C. L. '97, (9226)-(9227). Unchanged.

**CONSTRUED:** Leasehold interests in lands. See notes to Compilers' Section (11523). A life estate granted to man and wife is an

entirety and execution cannot be levied on a husband's individual life interest where he occupied jointly with his wife especially if it be their homestead. *Vinton v. Beamer*, 55 Mich. 561. By this act, common law rule, that leases of land be sold as personal property was changed, so proceedings would be as in cases of sales of real estate. A lease which had eight or ten years to run was such a conveyance as required recording. *Crouse v. Mitchell*, 130 Mich. 356.

**(12957). Effect of Filing of Notice of Levy.**

SEC. 142. Upon the filing of such notice of levy, it shall be notice of all the rights acquired by the plaintiff and purchaser at the sale, and the plaintiff in execution or his attorney, shall be thereafter entitled to reasonable notice from the lessor in case such lessor intends to forfeit the lease for any default made by the lessee, or person claiming under him, to the end that such plaintiff shall have a reasonable opportunity to comply with the terms of the lease and save a forfeiture; and in case the plaintiff or execution purchaser is compelled to pay any rent due at the date of sale on execution or previous thereto, no redemption shall be allowed until the amount so paid is refunded to the plaintiff or execution purchaser, with interest, in addition to the amount for which such leasehold interests may be sold on execution.

HISTORY: Re-enacts Sec. 3 of Act 69 of '79, being How. 6168; C. L. '97, (9228), omitting "at ten per cent per annum." Unchanged. See note to Sec. 141 of this chapter.

**(12958). Rights of Purchaser.**

SEC. 143. When such leasehold interest is sold on execution the purchaser will be thereupon entitled to all the rights and privileges of the defendant in and to the leasehold premises, and may immediately obtain possession thereof from such defendant or person holding under him in the manner provided in the case of an unlawful detainer of lands.

HISTORY: Re-enacts Sec. 4 of Act 69 of '79, being How. 6169; C. L. '97, (9229); omitting "in Ch. 217 of C. L. '71." Unchanged. See note to Sec. 141 of this chapter.

**(12959). Conveyance.**

SEC. 144. The officer making the sale shall, within ten days thereafter, execute to the purchaser a conveyance of the leasehold interest, which conveyance, if the unexpired term of such lease then exceeds three years, shall be by deed duly executed and acknowledged, as in the case of a conveyance of real estate,



which deed shall be deposited with said register of deeds, but shall not be recorded until the expiration of one year after the day of sale, and the officer making the sale shall endorse on such deed the date on which it will be entitled to record.

**HISTORY:** Re-enacts Sec. 5 of Act 69 of '79, being How. 6170; C. L. '97, (9230). Unchanged.

See note to Sec. 141 of this chapter.

**(12960). Redemption.**

**SEC. 145.** In all cases where the unexpired term of the lease exceeds three years at the date of sale on execution, the defendant shall have one year after such sale in which to redeem from the purchaser or his assigns the interest so sold on execution, and upon such redemption being duly made, said deed shall become void, and the defendant shall be entitled to repossess, recover, and enjoy the premises from the execution purchaser or assigns. Such redemption may be made in the manner provided by law for the redemption of real estate sold on execution.

**HISTORY:** Re-enacts Sec. 6 of Act 69 of '79, being How. 6171; C. L. '97, (9231). Unchanged.

See note to Sec. 141 of this chapter.

**(12961). Mining Licenses.**

**SEC. 146.** The term leasehold interest, wherever used in this chapter, shall be deemed to include mining licenses, for mining ore or minerals. Tenancies at will shall not be subject to the provisions of the last five sections.

**HISTORY:** Re-enacts Sec. 7 of Act 69 of '79; As Am. '83, p. 45, Act 54, Eff. Sept. 8, being How. 6172; C. L. '97, (9232), changing "Act" to "Chapter," and "Act" to "last five sections." Unchanged.

**(12962). Discharge from Levy.**

**SEC. 147.** In all cases of redemption of lands sold on execution, or in all cases of the sale of lands on mortgage foreclosure, whether by advertisement or chancery sale, or in all cases of payment of judgments or decrees where the record shows a levy, or any other lien by mortgage levy, or *lis pendens*, it shall and may be lawful and it is hereby made the duty of the officer making such sale, or the person receiving such money, or his attorney, to discharge such levy, judgment, mortgage, or

decree from the record of the register of deeds, in the proper county in which such sale is made.

**HISTORY:** Re-enacts Sec. 1 of Act 161 of '73, being How. 5708; C. L. '97, (9054), with a slight change in phraseology and the insertion of "or attorney." Modified.

**CONSTRUED:** To set aside a sale of real estate on execution for alleged irregularities application should be made to the court wherein the judgment was rendered. *Rhode v. Hassler*, 113 Mich. 56. To discharge decree, see Compilers' Sections (12808)-(12809). Certificate of satisfaction. See Compilers' Section (12898).

**(12963). Return of Articles.**

**Sec. 148.** The officer who shall make any sale on execution, shall, in his return on the execution, specify the articles sold, and the sum for which each article or parcel was sold; and if he shall be guilty of any fraud in the sale, or in the return, or shall unreasonably neglect to pay any money collected by him on such execution, when demanded by the creditor therein, he shall be liable to an action on the case, at the suit of the party injured, for five times the amount of the actual damages sustained by reason of such fraud or neglect.

**HISTORY:** Re-enacts and merges Sec's. 46 and 54, R. S. '46, Ch. 106, being C. L. '57, (4484)-(4492); C. L. '71, (6120)-(6128); How. 7705, 7713; C. L. '97, (10343)-(10351). Unchanged.

**CONSTRUED:** (C. L. '97, 10351) Purchaser's title not invalidated by an insufficient return to the execution. *Spafford v. Beach*, 2 Doug. 150. See *People v. Judges*, 1 Doug. 417. When officer's return of execution may be impeached. *Nall v. Granger*, 8 Mich. 450; *Winfield v. Adams*, 34 Mich. 437. Form and requisites of return before filing judgment creditor's bill. See notes to Subdivision 6 of Compilers' Section (12302).

**(12964). Order Restraining Waste.**

**Sec. 149.** If any person shall commit or threaten, or make preparations to commit any waste on any real estate which shall be attached or levied upon by execution in any civil action, the court from which such execution or attachment shall have issued, any circuit judge or circuit court commissioner, may, on the application of the plaintiff, either in term or vacation make an order restraining such person from committing any waste or further waste thereon. Any person who shall violate the terms of any such order, shall be deemed guilty of contempt of the court in which such action is pending, and shall be punishable as in other cases of contempt.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 110, being C. L. '57, (4705); As Am. '58, p. 9, Act 4, Eff. May 6; C. L. '71, (6360); How. 7947; C. L. '97, (11123), adding however, the last sentence in the above section relating to the penalty. Modified.

**CONSTRUED:** Stout v. Keyes, 2 Doug. 184; Ward v. Carp River Iron Co., 47 Mich. 68.

**(12965). Enforcement of Chancery Decree.**

**SEC. 150.** The court in chancery may enforce performance of any decree, or obedience thereto, by execution against the body of the party against whom such decree shall have been made, or by execution against the goods and chattels, and in default thereof, the lands and tenements of such party; but no execution shall be issued on any final decree, until the same shall have been enrolled, as hereinbefore provided.

**HISTORY:** Re-enacts Sec. 63, R. S. '46, Ch. 90, being C. L. '57, (3517); C. L. '71, (5099); How. 6653; C. L. '97, (468), inserting the necessary words "in chancery." Unchanged.

**ENFORCEMENT:** Can be demanded only by the party to whom the affirmative relief is given. *Mickle v. Maxfield*, 42 Mich. 309. Enforcement after assignment of decree. *Terry v. McClintock*, 41 Mich. 497; *Webster v. Hitchcock*, 11 Mich. 56; *Perkins v. Perkins*, 16 Mich. 162. Payment of money pursuant to order of court can be enforced by attachment and imprisonment only when there is no other adequate remedy. See *Compilers' Section* (12268) and notes. Payments required by interlocutory orders may be enforced by attachment; the performance of final decrees by execution. See *Steller v. Steller*, 25 Mich. 159; *Haines v. Haines*, 35 Mich. 144; *North v. North*, 39 Mich. 67; *Taylor v. Gladwin*, 40 Mich. 232; *Palmer v. Palmer*, 45 Mich. 150. The chancery rule, which does not allow proceedings to enforce a decree before enrollment, has no reference to orders of the court, but to proceedings in execution of the decree itself, and the practice as to chancery sales has allowed the preliminary steps of advertising and other preparatory measures in advance of enrollment, but has required the sale to be made after enrollment. *Taylor v. Gladwin*, 40 Mich. 235. See *Wilkie v. Judge*, 52 Mich. 641; *Dewey v. Dewey*, 151 Mich. 586, 589. A creditor having no judgment or decree, of a personal nature, can maintain a bill to subject equitable interest of a debtor to the payment of a debt. *Jenks v. Horton*, 114 Mich. 48, 50. Where execution may issue to collect a decree for the payment of money, the proceeding by contempt to enforce a civil remedy cannot be resorted to. *Carnahan v. Carnahan*, 143 Mich. 390, 396.

**CITED:** *Reynolds v. Reynolds*, 115 Mich. 381.

## CHAPTER XXIV.

### THE ENFORCEMENT OF JUDGMENTS, ORDERS AND DECREES OTHER THAN BY EXECUTION.

#### (12966). Notice of Sale of Real Estate.

SECTION 1. Hereafter any circuit court commissioner, or other officer authorized by law, or any person duly authorized by an order of the court to sell real estate in pursuance of any decree or final order of the court of equity, shall give a like notice of such sale as is required by law in the case of the sale of real estate on execution, and such sale shall be conducted in the same manner, and the person making such sale shall have the same powers and authority, and be subjected to the same liability as in case of sale of real estate on execution. All lawful fees for advertising and conducting such sale shall be added to the amount due on such order or decree and collected therewith.

**HISTORY:** Supersedes and merges Sec's. 1-6. 8 of Act 18 of '77, being How. 6747; As Am. '85, p. 123, Act 124, Eff. Sept. 19; 6748-49-50-51-52-54; C. L. '97, (9246)-(9247)-(9248)-(9249)-(9250)-(9251)-(9253). Unchanged.

**SALES OF REAL ESTATE BY CIRCUIT COURT COMMISSIONERS,** Hereafter commissioner's sales shall be conducted upon like notice and in the same manner as sales of real estate on execution.

**NOTICE:** Notice of sale of real estate on execution. See Compilers' Sections (12900)-(12901). *Ireland v. Woolman*, 15 Mich. 253; *Wagar v. Briscoe*, 38 Mich. 593. Due notice indispensable, and strict proof by affidavit should be made of record. *Perrien v. Fetters*, 35 Mich. 233. Notice may be given before enrollment of decree, but sale cannot be made until after. *Taylor v. Gladwin*, 40 Mich. 235. Premises must be described. *Griswold v. Fuller*, 33 Mich. 268. See *Brown v. Phillips*, 40 Mich. 264.

**PUBLICATION OF NOTICE:** Posted in three public places. *N. Y. Baptist Union v. Atwell*, 95 Mich. 240. Sufficiency of proof of publication. *Perrien v. Fetters*, 35 Mich. 233. Publication of notice of foreclosure sale in the weekly newspaper of legal and business information, is good. *Hook v. Sloman*, 155 Mich. 2. It is within the discretionary powers of the circuit judge to set aside the foreclosure sale where notice was published in a paper which has no circulation in the neighborhood of mortgagor. *Brewer v. Landis*, 111 Mich. 127. When further publication not required in case of adjournment. *Isbell v. Kenyon*, 33 Mich. 63.

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**SALE OF BIDDER:** Resale on failure to pay sum bid. *Isbell v. Kenyon*, 33 Mich. 63. Transfer of bid. *Culver v. McKeown*, 43 Mich. 322. In *Converse v. Clay*, 86 Mich. 379, the court held that C. L. '97, (9249), (repealed by this act) afforded ample protection against "straw bidding." The law does not contemplate that each bid, whether the highest or not, shall be accompanied with the amount thereof, and it is not unusual to allow time within which to produce the amount of the bid. Nor does it contemplate that the officer making the sale, by an unreasonable demand, shall prevent competition or a sale of the property in parcels and to the best advantage. *Converse v. Clay*, 86 Mich. 379.

**SALE:** Absence of commissioner or expiration of term of office. *Compilers' Section* (12183)-(12184). Sale of land in parcels, see *Compilers' Section* (12907), and notes. Officer not to purchase. See notes to *Compilers' Section* (14011).

**ADJOURNMENTS:** See *Compilers' Section* (12183); *Hart v. Lindsay*, Walk. 72; *Isbell v. Kenyon*, 33 Mich. 63.

**PENALTY:** See notes to *Compilers' Section* (12903).

**CHANCERY FORECLOSURES:** For sales on chancery foreclosures, see *Compilers' Section* (12683).

(12967). **Enforcing Performance of Decree.**

**SEC. 2.** In the case of a decree against an absent, concealed or non-resident defendant, process may issue to compel the performance of such decree, either by sequestration of the real and personal estate of the defendant, or such part thereof as shall be deemed sufficient; or where any specific estate or effects are demanded by the bill, by causing possession of the property so demanded to be delivered to the plaintiff.

**HISTORY:** Re-enacts Sec. 88, R. S. '46, Ch. 90, being C. L. '57, (3541); C. L. '71, (5124); How. 6678; C. L. '97, (493), with slight change in phraseology and "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** Similar section of former law construed in *Lawrence v. Fellows*, Walk. 468.

(12968). **When Possession Delivered.**

**SEC. 3.** Possession in the case last mentioned shall not be delivered until the plaintiff shall have given such security, and in such sum as the court shall direct, to abide the order of the court touching the restitution of the estate or effects delivered, in case the defendant shall appear and be admitted to defend the suit.

**HISTORY:** Re-enacts Sec. 89, R. S. '46, Ch. 90, being C. L. '57, (3542); C. L. '71, (5125); How. 6679; C. L. '97, (494). Unchanged.

**CONSTRUED:** Similar section of former law construed in *Lawrence v. Fellows*, Walk. 468.

**(12969). When Decree Satisfied out of Sequestered Estate.**

SEC. 4. Upon like security being given, the court, when a sequestration shall have issued, may order the decree to be satisfied out of the estate and effects sequestered; but if such security shall not be given, the estate and effects sequestered shall remain under the direction of the court, to abide its further order.

HISTORY: Re-enacts Sec. 90, R. S. '46, Ch. 90, being C. L. '57, (3543); C. L. '71, (5126); How. 6680; C. L. '97, (495). Unchanged.

CONSTRUED: Similar section of former law construed in *Lawrence v. Fellows*, Walk. 468.

**(12970). Collection of Judgment Against Municipality.**

SEC. 5. Whenever judgment shall have been recovered against any township, village or city, or against the trustees or common council, or officers thereof, in any action prosecuted by or against them in their name of office, no execution shall be awarded or issued upon such judgment, but it shall be the duty of the justice of the peace rendering such judgment, if in a justice's court at any time after the time for appealing has elapsed, or the clerk of the court, if such judgment shall be rendered in a court of record and shall not be reversed, on the application of the party in whose favor such judgment was rendered, his attorney, executor, administrator, or assigns, to make and deliver to the party so applying a certified transcript of such judgment, showing the amount and date thereof, with the rate of interest thereon, and of the costs as taxed under the seal of the court, if in a court having a seal, and it shall be lawful for the party so obtaining such certified transcript to file the same with the supervisor of the township, if such judgment is against the township, or with the assessing officer or officers of the city or village, if such judgment is against a city or village. And it shall be the duty of the supervisor or supervisors or assessing officer or officers receiving any such certified transcript or transcripts of any judgment or judgments to proceed to assess the amount thereof with the costs and interest from the date of rendition of judgment to the time when the warrant for the collection thereof will expire upon the taxable property of the township, city or village, as the case may be, upon the then next tax roll of such township, city or village, without any other or further certificate or certificates than such certified transcript or transcripts, as a part of the township, city or village tax, adding the total amount

of such judgment or judgments, as the case may be, to the other township, city or village taxes, and assessing the same in the same column with the general township, city or village tax. And it shall further be the duty of such supervisor, assessing officer or officers to set forth in the warrant attached to such tax roll each judgment separately, stating the amount thereof and to whom payable, and the same shall be collected and returned in the same manner as other taxes. And it shall further be the duty of such supervisor, assessing officer or officers, at the time when he or they shall deliver such tax roll to the treasurer or collecting officer of any such township, city or village, to deliver to the township clerk or to the clerk or recording officer of any such city or village a statement in writing under his hand, setting forth in detail and separately such judgment or judgments as the case may be, stating the amount of each, with costs and interest as herein provided, and to whom payable. And it shall be the duty of such treasurer or collecting officer of any such township, city or village, to collect and pay said judgment to the owner thereof or his attorney, on or before the date when such tax roll and warrant shall be returnable. In case any supervisor, treasurer, or other assessing or collecting officer shall neglect or refuse to comply with any of the provisions of this and the succeeding section of this chapter, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than one hundred dollars and costs of prosecution, or imprisonment in the county jail for a period not exceeding three months, or by both such fine and imprisonment, in the discretion of the court. Nothing herein contained shall be construed to exclude other remedies given by law for the enforcement of such judgment.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 119, being C. L. '57, (4917); C. L. '71, (6630); As Am. '83, p. 51, Act 63, Imd. Eff. May 2; How. 8218; As Am. '87, p. 444, Act 312, Imd. Eff. June 28; C. L. '97, (10482), with a slight change in phraseology. Unchanged.

**CONSTRUED:** Collection of costs against township. *Stockwell v. White Lake Twp. Board*, 22 Mich. 353. Collection of judgments. *Shippy v. Mason*, 90 Mich. 45; *Hammond v. Place*, 116 Mich. 628.

**CITED:** *Marathon Twp. v. Oregon Twp.* 8 Mich. 377; *McArthur v. Duncan Twp.*, 34 Mich. 27; *Griswold v. Ludington*, 117 Mich. 317. For proceeding in which statute was enforced—see *Montpelier Sav. Bank v. Quinn*, 149 Mich. 701. In *Hammond v. Place*, 116 Mich. 628, mandamus was held to lie under the statute, How. Sec. 8218, to compel the levy of an assessment to pay a judgment against a city, though the rate of taxation was thereby increased beyond its charter limit. But mandamus was held not to lie to compel the officers and common

council of a city to pay a judgment out of moneys on hand, where such moneys were raised and were required for other purposes; the creditors remedy being under the statute—*Griswold v. Common Council, of Ludington*, 117 Mich. 317. See *Dayton Twp. v. Rounds*, 22 Mich. 82; *Just v. Wise Twp.*, 42 Mich. 573; *Hart Twp. v. Oceana Co.*, 44 Mich. 417.

**(12971). Judgment Against Village Having no Assessing Officer.**

SEC. 6. In any case where a judgment has been, or is hereafter recovered against any such village which, by reason of holding no municipal elections, or for any other reason has no available assessing officer within the jurisdiction of the court wherein such judgment was rendered, the owner of such judgment or any person knowing the facts, acting in behalf of such owner, may make an affidavit showing that the village against which any such judgment is pending and unsatisfied, has no available assessing officer within the said jurisdiction, and file the same with the clerk of the circuit court wherein said judgment is, or with the justice of the peace having custody of the docket wherein such judgment is written. Whereupon it shall be the duty of such officer as shall make said certified transcript, to attach thereto a copy of said affidavit, the correctness of which copy shall also be certified to in said certificate. Any party receiving such certified transcript of judgment and affidavit may file the same with the supervisor of the township or townships in which any such village, having no assessing officer, is located. Whereupon it shall be the duty of said supervisor to assess the amount of said judgment with costs and interest, upon the taxable property of said village, which is without an assessing officer, and thereafter the same steps and proceedings shall be had in the premises as though it were a judgment against the township or townships within which said village is located, save that it shall be assessed against the property within the corporate limits of said village only.

HISTORY: Re-enacts Sec. 8, of R. S. '46, Ch. 119, as Added '97, p. 311, Act 235, Eff. Aug. 30, being C. L. '97, (10483). Unchanged.

**(12972). Judgment Against Supervisors.**

SEC. 7. When judgment shall be recovered against any county or the board of supervisors or any county officer in an action prosecuted by or against him in his name of office, no execution shall be awarded or issued upon such judgment, but the same, unless reversed, shall be levied and collected as other



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county charges, and when so collected, shall be paid by the county treasurer to the person to whom the same shall have been adjudged, upon the delivery of a proper voucher therefor.

**HISTORY:** Re-enacts Sec. 32, R. S. '46, Ch. 13, being C. L. '57, (331); C. L. '71, (463); How. 469; C. L. '97, (2471). The old section reading, however, "when judgment shall be recovered against a board of supervisors or against any county officer in an action, etc." Unchanged.

(12973). School District.

SEC. 8. No execution shall issue on any judgment against a school district, nor shall any suit be brought thereon, but the same shall be collected in the manner prescribed in this chapter.

**HISTORY:** Re-enacts and supersedes Sec. 3 of Ch. 7 of Act 164 of '81, being How. 5109; C. L. '97, (4723), changing "act" to "chapter," though such section was not expressly repealed by this act. Unchanged.

(12974). Treasurer to Certify to Judgment.

SEC. 9. Whenever any final judgment shall be obtained against the school district, if the same shall not be removed to any other court, the treasurer of the district shall certify to the supervisor of the township and to the director of the district the date and amount of such judgment, with the name of the person in whose favor the same was rendered, and if the judgment shall be removed to another court, the treasurer shall certify the same as aforesaid, immediately after the final determination thereof against the district.

**HISTORY:** Re-enacts and supersedes Sec. 4 of Ch. VII of Act 164 of '81, being How. 5110; C. L. '97, (4724); As Am. '01, p. 228, Act 165, Eff. Sept. 1, '02; As Am. '03, p. 63, Act 49, Eff. Sept. 17, though such section was not expressly repealed by this act. Unchanged.

(12975). When Treasurer Fails to Certify.

SEC. 10. If the treasurer shall fail to certify the judgment as required in the preceding section, it shall be lawful for the party obtaining the same, his executors, administrators, or assigns, to file with the supervisor the certificate of the justice or clerk of the court rendering the judgment, showing the facts which should have been certified by the treasurer.

**HISTORY:** Re-enacts and supersedes Sec. 5 of Ch. VII of Act 164 of '81, being How. 5111; C. L. '97, (4725); As Am. '01, p. 228, Act 165,

Eff. Sept. 1, '02, though such section was not expressly repealed by this act. Unchanged.

**(12976). Fractional School District.**

SEC. 11. If the district against which any such judgment shall be rendered is situated in part in two or more townships, a certificate thereof shall be delivered as aforesaid to the supervisor of each township in which such district is in part situated.

HISTORY: Re-enacts and supersedes Sec. 6 of Ch. VII of Act 164 of '81, being How. 5112; C. L. '97, (4726), though such section was not expressly repealed by this act. Unchanged.

**(12977). Supervisor to Assess Judgment.**

SEC. 12. The supervisor or supervisors receiving either of the certificates of a judgment as aforesaid shall proceed to assess the amount thereof, with interest from the date of the judgment to the time when the warrant for the collection thereof will expire, upon the taxable property of the district, placing the same on the next township assessment roll in the column for school taxes; and the same proceedings shall be had, and the same shall be collected and returned in the same manner as other district taxes.

HISTORY: Re-enacts and supersedes Sec. 7 of Ch. VII of Act 164 of '81, being How. 5113; C. L. '97, (4727); though such section was not expressly repealed by this act. Unchanged.

**(12978). Board of State Institution.**

SEC. 13. When any judgment or decree shall have been obtained against any corporate body, or unincorporated board, now or hereafter having charge or control of any state institution, no execution shall be issued thereon, but the amount thereof shall be included and collected in the state tax and paid to the person entitled thereto.

HISTORY: New section.

**CHAPTER XXV.**  
**OF ARREST AND BAIL IN CIVIL ACTIONS.**

**(12979). Who to Take Recognizance.**

**SECTION 1.** In all cases where special bail shall be required to be put in, a recognizance thereof may be taken before any justice of the supreme court, any circuit judge, circuit court commissioner, clerk of any court of record, and shall be filed in the office of the clerk of the court in which the action is pending.

**HISTORY:** Re-enacts and supersedes Sec. 1, R. S. '46, Ch. 98, being C. L. '57, (4133); As Am. '58, p. 8, Act 4, Eff. May 6; C. L. '71, (5749); How. 7318; C. L. '97, (10028), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Jurisdictional defects in the affidavit are not waived by putting in special bail and pleading to the issue. *Stephenson's Case*, 32 Mich. 60; *Graham v. Cass Circuit Judge*, 108 Mich. 425. But the mere sufficiency of the affidavit cannot be attacked after putting in special bail or pleading to the merits. *Stewart v. Hill*, 1 Mich. 265; *Maxwell v. Deens*, 46 Mich. 37; *Wiest v. Luyendyk*, 73 Mich. 663; *Reed v. McCready*, 170 Mich. 532.

**CITED:** *DeMyer v. McGonegal*, 32 Mich. 125; See *Baldwin v. Branch Circuit Judge*, 48 Mich. 526.

**(12980). Form of Recognizance.**

**SEC. 2.** The recognizance of special bail shall be, in substance, in the following form, to wit:

COURT

A. B.

vs.

C. D.

..... county, ss. Be it remembered that on this ..... day of ..... in the year nineteen hundred and ..... E. F. and G. H., of the county of ..... personally appeared before J. K. (describing the office), and severally acknowledged themselves to owe A. B., the above named plaintiff, the sum of (the sum for which the bail is required), each, to be levied upon their several goods and chattels, lands and tenements, upon condition that if C. D., the defendant, shall be condemned in this action, at the suit of A. B., the plaintiff, he, the said C. D. shall pay the costs and

condemnation of the court, or render himself into the custody of the sheriff of the county of ..... (the county in which the defendant was arrested), for the same, or if he fail so to do, that the said E. F. and G. H. will pay the costs and condemnation for him.

Taken and acknowledged the day { ..... E. F.  
and the year above written, before me, { ..... G. H.

J. K. Clerk, etc.

**HISTORY:** Re-enacts and supersedes Sec. 2, R. S. '46, Ch. 98, being C. L. '57, (4134); C. L. '71, (5750); How. 7319; C. L. '97 (10029), making a slight change in the above form, though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** This and the next section distinguish between the recognizance and the bail-piece. They are entirely different in form and substance. *Elliott v. Dudley*, 8 Mich. 65. For a proceeding under the statute, see *Ludwick v. Kent* Circuit judge, 138 Mich. 107.

#### (12981). Bail-Piece.

SEC. 3. Upon entering into any such recognizance, the persons becoming special bail shall be entitled to a bail-piece from the officer taking the recognizances, in sustance, (substance) as follows, to wit:

..... Court.

..... county, ss. On this ..... day of .....  
..... nineteen hundred and ..... C. D. is delivered  
to bail on a cepi corpus, unto E. F. and G. H., of the county  
of ..... at the suit of A. B., in the plea of .....  
(as the action may be).

J. K., Clerk (or Judge, etc.).

**HISTORY:** Re-enacts and supersedes Sec. 3, R. S. '46, Ch. 98, being C. L. '57, (4135); C. L. '71, (5751); How. 7320; C. L. '97, (10030), making an immaterial change in the form of bail-piece, though such section was not expressly repealed by this act. Unchanged.

**BAIL-PIECE:** See note to the preceding section. Bail-piece waived unless demanded. *Wilcox v. Ismond*, 32 Mich. 268.

#### (12982). Exceptions to Special Bail.

SEC. 4. Exceptions to special bail may be taken by an endorsement to that effect upon the recognizance on file, within twenty days after notice of putting in such bail, and bail shall be perfected within ten days after notice of such exception.

**HISTORY:** Re-enacts and supersedes Sec. 4, R. S. '46, Ch. 98, being C. L. '57, (4136); C. L. '71, (5752); How. 7321; C. L. '97, (10031),

though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Defendant is not entitled to his release until plaintiff has had an opportunity to take exception to the special bail. *Ludwick v. Kent Circuit Judge*, 138 Mich. 107.

**CITED:** *DeMyer v. McGonegal*, 32 Mich. 125.

**(12983). Justification of Bail.**

**SEC. 5.** Special bail may justify by affidavit, before any officer authorized to take recognizance of special bail; and such affidavit shall set forth the township, or city, and county, in this state, in which the bail reside, and that they are severally worth the sum in which the defendant is held to bail, after all their debts are paid.

**HISTORY:** Re-enacts and supersedes Sec. 5, R. S. '46, Ch. 98, being C. L. '57, (4137); C. L. '71, (5753); How. 7322; C. L. '97, (10032), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** This section prescribes only the method of perpetuating the evidence of justification. *Ludwick v. Kent Circuit Judge*, 138 Mich. 110.

**(12984). Assignment of Bail Bond.**

**SEC. 6.** If special bail be not put in and perfected within the time limited by law, according to the rules and practice of the court, and the plaintiff be satisfied with the bail taken by the officer serving the writ, he may take an assignment of the bail bond from the officer to whom the bond was given, and may sue thereon in his own name.

**HISTORY:** Re-enacts and supersedes Sec. 6, R. S. '46, Ch. 98, being C. L. '57, (4138); C. L. '71, (5754); How. 7323; C. L. '97, (10033), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Special bail is not perfected until the court approves the sufficiency of the sureties. *Ludwick v. Kent Circuit Judge*, 138 Mich. 111. As to what constitutes perfecting special bail, see *Id.* The assignment of the bond need not be under seal. *Wilcox v. Ismon*, 34 Mich. 268.

**CITED:** *DeMyer v. McGonegal*, 32 Mich. 126; *Wilcox v. Ismond*, 34 Mich. 271; *Fisher v. Drewa*, 63 Mich. 656. See *Prior v. Bodrie*, 49 Mich. 201; *McNeal v. VanDuser*, 142 Mich. 593.

**(12985). Setting Aside or Stay of Proceedings.**

**SEC. 7.** The proceedings in the suit on the bail bond may be set aside if irregular, or stayed on terms, in order that a trial may be had in the original action.

**HISTORY:** Re-enacts and supersedes Sec. 7, R. S. '46, Ch. 98, being C. L. '57, (4139); C. L. '71, (5755); How. 7324; C. L. '97, (10034), though such section was not expressly repealed by this act. Unchanged.

**CITED:** Schwarzschild & Sulzberger Co. v. Cryan, 167 Mich. 379.

**(12986). Terms of Stay.**

**SEC. 8.** Where the plaintiff has not lost a trial in the original action by reason of default in not filing and perfecting special bail, the court may stay the proceedings on the bail bond, upon the putting in and perfecting special bail, paying the costs of assigning the bail bond, and of the proceedings thereon, receiving a declaration in the action and pleading issuable to the merits, so that the original cause may be tried at the same time if the plaintiff shall so elect, and if the plaintiff has lost a trial by reason of such default, judgment shall be entered on the bail bond as security.

**HISTORY:** Re-enacts and supersedes Sec. 8, R. S. '46, Ch. 98, being C. L. '57, (4140); C. L. '71, (5756); How. 7325; C. L. '97, (10035), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** This section relates only to proceedings where no surrender of the principal defendant has been attempted and no exoneration of bail applied for. Schwarzschild & Sulzberger Co. v. Cryan, 167 Mich. 377, citing McNeal v. Van Duser, 142 Mich. 593.

**(12987). Rule Requiring Sheriff to Put in Special Bail.**

**SEC. 9.** If special bail shall not be put in and perfected within the time limited therefor, upon filing an affidavit that such bail is not put in and perfected, and that the writ has been returned served, a rule may be entered with the clerk of the court, in vacation or in term, requiring the sheriff or other officer making the arrest, to put in and perfect special bail within twenty days after service of notice of such rule.

**HISTORY:** Re-enacts and supersedes Sec. 9, R. S. '46, Ch. 98, being C. L. '57, (4141); C. L. '71, (5757); How. 7326; C. L. '97, (10036), though such section was not expressly repealed by this act. Unchanged.

**CITED:** Ludwick v. Kent Circuit Judge, 138 Mich. 109; DeMyer v. McGonegal, 32 Mich. 127.

**(12988). Attachment in Case of Failure.**

**SEC. 10.** If such bail be not put in and perfected within the time specified in such rule, upon filing an affidavit of the service of notice thereof, a rule may be entered with such clerk,

in vacation or in term, that an attachment issue against the sheriff, or other officer who may have made the arrest, and such attachment may be issued accordingly.

**HISTORY:** Re-enacts and supersedes Sec. 10, R. S. '46, Ch. 98, being C. L. '57, (4142); C. L. '71, (5758); How. 7327; C. L. '97, (10037), though such section was not expressly repealed by this act. Unchanged.

**CITED:** DeMyer v. McGonegal, 32 Mich. 127. See Ludwick v. Kent Circuit Judge, 138 Mich. 109.

**(12989). Proceedings Against Sheriff.**

**SEC. 11.** Upon the sheriff or other officer being brought into court on such attachment, for not putting in bail to the action, the court may by summary proceedings ascertain the amount due to the plaintiff in the action, in the same manner as if interlocutory judgment had been entered against the defendant, and may render a judgment against such sheriff or other officer for the amount so ascertained to be due, with the costs of the suit and proceedings.

**HISTORY:** Re-enacts and supersedes Sec. 11, R. S. '46, Ch. 98, being C. L. '57, (4143); C. L. '71, (5759); How. 7328; C. L. '97, (10038), though such section was not expressly repealed by this act. Unchanged.

**CITED:** DeMyer v. McGonegal, 32 Mich. 127.

**(12990). Stay of Proceedings.**

**SEC. 12.** If the court shall determine that the amount so ascertained ought to be paid by such sheriff or other officer, and such sheriff or other officer shall confess a judgment to the plaintiff, for the amount so ascertained, with the costs of suit and the proceedings, the court shall thereupon stay all other proceedings against him, until he shall have had a reasonable time to obtain judgment on the bond taken on the arrest of the defendant, and to collect the amount so ascertained to be due to the plaintiff.

**HISTORY:** Re-enacts and supersedes Sec. 12, R. S. '46, Ch. 98, being C. L. '57, (4144); C. L. '71, (5760); How. 7329; C. L. '97, (10039), though such section was not expressly repealed by this act. Unchanged.

**CITED:** DeMyer v. McGonegal, 32 Mich. 127.

**(12991). Execution on Judgment Against Sheriff.**

**SEC. 13.** If, in any such action, after a reasonable time, the sheriff or other officer shall not satisfy the plaintiff in the

action the amount due him, with costs and interest, the court shall award execution on the judgment against such sheriff or other officer; and if such execution be returned unsatisfied, in part or in whole, the same proceedings shall be had on the official bond of such sheriff or other officer to collect such deficiency, as in other cases of delinquency.

**HISTORY:** Re-enacts and supersedes Sec. 13, R. S. '46, Ch. 98, being C. L. '57, (4145); C. L. '71, (5761); How. 7330; C. L. '97, (10040), though such section was not expressly repealed by this act. Unchanged.

**CITED:** DeMyer v. McGonegal, 32 Mich. 127.

**(12992). Officer May Put in Special Bail.**

**SEC. 14.** The sheriff or other officer who shall have made an arrest may, for his own indemnity, put in and perfect special bail to the action when such bail shall have been required as herein directed, at any time before judgment rendered against him, on payment of the cost of the proceedings against him; and the putting in of such bail by such officer shall not be deemed a performance of the condition of the bond taken on the arrest; but such officer may, notwithstanding, prosecute such bond and recover the amount of all damages he may have sustained by the neglect of the defendant to put in such bail.

**HISTORY:** Re-enacts and supersedes Sec. 14, R. S. '46, Ch. 98, being C. L. '57, (4146); C. L. '71, (5762); How. 7331; C. L. '97, (10041), though such section was not expressly repealed by this act. Unchanged.

**CITED:** DeMyer v. McGonegal, 32 Mich. 127.

**(12993). When Suit May be Commenced Against Special Bail.**

**SEC. 15.** No suit shall be commenced upon any recognizance of special bail, until an execution against the body of the defendant, having at least fifteen days between the teste and return thereof, shall have been issued to the sheriff of the county in which such defendant was arrested, and by him returned that the defendant could not be found within his county.

**HISTORY:** Re-enacts and supersedes Sec. 15, R. S. '46, Ch. 98, being C. L. '57, (4147); C. L. '71, (5763); How. 7332; C. L. '97, (10042), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** A return of the execution as "unsatisfied" merely is not sufficient; it must show that defendant could not be found within the county. Barnum v. Waterbury, 38 Mich. 280. Return held suf-



ficient. *Lichfelt v. Kopp*, 38 Mich. 312. The right of special bail to surrender their principal expires eight days from the commencement of a suit on the recognizance, after the timely and regular issue and return, "not found," of a body execution. *Lyman v. Giddey*, 96 Mich. 401, citing *Begole v. Stimson*, 39 Mich. 288; *Koch v. Coots*, 43 Mich. 30. They have eight days from the service of the declaration, when suit is so begun. *Begole v. Stimson*, 39 Mich. 398. See Compilers' Section (12816).

CITED: *Fisher v. Drewa*, 63 Mich. 657.

**(12994). Sheriff to Endeavor to Serve Execution.**

SEC. 16. Upon any such execution being issued and delivered to the sheriff, it shall be his duty to use all reasonable endeavors to execute the same, notwithstanding any directions he may receive from the plaintiff, or his attorney.

HISTORY: Re-enacts and supersedes Sec. 16, R. S. '46, Ch. 98, being C. L. '57, (4148); C. L. '71, (5764); How. 7333; C. L. '97, (10043), though such section was not expressly repealed by this act. Unchanged.

**(12995). When Bail Entitled to Verdict.**

SEC. 17. If it appear on the trial of any such action against bail, that an execution against the body of the defendant was not issued as herein directed, or that it was not issued in sufficient time to enable the sheriff to execute the same, or that directions were given by the plaintiff or his attorney to prevent the service of such execution, or that any other fraudulent or collusive means were used to prevent such service, the bail shall be entitled to a verdict in their favor.

HISTORY: Re-enacts and supersedes Sec. 17, R. S. '46, Ch. 98, being C. L. '57, (4149); C. L. '71, (5765); How. 7334; C. L. '97, (10044), though such section was not expressly repealed by this act. Unchanged.

**(12996). Relief of Bail at Death of Principal.**

SEC. 18. When the defendant in a suit shall die after the return of the execution against his body, and before the expiration of eight days from the return of the process served on his bail, the court shall relieve such bail on the same terms as if they had surrendered their principal at the time of his death.

HISTORY: Re-enacts and supersedes Sec. 18, R. S. '46, Ch. 98, being C. L. '57, (4150); C. L. '71, (5766); How. 7335; C. L. '97, (10045), though such section was not expressly repealed by this act. Unchanged.

See notes to Compilers' Section (12993).

**(12997). Surrender by Special Bail.**

SEC. 19. The special bail of any defendant may surrender him, or the sheriff of the county may retake such defendant into his custody for the reasons set forth in the next section, or such defendant may surrender himself in exoneration of his bail, before any judge of a circuit court, or a circuit court commissioner.

**HISTORY:** Re-enacts and supersedes Sec. 20, R. S. '46, Ch. 98, being C. L. '57, (4152); As Am. '58, p. 8, Act 4, Eff. May 6; C. L. '71, (5768); How. 7337; C. L. '97, (10047); As Am. '05, p. 314, Act 215, Eff. Sept. 16, making a necessary change in phraseology, though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Special bail may at any time pending the suit or before the return of the ca. sa. surrender the principal and are thus discharged from liability. *Umpfrey v. Emery*, 121 Mich. 184. See *Morgan v. Jones*, 117 Mich. 59. Exoneration of bail has always been considered within the range of chamber business. *DeMyer v. McGonegal*, 32 Mich. 131. As to the constitutional powers and jurisdiction of circuit court commissioners, see Const. VII, 21, and notes to Const. '50, VI, 16.

**CITED:** *Elliott v. Dudley*, 8 Mich. 63; *DeMyer v. McGonegal*, 32 Mich. 128; *McNeal v. VanDuser*, 142 Mich. 595; *Schwarzschild & Sulzberger Co. v. Cryan*, 167 Mich. 379.

**(12998). Proceedings for Surrender.**

SEC. 20. The proceedings to effect such surrender shall be as follows:

1. There shall be produced to the officer authorized to accept the same two copies of the bail-piece, upon one of which such officer shall endorse an order that the defendant be committed to the custody of the sheriff, in exoneration of his bail, which shall be delivered to such sheriff, and shall authorize him to commit and detain such defendant, until he shall be duly discharged;

2. Upon producing to such officer the certificate of the sheriff, that the defendant has been committed to, and remains in his custody, by virtue of such order of commitment, acknowledged before such officer by the sheriff, or proved by a subscribing witness thereto, an order shall be made by such officer, requiring the plaintiff to show cause before him, at such time and place as he shall appoint, why the bail of such defendant should not be exonerated from their liability;

3. Upon producing proof of the due service of such order on the plaintiff or his attorney, such officer shall proceed to hear the allegations and proofs of the parties; and if no good

cause to the contrary appear, shall indorse an order on the second copy of the bail-piece, briefly reciting the proceedings had before him, and thereby declaring that the bail of such defendant are discharged from all liability as such bail, in the suit in which such bail-piece was taken;

4. To such copy of the bail-piece shall be attached the certificate of the sheriff hereinbefore required, with the acknowledgment or proof thereof, the order to show cause and the proof of the service thereof; which paper shall be immediately filed in the office of the clerk of the court, and until so filed, the liability of the bail shall continue;

5. If the sheriff who shall have taken such special bail bond shall discover that any surety to said bond is insufficient; he shall re-take into custody the defendant who executed said bond, in any place that he may be found, and may commit the said defendant to the county jail until other good and sufficient surety shall be offered.

**HISTORY:** Re-enacts and supersedes Sec. 21, R. S. '46, Ch. 98, being C. L. '57, (4153); C. L. '71, (5769); How. 7338; C. L. '97, (10048); As Am. '05, p. 314, Act 215; Eff. Sept. 16, though such section was not expressly repealed by this act. Unchanged.

**SUBD. 1:** This requirement of copies of the bail-piece is jurisdictional. Without them the judge has no authority to proceed. *Elliott v. Dudley*, 8 Mich. 62, 66. As to jurisdictional facts, see *Wight v. Warner*, 1 Doug. 384; *Chandler v. Nash*, 5 Mich. 404. The copy of the bail piece need not be certified by the clerk, but copies sworn to by one of the signers to be true copies is sufficient. *Morgan v. Jones*, 117 Mich. 61.

**SUBD. 2:** A plaintiff who fails to appear and show cause waives irregularities. *Morgan v. Jones*, 117 Mich. 64. See also, *McNeal v. VanDuser*, 142 Mich. 594.

**SUBD. 3:** It is sufficient if the order is endorsed on a piece of paper attached to the bail-piece. *McNeal v. VanDuser*, 142 Mich. 595.

**SUBD. 4:** *Morgan v. Jones*, 117 Mich. 64.

**CITED:** *Umpfrey v. Emery*, 121 Mich. 185; *Schwarzschild & Sulzberger Co. v. Cryan*, 167 Mich. 379; See *DeMyer v. McGonegal*, 32 Mich. 123.

### (12999). Surrender of Defendant.

**SEC. 21.** When a bail bond shall have been taken on the arrest of a defendant, the bail therein may surrender their principal or the sheriff of the county may re-take said defendant into his custody, or he may surrender himself in exoneration of his bail in the same manner, before the same officers and with the like effect as provided in the preceding section with respect to special bail.

**HISTORY:** Re-enacts and supersedes Sec. 22, R. S. '46, Ch. 98, being C. L. '57, (4154); C. L. '71, (5770); How. 7339; C. L. '97, (10049); As Am. '05, p. 315, Act 215, Eff. Sept. 16, though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** When defendant has not perfected special bail within the time required by the rules of court and plaintiff under Compilers' Section (12984) brings suit on the bail bond, the sureties may yet be released from liability upon the surrender of the principal. *McNeal v. VanDuser*, 142 Mich. 595.

**CITED:** *Schwarzschild & Sulzberger Co. v. Cryan*, 167 Mich. 380; *De Myer v. McGonegal*, 32 Mich. 128; *Umphrey v. Emery*, 121 Mich. 185.

### Liberties of Jails and Escapes.

#### (13000). Who Entitled to Liberties of Jail.

SEC. 22. Every person who shall be in the custody of the sheriff of any county by virtue:

1. Of any *capias ad respondendum*; or
  2. Of any execution in a civil action; or
  3. Of any attachment for the non-payment of costs; or
  4. In consequence of a surrender in exoneration of his bail;
- shall be entitled to the liberty of the jail limits, which limits shall be co-extensive with the limits of such county, upon executing a bond to such sheriff and his assigns, as prescribed in the next section.

**HISTORY:** Re-enacts and supersedes Sec. 1, R. S. '46, Ch. 147, being C. L. '57, (5548); C. L. '71, (7335); How. 8912; C. L. '97, (10505), omitting "by virtue" in third subdivision, though such section was not expressly repealed by this act. Unchanged.

**JAIL LIMITS BOND:** A jail limits bond, executed pursuant to the provisions of this chapter, is given to the sheriff of the county in his official capacity, and stands as indemnity to his successor in office, without any written assignment, and during its lifetime may be assigned by the sheriff in office to the party for whose benefit it was given, whenever a breach occurs. *Kruse v. Kingsbury*, 102 Mich. 100. This bond is a substitute for the custody of the sheriff; and, after admitting the prisoner to the liberty of the jail limits, the sheriff has no longer any power over him, either to restrain or discharge him. *Id.* A bond given to under sheriff to be treated as bond to the sheriff is a substitute for the custody of sheriff, and after bond is given, sheriff has no power to authorize or prevent his escape, and permission by the sheriff to leave the county does not release the bond. *Smith, Sturgeon & Co. v. Grosslight*, 123 Mich. 91. Nothing but the act of God or the enemies of the country will excuse a sheriff for an escape. Where principal voluntarily left county and went into an adjoining county to answer to a criminal charge, he was guilty of an es-

cape, no matter how short a time he was away. Id. If a debtor gave bond for jail limits, and after lapse of six months is surrendered by bondsman to sheriff, he cannot be thus relieved, but must have been imprisoned in jail for a period as fixed by statute, (Compilers' Section 13618) before he can be relieved. *Ruslewski v. Michalski*, 135 Mich. 530; *Wilson & Co. v. Franz*, 206 Mich. 581.

CONSTRUED: *Bromley v. People*, 7 Mich. 475.

**(13001). Bond to be Executed by Prisoner.**

SEC. 23. Such bond shall be executed by the prisoner and one or more sufficient sureties, being inhabitants and householders of the county, in a penalty, which shall be as follows:

1. It shall be not less than double the amount of the sum in which the sheriff was required to hold the defendant to bail, if he be in custody on original process, or be surrendered in exoneration of his bail before judgment docketed against him;

2. It shall be not less than double the amount directed to be levied by the attachment or execution, if he be in custody upon attachment or execution;

3. It shall be not less than double the amount for which judgment shall have been rendered against him, if he be surrendered after judgment docketed.

HISTORY: Re-enacts and supersedes Sec. 2, R. S. '46, Ch. 147, being C. L. '57, (5549); C. L. '71, (7336); How. 8913; C. L. '97, (10506), though such section was not expressly repealed by this act. Unchanged.

**(13002). Condition of Bond.**

SEC. 24. Such bond shall be conditioned, that the person so in custody of such sheriff, shall not at any time or in any manner, escape or go without the jail limits of the county, until legally discharged.

HISTORY: Re-enacts and supersedes Sec. 3, R. S. '46, Ch. 147, being C. L. '57, (5550); C. L. '71, (7337); How. 8914; C. L. '97, (10507), though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: *Kruse v. Kingsbury*, 102 Mich. 103.

**(13003). For Whom Held.**

SEC. 25. Every such bond taken for the liberties of any jail, shall be valid, and shall be held for the indemnity of the sheriff taking the same, and of the party at whose suit the prisoner executing such bond shall be confined.

**HISTORY:** Re-enacts and supersedes Sec. 4, R. S. '46, Ch. 147, being C. L. '57, (5551); C. L. '71, (7338); How. 8915; C. L. '97, (10508), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Kruse v. Kingsbury, 102 Mich. 103.

**(13004). When Prisoner May be Recommitted.**

**SEC. 26.** If a sheriff who shall have taken any such bond for the liberties of any jail, shall discover that any surety to such bond is insufficient, he may commit the prisoner who executed the same to close confinement in such jail, until other good and sufficient sureties shall be offered.

**HISTORY:** This section re-enacts and supersedes Sec. 5, R. S. '46, Ch. 147, being C. L. '57, (5552); C. L. '71, (7339); How. 8916; C. L. '97, (10509), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Whether the prisoner is in actual confinement or not when the new surety is secured cannot affect the validity of the bond. Kruse v. Kingsbury, 102 Mich. 106-7. See further, Page v. Mitchell, 13 Mich. 68-9.

**(13005). Surrender by Sureties.**

**SEC. 27.** The sureties in any bond given for the liberties of any jail, may surrender their principal at any time before judgment shall be rendered against them on such bond; but such bail shall not be exonerated thereby from any liability incurred before the making of such surrender.

**HISTORY:** Re-enacts and supersedes Sec. 6, R. S. '46, Ch. 147, being C. L. '57, (5553); C. L. '71, (7340); How. 8917; C. L. '97, (10510), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Kruse v. Kingsbury, 102 Mich. 103.

**(13006). How Surrender Made.**

**SEC. 28.** Such surrender may be made as follows: The bail may take their principal to the keeper of the jail, and upon the written requirement of such bail, the keeper shall take such principal into his custody, and thereupon indorse upon the bond given for the limits, an acknowledgement of the surrender of such principal; and such keeper shall also, if required, give the bail a certificate acknowledging such surrender.

**HISTORY:** Re-enacts and supersedes Sec. 7, R. S. '46, Ch. 147, being C. L. '57, (5554); C. L. '71, (7341); How. 8918; C. L. '97, (10511),

though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: *Kruse v. Kingsbury*, 102 Mich. 103; *Rusiewski v. Michalski*, 135 Mich. 530.

(13007). **What Deemed Escape of Prisoner.**

Sec. 29. The going at large of any prisoner who shall have executed such bond, or of any prisoner who would be entitled to the liberties of any jail upon executing such bond, within the jail limits of the county in which he shall be in custody, shall not be deemed an escape of such prisoner; but in case any such prisoner shall go at large without the jail limits of such county without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape and forfeiture of the bond so executed, and the sheriff in whose custody such prisoner shall have been, shall have the same authority to pursue and re-take such prisoner, as if such escape had been made from the jail.

HISTORY: Re-enacts and supersedes Sec. 8, R. S. '46, Ch. 147, being C. L. '57, (5555); C. L. '71, (7342); How. 8919; C. L. '97, (10512), though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: *Page v. Mitchell*, 13 Mich. 68-9.

(13008). **Defense in Suit on Bond.**

Sec. 30. In every suit brought by a sheriff on such bond, the defendants may give notice of a voluntary return of the prisoner to the liberties of the jail from which he escaped, or a recaption of such prisoner by the sheriff from whose custody he escaped, before the commencement of such suit, and may give evidence thereof in bar of such action; and such defendants shall be entitled to make such or any other defense to such suit, which might be made by such sheriff, to an action against him for an escape.

HISTORY: Re-enacts and supersedes Sec. 9, R. S. '46, Ch. 147, being C. L. '57, (5556); C. L. '71, (7343); How. 8920; C. L. '97, (10513), though such section was not expressly repealed by this act. Unchanged.

CITED: In an action against sureties upon a bond to the jail limits, the fact that their principal had voluntarily returned within the jail limits before the commencement of suit constituted a complete defense under C. L. '97, (10513), *Smith, Sturgeon & Co. v. Grosslight*, 123 Mich. 87.

**(13009). Effect of Judgment Against Sheriff.**

SEC. 31. But if an action shall have been brought against such sheriff for such escape, and due notice thereof shall have been given to the prisoner and his sureties who executed the bond for the jail liberties, the judgment against such sheriff shall be conclusive evidence of his right to recover against such prisoner and his sureties, to whom such notice was given, in the action on such bond, as to all matters which were or might have been controverted in the action against the sheriff.

**HISTORY:** Re-enacts and supersedes Sec. 10, R. S. '46, Ch. 147, being C. L. '57, (5557); C. L. '71, (7344); How. 8921; C. L. '97, (10514), though such section was not expressly repealed by this act. Unchanged.

**(13010). Summary Judgment for Sheriff.**

SEC. 32. In every such action brought by a sheriff on a bond executed for the jail liberties, if it shall appear that judgment has been rendered against such sheriff for the escape of the prisoner, and that due notice of the pendency of the action against the sheriff was given to such prisoner and his sureties, to enable them to defend the same, the court shall render judgment in the suit upon such bond, at the first term after the commencement of such suit.

**HISTORY:** Re-enacts and supersedes Sec. 11, R. S. '46, Ch. 147, being C. L. '57, (5558); C. L. '71, (7345); How. 8922; C. L. '97, (10515), though such section was not expressly repealed by this act. Unchanged.

**(13011). Previous Notice Required.**

SEC. 33. But to entitle any sheriff to move for such judgment he shall have filed his declaration, and shall show to the court that he has given twenty days' notice of such motion.

**HISTORY:** Re-enacts and supersedes Sec. 12, R. S. '46, Ch. 147, being C. L. '57, (5559); C. L. '71, (7346); How. 8923; C. L. '97, (10516), though such action was not expressly repealed by this act. Unchanged.

**(13012). Stay of Proceedings on Judgment.**

SEC. 34. If it shall appear on the hearing of such motion, that the defendants have any meritorious cause of defense, which was not controverted in the action against the sheriff, and which by law could not have been so controverted, the



court shall suspend proceedings on such judgment, until a trial in such action shall be had; but such judgment shall remain as a security for the sheriff.

**HISTORY:** Re-enacts and supersedes Sec. 13, R. S. '46, Ch. 147, being C. L. '57, (5560); C. L. '71, (7347); How. 8924; C. L. '97, (10517), though such section was not expressly repealed by this act. Unchanged.

**(13013). When Judgment Vacated.**

**SEC. 35.** If such defense be established, the court shall vacate such judgment, and render judgment as in other cases.

**HISTORY:** Re-enacts and supersedes Sec. 14, R. S. '46, Ch. 147, being C. L. '57, (5561); C. L. '71, (7348); How. 8925; C. L. '97, (10518), though such section was not expressly repealed by this act. Unchanged.

**(13014). Evidence of Damages.**

**SEC. 36.** In every action brought by a sheriff on such bond, the recovery of a judgment against him for the escape of the prisoner, shall be evidence of the damages sustained by him, in the same manner as if such judgment had been collected; and such sheriff shall be entitled to recover the costs, and his reasonable expenses in defending the suit against him, as part of his damages.

**HISTORY:** Re-enacts and supersedes Sec. 15, R. S. '46, Ch. 147, being C. L. '57, (5562); C. L. '71, (7349); How. 8926; C. L. '97, (10519), though such section was not expressly repealed by this act. Unchanged.

**(13015). Assignment of Forfeited Bonds.**

**SEC. 37.** If any such bond shall be forfeited, the party at whose suit the prisoner executing the same shall have been confined, or in case of his death, the executors or administrators of such party, shall be entitled to an assignment thereof, which shall be made by the sheriff taking the same, or his successor in office, or in case of a vacancy in his office, by his undersheriff, by an indorsement thereon.

**HISTORY:** Re-enacts and supersedes Sec. 16, R. S. '46, Ch. 147, being C. L. '57, (5563); C. L. '71, (7350); How. 8927; C. L. '97, (10520), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** The bond may be assigned by a deputy sheriff. *Hughes v. Hally*, 137 Mich. 434. See *Kruse v. Kingsley*, 102 Mich. 103.

**(13016). Action by Assignees.**

SEC. 38. The party to whom such assignment shall have been made, may maintain an action on such bond as assignee of the sheriff taking the same, in the same cases in which such action might be maintained by such sheriff, and upon obtaining judgment therein, he shall recover damages for such breaches of the condition as shall have been assigned by him, as follows:

1. If the prisoner escaping was confined by virtue of an execution, or by virtue of an attachment for nonpayment of costs, the measure of the plaintiff's damages shall be the amount directed to be levied by such execution or attachment, with interest thereon to the time of such recovery.

2. If such prisoner was confined by virtue of a *capias ad respondendum*, or upon a surrender in exoneration of his bail, made before or after judgment rendered against him, the plaintiff shall recover only the actual damages sustained by him.

HISTORY: Re-enacts and supersedes Sec. 17, R. S. '46, Ch. 147, being C. L. '57, (5564); C. L. '71, (7351); How. 8928; C. L. '97, (10521), though such section was not expressly repealed by this act. Unchanged.

CITED: *Hughes v. Hally*, 137 Mich. 435.

**(13017). Effect of Assignment.**

SEC. 39. The acceptance of an assignment of any such bond, shall be a bar to any action by or on behalf of the party receiving such assignment, against the sheriff or other officer making the same, for any escape by the prisoner executing such bond, amounting to a breach of such bond.

HISTORY: Re-enacts and supersedes Sec. 18, R. S. '46, Ch. 147, being C. L. '57, (5565); C. L. '71, (7352); How. 8929; C. L. '97, (10522), though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: *Kruse v. Kingsbury*, 102 Mich. 103; *Wilson & Co. v. Franz*, 206 Mich. 583.

**(13018). Defense to Action of Assignees.**

SEC. 40. In every action brought by the assignee of such bond, the defendant shall be entitled to give notice of a voluntary return of the prisoner to the liberties of the jail, before the commencement of such action, in bar thereof, and to make any defense which they would be entitled to make, if such

action had been brought in the name and for the benefit of the sheriff to whom such bond was executed.

**HISTORY:** Re-enacts and supersedes Sec. 19, R. S. '46, Ch. 147, being C. L. '57, (5566); C. L. '71, (7353); How. 8930; C. L. '97, (10523), though such section was not expressly repealed by this act. Unchanged.

**CITED:** Smith, Sturgeon & Co. v. Grosslight, 123 Mich. 93; Grosslight v. Wayne Circuit Judge, 127 Mich. 416.

**(13019). Stay of Proceedings Against Sheriff.**

**SEC. 41.** In case the party at whose suit any person shall have been confined to the liberties of a jail, shall refuse or neglect to take an assignment of the bond executed by such person, as hereinbefore provided, and shall prosecute any sheriff for the escape of such person, the court in which such action shall be pending, shall by rule, stay all proceedings upon the judgment against such sheriff, until he shall have had a reasonable time to prosecute the bond taken by him, and to collect the amount of any judgment he may recover thereon.

**HISTORY:** Re-enacts and supersedes Sec. 20, R. S. '46, Ch. 147, being C. L. '57, (5567); C. L. '71, (7354); How. 8931; C. L. '97, (10524), though such section was not expressly repealed by this act. Unchanged.

**(13020). When Stay not Authorized.**

**SEC. 42.** But the last preceding section shall not extend to authorize such stay of proceedings in any action where the judgment shall have been recovered against any sheriff, for any escape committed with the assent, aid or assistance of such sheriff.

**HISTORY:** Re-enacts and supersedes Sec. 21, R. S. '46, Ch. 147, being C. L. '57, (5568); C. L. '71, (7355); How. 8932; C. L. '97, (10525), though such section was not expressly repealed by this act. Unchanged.

**Of Escapes and Liability of Sheriffs Therefor.**

**(13021). When Prisoner to be Actually Confined.**

**SEC. 43.** All prisoners committed to any jail upon process for contempt, or committed for misconduct in the cases prescribed by law, except on attachments for the non-payment of costs, shall be actually confined and detained within such jail until they shall be from thence discharged by due course of

law, or shall be removed to some other jail or place of confinement in the cases provided by law; and if any sheriff or keeper of a jail shall permit or suffer any prisoner so committed to such jail, to go or be at large out of his prison, except by virtue of some writ of habeas corpus or rule of court, or in such other cases as may be provided by law, he shall be liable to the party aggrieved, for his damages sustained thereby and shall be deemed guilty of a misdemeanor.

**HISTORY:** Re-enacts and supersedes Sec. 22, R. S. '46, Ch. 147, being C. L. '57, (5569); C. L. '71, (7356); How. 8933; C. L. '97, (10526), though such section was not expressly repealed by this act. Unchanged.

**(13022). What Deemed an Escape—Capias.**

**SEC. 44.** If any prisoner committed to any jail, by virtue of any capias ad respondendum, or upon a surrender in exoneration of his bail, made either before or after judgment rendered, shall go or be at large, without the jail limits of the county in which he shall have been imprisoned, without the assent of the party at whose suit such prisoner shall have been committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party in an action of trespass on the case to the extent of the damages sustained by him.

**HISTORY:** Re-enacts and supersedes Sec. 23, R. S. '46, Ch. 147, being C. L. '57, (5570); C. L. '71, (7357); How. 8934; C. L. '97, (10527), though such section was not expressly repealed by this act. Unchanged.

**(13023). What Deemed an Escape—Civil Action.**

**SEC. 45.** If any prisoner committed to any jail, in execution in a civil action, or upon an attachment for the non-payment of costs, shall go or be at large without the jail limits of the county in which he shall have been imprisoned, without the assent of the party at whose suit such prisoners shall have been committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party for the debt, damages, or sum of money for which such prisoner was committed, to be recovered in an action of assumpsit or of trespass on the case.

**HISTORY:** Re-enacts and supersedes Sec. 24, R. S. '46, Ch. 147, being C. L. '57, (5571); C. L. '71, (7358); How. 8935; C. L. '97,

(10528), changing "of debt" to "of assumpsit," though such section was not expressly repealed by this act. Unchanged.

**(13024). Defense by Sheriff.**

SEC. 46. In every action against a sheriff or other officer, for the escape of any prisoner, the defendant may give notice that before the commencement of such action, such prisoner voluntarily returned to the jail from which he escaped, or within the liberties thereof; or that such defendant re-took such prisoner, and had him within the jail from which he escaped or within the liberties thereof, before the commencement of such action; and in either case that such escape was made without the consent of such defendant.

HISTORY: Re-enacts and supersedes Sec. 25, R. S. '56, Ch. 147, being C. L. '57, (5572); C. L. '71, (7359); How. 8936; C. L. '97, (10529), though such section was not expressly repealed by this act. Unchanged.

**(13025). Penalty for Receiving Gratuity.**

SEC. 47. Every sheriff or other officer, who shall demand or receive any reward, gratuity, or valuable thing, to procure, assist, connive at, or permit any escape of any prisoner in his custody, shall be deemed guilty of a misdemeanor.

HISTORY: Re-enacts and supersedes Sec. 26, R. S. '46, Ch. 147, being C. L. '57, (5573); C. L. '71, (7360); How. 8937; C. L. '97, (10530), though such section was not expressly repealed by this act. Unchanged.

**(13026). Forfeiture of Office.**

SEC. 48. Every sheriff or other officer who shall be convicted of a violation of the last section, shall forfeit his office, and shall be forever thereafter incapable of executing the same.

HISTORY: Re-enacts and supersedes Sec. 27, R. S. '46, Ch. 147, being C. L. '57, (5574); C. L. '71, (7361); How. 8938; C. L. '97, (10531), though such section was not expressly repealed by this act. Unchanged.

**(13027). Payment for Board and Keeping.**

SEC. 49. Whenever in any civil action, any person shall be committed to any jail in default of bail, or by virtue of an execution issued or proceeding founded on a judgment rendered in such suit, the plaintiff or defendant at whose instance such person shall be so imprisoned, shall pay, on demand, to the

sheriff or the keeper of the common jail of the county, the expenses of the board and keeping of such person so imprisoned; and the said sheriff or keeper of said jail shall not be required to retain such person any longer in jail than such expenses of said board and keeping shall be paid in advance; nor shall such expenses constitute any charge against the county.

**HISTORY:** This section merges and supersedes Sec. 2 of Act 162 of '67, being C. L. '71, (7383); How. 8960; C. L. '97, (10553), and Sec. 3 of Act 162 of '67; As Added '71, p. 100, Act 76, Eff. July 18; C. L. '71, (7384); As Am. '75, p. 187, Act 157, Imd. Eff. Apr. 29; How. 8961; C. L. '97, (10554). Modified.

**CONSTRUED:** Bail are discharged where the sheriff has released defendant from custody on plaintiff's refusal to pay the expenses of his board and keeping in advance, as required by this section, after he has been taken on execution. *Prior v. Bodrie*, 49 Mich. 203. The imprisonment of a defendant on a body execution is a satisfaction of the debt, and his discharge by reason of plaintiff's failure, on demand, to pay the expenses of board and keeping will not revive the judgment. *Strawsine v. Salsbury*, 75 Mich. 542. See *In re Lauer's Estate*, 184 Mich. 503.

## CHAPTER XXVI.

### OF PROCEEDINGS BY ATTACHMENT IN COURTS OF RECORD.

#### (13028). When Creditor May Proceed by Attachment.

SECTION 1. Any creditor shall be entitled to proceed by attachment against his debtor in the circuit court of the county in which the creditor or the debtor (or in case of joint debtors, either of them) shall reside, if the debtor have property subject to attachment in said county; and in case the debtor has no property in said county, or is a non-resident of this state, then in the circuit court of any county where the property of the debtor subject to attachment, may be found, in the cases, upon the conditions, and in the manner provided in this chapter.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 114, being C. L. '57, (4742); As Am. '61, p. 478, Act 229, Eff. June 15; C. L. '71, (6397); How. 7986; C. L. '97, (10555). Unchanged.

ATTACHMENT: The proceeding by attachment is, in the first instance, in rem; it is strictly a statutory remedy, and one in which the course marked out by statute, at least as to all its substantial provisions, is required to be strictly pursued. *Welles v. Detroit*, 2 Doug. 80; *Estlow v. Hanna*, 75 Mich. 222; *Wiesinger v. Banp*, 106 Mich. 293. See, also, note "Attachment," to Compilers' Section (14337). The proceeding is two-fold, in rem and in personam. The writ is a summons as well as an attachment. *Bower v. Town*, 12 Mich. 233. The remedy is a harsh one, proper when it comes within the plain provisions of the statute, but the statute should not be extended by construction. *Estlow v. Hanna*, 75 Mich. 224.

WITHIN THE COUNTY: Attachment proceedings must be had in the county where property of defendant may be found subject to attachment. *Stern v. Wayne Circuit Judge*, 105 Mich. 687. Under this section plaintiff can proceed in attachment only where one of the parties resides in the county where suit is commenced, or the defendant has property in said county, but not in the county where he resides, or is a non-resident of the state; but such conditions need not be set forth in the affidavit, except as embraced in the next section. *Stringer v. Dean*, 61 Mich. 196. A writ of attachment may issue against a domestic corporation in the county where its home office is located, in favor of a creditor who resides in that county, in the like cases as in suits between individuals. *Mich. Dairy Co. v. Runnels*, 96 Mich. 109.

MOTION TO QUASH: The defendant may appear and move to quash the writ and vacate the judgment for want of jurisdiction under

this section, supporting his motion by affidavits; and if the plaintiff desires to contest the facts, he has the right to frame an issue, unless waived, and try the same before a jury. *Stringer v. Dean*, 61 Mich. 202; citing *Haywood v. Johnson*, 41 Mich. 605. Objections to the process or proceedings by which a defendant in attachment proceedings is brought into court are waived by pleading to the merits. *Hardware Co. v. Denison*, 83 Mich. 42; *John D. Gruber Co. v. Montcalm Circuit Judge*, 183 Mich. 479. Attachment proceedings will not be dismissed by motion to quash based on the merits. *S. K. Martin Lumber Co. v. Menominee Circuit Judge*, 116 Mich. 354. It is proper practice to bring to the attention of the trial court by a motion to quash, such defects as are apparent upon the face of an affidavit for attachment. *John D. Gruber Co. v. Montcalm Circuit Judge*, 183 Mich. 477. But if it is desired to contest the truth of the grounds alleged in the affidavit for the issuance of the writ, the remedy is by dissolution of the attachment under Compilers' Sections (13075)-(13076)-(13077)-(13078)-(13079). *Id.* See *S. K. Martin Lumber Co. v. Menominee Circuit Judge*, 116 Mich. 354.

CITED: *State Bank of Eldorado v. Maxon*, 123 Mich. 253; *Showen v. J. L. Owens Co.*, 158 Mich. 333; *Greacen v. Lumber Co.*, 167 Mich. 572. *Newland v. Wayne Circuit Judge*, 85 Mich. 151; *Cofrode v. Wayne Circuit Judge*, 79 Mich. 343.

#### (13029). Affidavit to be Attached to Writ.

SEC. 2. Before any such writ of attachment shall be executed, the plaintiff, or some person in his behalf, shall make and annex thereto an affidavit, stating that the defendant therein is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be, over and above all legal set-offs, and that the same is due upon contract, or upon judgment or decree, and containing a further statement that the deponent knows, or has good reason to believe, either;

1. That the defendant has absconded, or is about to abscond from this state, or that he is concealed therein, to the injury of his creditors; or

2. That the defendant has assigned, disposed of or concealed or is about to assign, dispose of or conceal any of his property with the intent to defraud his creditors; or

3. That the defendant has removed, or is about to remove any of his property out of this state, with intent to defraud his creditors; or

4. That he has fraudulently contracted the debt, or incurred the obligation respecting which the suit is brought; or

5. That the defendant is not a resident of this state, and has not resided therein for three months immediately preceded the time of making such affidavit; or

6. That the defendant is a foreign corporation:



*Provided*, That such affidavit shall not be deemed insufficient by reason of the intervention of a day between the date of the jurat to such affidavit, and the issuing of the writ, and that when the person making such affidavit shall reside in any other county in this state, than that in which the writ of attachment is to issue, one day's time for every thirty miles travel, by the usual post route, from the residence of such person to the place from which such writ shall issue, shall be allowed between the date of such jurat and the issuing of such writ, and Sundays and legal holidays shall not be counted as intervening days in any case.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 114, being C. L. '57, (4743); As Am. '61, p. 478, Act 229, Eff. June 15; C. L. '71, (6398); How. 7987; C. L. '97, (10556), omitting after "contract" "express or implied" and adding the last clause as above. Modified.

**ATTACHMENT:** The writ cannot issue before the affidavit is filed. *Holmes v. King*, 158 Mich. 445. The return of the writ before the return day is fatal to the proceedings. *Id.* An alias writ of attachment may issue. *VanBenschoten v. Fales*, 126 Mich. 177. Against joint debtors, *Cottrell v. Hathaway*, 108 Mich. 620; *VanBenschoten v. Fales*, 126 Mich. 177. Action by attachment cannot be commenced before the debt is due. *Wiesinger v. First National Bank*, 106 Mich. 292. But see Compilers' Section (13062). A general appearance operates to convert the suit from an action in rem into an action in personam. *Buthcer v. Cappon & Bertsch Co.*, 148 Mich. 555. Admission in evidence of files in an attachment suit, see *Jansen v. McQueen*, 113 Mich. 254.

**AFFIDAVIT:** See note, "Affidavit" to Compilers' Section (14337). No valid writ without a sufficient affidavit. *Beebe v. Morrell*, 76 Mich. 114. Nothing further than is required by this section need be set forth in the affidavit. *Stringer v. Dean*, 61 Mich. 202. The formal requisites of an affidavit are the title, venue, signature, jurat and authentication. The general rule is that the affidavit must be entitled in suit in which it is to be used. If there be no suit pending, at the time, the affidavit must not be entitled. If a suit be pending and the affidavit is entitled in a suit not pending, the affidavit is a nullity. *Beebe v. Morrell*, 76 Mich. 118-19. But an affidavit is sufficient, if it refers to another paper appended, which is properly entitled. *Beebe v. Morrell*, 76 Mich. 119; *King v. Harrington*, 14 Mich. 540. The failure of the clerk to indorse upon the affidavit the time it was received, or his neglect to keep it on file, or his attaching it to the writ, will not affect the validity of the writ. *Beebe v. Morrell*, 76 Mich. 114; *Yale State Bank v. Fletcher*, 173 Mich. 585. The allegation that two defendants named "are justly indebted" to the plaintiff imports a joint indebtedness, and a subsequent averment that such debt is due from one necessarily avers that it is due from both. *Sword v. Lenawee Circuit Judge*, 71 Mich. 284. Sufficient allegation of partnership debt. *Miller v. Bay Circuit Judge*, 41 Mich. 326. An averment that there is a debt due "upon express contract and implied contract" is equivalent to averring that it is due upon express and upon implied contract and is

sufficient. *Emerson v. Steel & Spring Co.*, 100 Mich. 127, citing *Buehler v. De Lemos*, 84 Mich. 554. The omission of the word "not" from the averment that the defendant is a non-resident and has not resided, etc., renders the affidavit a nullity. *Freer v. White*, 91 Mich. 74. The use of the disjunctive "or" in an averment in the affidavit that the defendant "is about to assign, dispose of, 'or' conceal her property with intent to defraud her creditors," will not invalidate it, as but one ground for the writ is stated. *Jones v. Peek*, 101 Mich. 389; distinguishing from *Kegel v. Schrenkheisen*, 37 Mich. 174. The use of the disjunctive "or" in an averment that the defendant "fraudulently contracted the debt 'or' incurred the obligation respecting which the suit is brought," will not invalidate the affidavit. *Emerson v. Steel & Spring Co.*, 100 Mich. 127. Good practice requires the naming of the plaintiff in the affidavit, but its omission will not invalidate, where the affidavit and writ bear the same date. The affidavit must be attached to the writ and will sufficiently identify plaintiff by reference to him as "named in the annexed writ." *Stringer v. Dean*, 61 Mich. 201. An affidavit purporting to be made by an agent or attorney, who deposes "that he is the attorney for the plaintiff named in the annexed writ of attachment," sufficiently shows, by legal inference, that it was made in plaintiff's behalf. *Stringer v. Dean*, 61 Mich. 201, citing *Nicolls v. Lawrence*, 30 Mich. 395-99. The plaintiff is not limited in his recovery by the sum sworn in the affidavit to be due, if by the proof, a greater sum is shown to be due him. *Pew v. Yoare*, 12 Mich. 16. The sufficiency of the affidavit is waived by pleading to the merits. *Hardware Co. v. Denison*, 83 Mich. 41, Amendment of affidavit. *Emerson v. Steel & Spring Co.*, 100 Mich. 127; *Freer v. White*, 91 Mich. 74; *Barber v. Smith*, 41 Mich. 138. See *Drew v. Dequindre*, 2 Doug. 93; *VanBenschoten v. Fales*, 126 Mich. 177; *Butcher v. Cappon & Bertsch Leather Company*, 148 Mich. 554. The affidavit may be sworn to before a deputy clerk. *Dorr v. Clark*, 7 Mich. 310. But is a nullity if sworn to before one not authorized to administer oaths. *Greenvault v. Bank*, 2 Mich. 506. Misnomer in affidavit. *VanBenschoten v. Fales*, 126 Mich. 177. See also *Bane v. Keys*, 115 Mich. 244; *Belcher-Stine Lumber Co. v. Burns*, 159 Mich. 469.

**IMPLIED ASSUMPSIT:** Attachment lies upon the implied assumpsit arising out of the embezzlement by a clerk of the money of his employer. *Nat'l Bank v. Fonda*, 65 Mich. 533, citing *Farwell v. Myers*, 64 Mich. 234.

**FIRST:** See notes to Compilers' Section (14337), subd. 4.

**SECOND:** See notes to Compilers' Section (14337), subd. 1.

**THIRD:** Fraud is not inferable from mere breach of contract, and where an attachment is asked for on the ground of fraud, the burden of proving it is on the plaintiff. *Powers v. O'Brien*, 44 Mich. 317. The individual property of an innocent co-partner is not liable to attachment for a firm debt fraudulently contracted by the other member of the firm. *Jaffray v. Jennings*, 101 Mich. 515. A writ of attachment issued on the ground that the debt sued for was fraudulently contracted will be dissolved if it appears that a portion of said claim is not affected by such fraud. *Estlow v. Hanna*, 75 Mich. 219. The intent to defraud must be found to exist as a fact to maintain the writ. *First National Bank v. Steele*, 81 Mich. 93. Payment of honest debts to one creditor, to the exclusion of others, cannot be made the

basis of a charge of fraud against the debtor. *Id.* 97. Nor the execution of chattel mortgages to secure such indebtedness. *Gore v. Ray*, 73 Mich. 385; *Iosco County Savings Bank v. Barnes*, 100 Mich. 15. As to what constitutes an assignment with intent to defraud, see *McBryan v. Trowbridge*, 125 Mich. 548. See also *McMorran v. Moore*, 113 Mich. 102; *Feldman v. Preston*, 194 Mich. 352.

FIFTH: See notes to Compilers' Section (14337), Subd. 4. See *Freer v. White*, 91 Mich. 74, as to affidavit. One who stays most of his time in this state, but claims a home in another state from which he came and where his wife lives, and who frequently visits and lives with her, is a non-resident subject to attachment. *Loder v. Littlefield*, 39 Mich. 512.

SIXTH: The true construction of this provision is that, while, as against foreign corporations that fact alone is sufficient to authorize the issuance of the writ, some other statutory ground must be set out in case of a domestic corporation. *Mich. Dairy Co. v. Runnels*, 96 Mich. 109.

INTERVENTION OF DAY: See notes to Compilers' Section (14337), Subd. 5. *Adams v. Wayne Circuit Judge*, 98 Mich. 53. The day does not begin to run, until after the expiration of the day upon which the affidavit is executed and the writ may issue after the expiration of said intervening day. *Horton v. Monroe*, 98 Mich. 195. This provision does not apply to proceedings by attachment under the log lien law. *McPherson v. McGillis*, 93 Mich. 525; *Lumber Co. v. Lyons*, 95 Mich. 584.

CITED: *Archer v. Laidlaw*, 129 Mich. 201; *Showen v. J. L. Owen Co.*, 158 Mich. 333; *Greacen v. Lumber Co.*, 167 Mich. 572.

### (13030). Against Corporations.

SEC. 3. In any county where the plaintiff may reside, other than the one wherein the principal office of any domestic corporation may be located, a writ of attachment may be the first process against any corporation, which shall be served in the same manner as other writs of attachment issuing out of the court wherein suit is commenced; and upon the return of such service being made, such corporation shall be deemed to be in court, and the like proceedings as near as may be, shall be thereupon had as in cases of suits against individuals: *Provided*, That this section shall not apply to railroad companies or corporations whose right of way, or any part of same, is within the boundaries of the state of Michigan, nor to navigation companies or corporations.

HISTORY: Re-enacts a part of Sec. 3, R. S. '46, Ch. 116, being C. L. '57, (4835); C. L. '71, (6544); As Am. '77, p. 112, Act 123, Eff. Aug. 21; How. 8137; As Am. '87, p. 303, Act 242, Eff. Sept. 28; C. L. '97, (10468). Modified.

ATTACHMENT: By the amendment of '87 (see history above), a remedy by attachment was given against domestic corporations, other than railroad and navigation companies, in all cases, in which the

plaintiff resided in a county, other than the home county of the corporation, and in case attachment of property could be had. *Mich. Dairy Co. v. Runnels*, 96 Mich. 109. Where the plaintiff resides in a county other than the one where the offices of a defendant domestic corporation are located, attachment may issue. *Greacen v. Buckley & Douglas Lumber Co.*, 167 Mich. 569. A circuit court of a county in which an interurban railroad owns and operates lines and maintains a station where tickets are sold and in which service was made on it, has jurisdiction to try a suit for personal injuries arising therein, although neither the plaintiff nor the defendant are domiciled in the county. *Pollock v. Detroit United Railway Co.*, 168 Mich. 581; 19 D. L. N. 42; 134 N. W. 1029.

See *Arnold v. Huber Mfg. Co.*, 166 Mich. 190; *Showen v. J. L. Owens Co.*, 158 Mich. 330; *Atwood v. Sault Ste. Marie Co.*, 148 Mich. 224; *Moinet v. Burnham, Stoepel & Co.*, 143 Mich. 492; *Goodrich v. Hackley & Co.*, 141 Mich. 346; *Thompson v. McMorran Co.*, 132 Mich. 598.

**(13031). Endorsement.**

SEC. 4. Such writ of attachment shall be indorsed in the same cases, and in the same manner, as original writs are required by law to be indorsed, by some person as security for costs, and with the like effect.

HISTORY: Re-enacts Sec. 3, R. S. '46, Ch. 114, being C. L. '57, (4744); C. L. '71, (6399); How. 7988; C. L. '97, (10557). Unchanged.

**(13032). When Not to Issue.**

SEC. 5. No writ of attachment shall be issued under the provisions of this chapter, unless the amount stated in such affidavit as due to the plaintiff, over and above all legal set-offs, shall exceed the sum of one hundred dollars.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 114, being C. L. '57, (4745); C. L. '71, (6400); How. 7989; C. L. '97, (10558). Unchanged.

CONSTRUED: One hundred dollars. *Buckley v. Lowry*, 2 Mich. 421; *Hale v. Chandler*, 3 Mich. 534-5; *Hinchman v. Town*, 10 Mich. 512; *Barker v. Thorn*, 20 Mich. 268.

**(13033). Command of Writ.**

SEC. 6. Such writ shall command the sheriff, or other officer to whom it may be directed, to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant not exempt from execution, wheresoever the same may be found within the county, as will be sufficient to satisfy the plaintiff's demand, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in such attachment, and also to summon the defendant, if to be found within his county, or in any county where he may have seized

property under and by virtue of such writ, to appear before the circuit court, at the time and place to be specified in such writ, to answer the plaintiff; and such writ shall be tested and made returnable in the same manner as other writs issuing out of the circuit court.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 114, being C. L. '57, (4746); As Am. '69, p. 263, Act 144, Eff. July 5; C. L. '71, (6401); How. 7990; C. L. '97, (10559), omitting, however, reference to R. S. '46. Unchanged.

**WRIT OF ATTACHMENT:** As to the form of the writ, see Circuit Court Rule 18, Section 5, '16. The writ of attachment is a summons with a clause authorizing a seizure of property. *Thompson v. Thomas*, 11 Mich. 276. It is meane process. *Fletcher v. Morrell*, 78 Mich. 180. Omission of year in date of writ. *Nash v. Mallory*, 17 Mich. 232; *Vinton v. Mead*, 17 Mich. 388. The names of plaintiffs in attachment must be stated with certainty in the process, and a copartnership title is not sufficient. *Barber v. Smith*, 41 Mich. 138. See *Emerson v. Steel & Spring Co.*, 100 Mich. 132; *Freer v. White*, 91 Mich. 74. Abuse of writ. *Rosenthal v. Muskegon Circuit Judge*, 98 Mich. 208. Where property is seized in different counties. *Skeels v. Oceana Circuit Judge*, 119 Mich. 290. Duties of sheriff. *Springett v. Colerick*, 67 Mich. 362. Where the debtors are non-residents. *Archer v. Laidlaw*, 129 Mich. 199; *Showen v. J. L. Owens Co.*, 158 Mich. 333; *Campbell v. Keys*, 130 Mich. 132.

**SAFELY KEEP:** See notes to Compilers' Section (14339). The property attached remains in the custody of the sheriff or officer who served the writ, until the suit is disposed of, unless bonded or the attachment is dissolved. *Fletcher v. Morrell*, 78 Mich. 180. An attachment lien binds until an execution can be levied. *Avery v. Stephens*, 48 Mich. 246. No one but a purchaser for a valuable consideration can claim title to property which has been fraudulently assigned, against the action of an attaching creditor. *Dixon v. Hill*, 5 Mich. 408.

#### (13034). Exemptions.

SEC. 7. The provisions of chapter twenty-three of this act, relating to exemptions from execution, and the manner of levying upon property belonging to a class or species in which exemptions are by law allowed, shall be applicable to the levy of attachments in like cases.

**HISTORY:** New section.

#### (13035). How Writ Executed.

SEC. 8. The sheriff or other officer to whom such writ shall be directed, shall execute the same on or before the return day thereof, by seizing so much of the lands, tenements, goods, chattels, moneys and effects of the defendant, wheresoever the same may be found in his county, as will be sufficient to satisfy

the demand and costs, and by making an inventory thereof, and serving a copy of such attachment and inventory, certified by him, upon the defendant, if he can be found in his county; and in case any property of the defendant is found and seized in said county, but not sufficient to satisfy the demand and costs, then said officer shall seize other property of the defendant, subject to attachment, sufficient with that seized within his county to satisfy the demand and costs, wherever the same may be found within the state, and shall serve a copy of such attachment and inventory upon said defendant, if found within either county where property has been seized under this writ, and in case any defendant shall not be found in either county where property has been seized, such service may be made in any county within this state by the sheriff of the county wherein such defendant may be: *Provided, however,* That in case of several attachments of the same property, it shall be necessary to make an inventory and serve a copy thereof only with the first.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 114, being C. L. '57, (4747); As Am. '61, p. 479, Act 229, Eff. June 15; C. L. '71, (6402); How. 7991; As Am. '95, p. 258, Act 129, Eff. Aug. 30; C. L. '97, (10560). Unchanged.

**ATTACHABLE PROPERTY:** See notes to Compilers' Sections (14339) and (14340). The officer may attach any property subject to execution. *King v. Hubbell*, 42 Mich. 602. As to what property is subject to execution, see notes to Compilers' Sections (12818), (12855) and (12870). The interest of a mortgagee in lands is not subject to attachment. *Columbia Bank v. Jacobs*, 10 Mich. 349. An attachment against partnership property is unauthorized, unless grounds for issuing the writ exist against all the partners. Nor may the separate property of one partner be seized, unless a good cause for issuing the writ is shown against the owner of such separate property. *Edwards v. Hughes*, 20 Mich. 289. Shares of stock in which the debtor has only a beneficial interest and the legal title to which is vested in a third person as trustee are not subject to attachment. *Gypsum Plaster & Stucco Co. v. Kent Circuit Judge*, 97 Mich. 631. As to exempt property, see Compilers' Sections (12858), (12859) and (12888) and the notes thereto. See also *Campbell v. Keys*, 130 Mich. 128.

**EXECUTION OF WRIT:** See notes to Compilers' Section (14340). For a statement of the law regulating the action of the sheriff in serving the writ, as to diligence, etc., see *Springett v. Colerick*, 67 Mich. 368-70. And see *Beard v. Clippert*, 63 Mich. 716. The fact that no levy is endorsed on an attachment is immaterial, where the return recites a levy and is accompanied by the appraisal. *Grover v. Buck*, 34 Mich. 519. Service of uncertified copy, when not fatal. *Leonard v. Woodward*, 34 Mich. 514. Service of certified copy of inventory alone is not sufficient personal service. *Stearns v. Taylor*, 27 Mich. 88. Before levying upon property as to the title to which there is reasonable doubt, a sheriff may require a bond of indemnity and refuse to levy

without it. *Smith v. Cicotte*, 11 Mich. 383. Liability of officer for attaching property not belonging to defendant. *Cook v. Hopper*, 23 Mich. 511. Service of copy of inventory. *DeCarie v. Marks*, 171 Mich. 168. The plaintiff is not ordinarily liable for a trespass committed by the officer in levying the writ, unless it appear that such trespass was committed by his direction. *Foster v. Wiley*, 27 Mich. 244, 247. See *Michels v. Stork*, 44 Mich. 2. The officer is required only to take such possession of the property as it is, in its nature, susceptible of; and in the case of a growing crop, such possession would be constructive only. *Grover v. Buck*, 34 Mich. 522.

**RETURN:** A writ of attachment is mesne process and must be returned by the officer and remain in the custody of the clerk as a part of the files in the case. *Fletcher v. Morrell*, 78 Mich. 180. A return is premature if made before the return day, unless there has been personal service. *King v. Harrington*, 14 Mich. 541; *Myers v. Prosser*, 40 Mich. 644; *Kraft v. Raths*, 45 Mich. 20; *Michaels v. Stork*, 44 Mich. 2; *Nicolls v. Lawrence*, 30 Mich. 395; *Millard v. Hayward*, 107 Mich. 219, and note "Six days," to Compilers' Section (14340).

**CITED:** *Avery v. Stephens*, 48 Mich. 249; *Federspiel v. Johnstone*, 87 Mich. 305; *McGuire v. Saginaw Circuit Judge*, 101 Mich. 276; *Graecen v. Lumber Co.*, 167 Mich. 573; See *Millard v. Hayward*, 107 Mich. 220; *Showen v. J. L. Owens Co.*, 158 Mich. 333; *Skeels v. Oceana Circuit Judge*, 119 Mich. 292.

### (13036). Appraisal of Property.

**SEC. 9.** The property so attached shall be appraised by two disinterested freeholders of the county in which said property was seized, who shall first be sworn by the officer to make a true appraisement thereof, which appraisement shall be signed by such freeholders and returned with the writ: *Provided*, That in case of several attachments of the same property, one inventory and appraisal shall be sufficient, and the subsequent attachment shall be served on the property as in the hands of the officer, by reference to the inventory and appraisal under the first writ.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 114, being C. L. '57, (4748); As Am. '61, p. 479, Act 229, Eff. June 15; C. L. '71, (6403); How. 7992; C. L. '97, (10561). Unchanged.

**CONSTRUED:** The statute requires disinterested freeholders as appraisers for the protection of the defendant. *Grover v. Buck*, 34 Mich. 521. The sworn appraisement is admissible as, but not conclusive evidence of value of the property seized. *Worthington v. Hanna*, 23 Mich. 531; cited and followed in *Walrath v. Campbell*, 28 Mich. 117; *Hunt v. Strew*, 33 Mich. 89. See *Sirrine v. Briggs*, 31 Mich. 446; *Dyer v. Rosenthal*, 45 Mich. 588. The clerk of the court may act as an appraiser. *DeCarie v. Marks*, 171 Mich. 167; See *Federspiel v. Johnstone*, 87 Mich. 304-5; *Drew v. Dequindre*, 2 Doug. 93; also notes to Compilers' Section (12861).

**(13037). Attachment of Real Estate.**

SEC. 10. In attaching real estate, or any right or interest in land, it shall not be necessary that the officer should enter upon the land or be within view of it; and in attaching shares of stock, or the interest of stockholders in any corporation organized under the laws of this state, the levy shall be made in the manner provided by law for the seizure of such property on execution.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 114, being C. L. '57, (4749); C. L. '71, (6404); As Am. '77, p. 3, Act 5, Eff. Aug. 21; How. 7993; C. L. '97, (10562). Unchanged.

**CONSTRUED:** As to levy on real estate, see notes to Compilers' Section (12821). Levy on stock, under amendment of '77. *Van Norman v. Judge*, 45 Mich. 210. See *Newberry v. Iron Co.*, 17 Mich. 141; *Blair v. Compton*, 33 Mich. 414. Shares of stock, in which the debtor has only a beneficial interest and the legal title to which is vested in a third person as trustee, are not subject to attachment. *Gypsum Plaster & Stucco Co. v. Kent Circuit Judge*, 97 Mich. 631.

**CITED:** *Old Second Nat. Bank v. Williams*, 112 Mich. 567.

**(13038). Binding of Goods.**

SEC. 11. Such attachment shall bind the goods and chattels so attached from the time they were attached.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 114, being C. L. '57, (4750); C. L. '71, (6405); How. 7994; C. L. '97, (10563). Unchanged.

**CONSTRUED:** Rights acquired by attachment are inchoate until judgment and execution levy. *Fuller v. Hasbrouck*, 46 Mich. 82. An attachment lien binds until an execution can be levied. *Avery v. Stephens*, 48 Mich. 246. And the property remains in the officer's hands until the suit is disposed of, unless bonded or the attachment is dissolved. *Fletcher v. Morrell*, 78 Mich. 180.

**(13039). Lien on Real Estate.**

SEC. 12. Real estate attached shall be bound, and the attachment shall be a lien thereon from the time when a certified copy of the attachment, with a description of the real estate attached, shall be deposited in the office of the register of deeds in the county where the real estate attached is situated.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 114, being C. L. '57, (4751); C. L. '71, (6406); As Am. '75, p. 184, Act 154, Eff. Aug. 3; How. 7995; C. L. '97, (10564). Unchanged.

**CONSTRUED:** The deposit of this certified copy is a condition precedent to the establishment of a lien under the seizure. *Davis Sew. Mach. Co. v. Whitney*, 61 Mich. 518. The object of filing the paper in the register's office is not to give notice to third parties, but to fix the lien. *Davis Sew. Mach. Co. v. Whitney*, 61 Mich. 521; *French v.*



De Bow, 38 Mich. 708. When a lien by attachment has once become operative, a subsequent taking of possession for a homestead will not defeat it. Avery v. Stephens, 48 Mich. 246; Davis Sew. Mach. Co. v. Whitney, 61 Mich. 521. An attaching creditor is not entitled to priority over an unrecorded mortgage. Campbell v. Keys, 130 Mich. 127. See further Campau v. Barnard, 25 Mich. 383; Springett v. Colerick, 67 Mich. 367; and notes to Compilers' Sections (11721) and (12898). See Travelers Insurance Co. v. Kent Circuit Judge, 144 Mich. 688.

**(13040). Register of Deeds to Note Time and Enter Receipt.**

SEC. 13. Each register of deeds shall note on every such certified copy, the day, hour and minute when he received it, and shall also enter in a book to be kept by him for that purpose, the names of the parties in such writ, designating who is plaintiff and who defendant, the time when the land was attached, a correct description of the land attached, and the time when such copy was deposited.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 114, being C. L. '57, (4752); C. L. '71, (6407); How. 7996; As Am. '97, p. 126, Act 115, Eff. Aug. 30; C. L. '97, (10565). Unchanged.

**(13041). Fees of Register and Appraisers.**

SEC. 14. The register of deeds shall be entitled to a fee of twenty-five cents for his services in each case, to be paid on the delivery of such copy; and the appraisers of the property attached pursuant to the provisions of this chapter, shall each be entitled to receive two dollars for each day, and one dollar for each half day necessarily occupied by him in the appraisal, and six cents per mile for traveling one way, to be paid on the rendition of the services; which fees and compensation may be taxed for the plaintiff in his bill of costs.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 114, being C. L. '57, (4753); C. L. '71, (6408); How. 7997; C. L. '97, (10566), increasing, however, the fees of the appraiser from one dollar per day to two dollars per day. Unchanged.

**(13042). Property to Remain with Officer.**

SEC. 15. The property attached shall remain in the hands of the officer serving the attachment, unless the defendant or any other person in whose possession such property may have been found, shall, before judgment in such suit, deliver to the officer a bond, executed to him by two or more sufficient sureties, being freeholders within this state, either with or without such defendant, or other person, to the satisfaction of such officer, as hereinafter provided.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 114, being C. L. '57, (4754); C. L. '71, (6409); How. 7998; C. L. '97, (10567). Unchanged.

**IN OFFICERS' POSSESSION:** Under this statute it is the duty of the officer to hold the property until the coming of an execution to enforce the judgment in the case. He has no right to sell and dispose of the property without an order of the court, obtained only upon a special showing. *Terry v. Metevier*, 104 Mich. 52-3; *Trowbridge v. Bullard*, 81 Mich. 451. The property remains in the officer's hands, until the disposition of the suit, unless bonded or the attachment is dissolved. *Fletcher v. Morrell*, 78 Mich. 180. The officer cannot lawfully deliver the property to plaintiff while the suit is pending. *Vanmeter v. Crossman*, 39 Mich. 610. Constructive possession only, in case of growing crops. *Grover v. Buck*, 34 Mich. 519. Machinery bolted to freehold. *Patch v. Wessels*, 46 Mich. 249. Temporary possession of mortgaged property. *King v. Hubbell*, 42 Mich. 603. See *Meads v. Copper Mines*, 125 Mich. 456.

**BOND:** See notes to Compilers' Section (14342). *Fletcher v. Morrell*, 78 Mich. 180. Condition of bond. *Phansteihl v. Vanderhoof*, 22 Mich. 297. Must run to the sheriff who holds it in trust. *Forrest v. O'Donnell*, 42 Mich. 556. The statute seems to contemplate the giving of a bond only by "the defendant or any other person in whose possession such property may have been found." *King v. Hubbell*, 42 Mich. 603. The bond given by the sureties must be considered as referring to the suit as then constituted in respect to parties and not as it should possibly be thereafter constituted. *Andre v. Fitzhugh*, 18 Mich. 100. Questioning of affidavit by sureties. *Goebel v. Stevenson*, 35 Mich. 172. After the sheriff relinquishes the property, upon the giving of the bond, he has no further control of it. *Patch v. Wessels*, 46 Mich. 252. After having secured a release of the attached property by giving a bond, the defendant is estopped from having the attachment dissolved. *Paddock v. Matthews*, 3 Mich. 21; See also *Butcher v. Cappon & Bertsch Leather Co.*, 148 Mich. 553.

### (13043). Conditions of Bond.

Sec. 16. Such bond may be in a penalty double the amount specified in the affidavit annexed to the writ, as due to the plaintiff, conditioned for the payment of any judgment which may be recovered by the plaintiff in the suit commenced by such attachment, within sixty days after such judgment shall be rendered; or in a penalty double the appraised value of the property, and conditioned that such property shall be produced in like condition as when received, to satisfy any execution that may be issued on any judgment to be recovered by the plaintiff upon such attachment.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 114, being C. L. '57, (4755); C. L. '71, (6410); How. 7999; C. L. '97, (10568), inserting after "produced" "in like condition as when received." Unchanged.

**CONSTRUED:** Upon breach of the condition of the bond, the plaintiff will be entitled to recover the full amount of the judgment, irrespective of the value of the property attached. *Phansteihl v. Van-*

derhoof, 22 Mich. 296; Dorr v. Clark, 7 Mich. 310; Goebel v. Stevenson, 35 Mich. 172.

CITED: Paddock v. Matthews, 3 Mich. 21; Hale v. Chandler, 3 Mich. 538; Columbia Bank v. Jacobs, 10 Mich. 354; Andre v. Fitzhugh, 18 Mich. 99; Meads v. Copper Mines, 125 Mich. 456.

**(13044). Release of Property.**

SEC. 17. Upon the execution and delivery of such bond as provided in the preceding sections, the property attached shall be delivered by the officer to the defendant or person in whose possession the same shall have been found, but the suit shall not be discontinued or in any way affected by such delivery.

HISTORY: Re-enacts Sec. 15, R. S. '46, Ch. 114, being C. L. '57, (4756); C. L. '71, (6411); How. 8000; C. L. '97, (10569). Unchanged. See cases cited under last two sections.

**(13045). Prosecution of Bond.**

SEC. 18. In case of a failure to perform the condition of any such bond the plaintiff in such attachment may prosecute a suit thereon in his own name; and shall be entitled to recover thereon the full value of the property attached, or so much thereof as shall be sufficient to satisfy the judgment rendered on such attachment, with interest and costs.

HISTORY: Re-enacts Sec. 16, R. S. '46, Ch. 114, being C. L. '57, (4757); C. L. '71, (6412); How. 8001; C. L. '97, (10570), making a change in phraseology, however, so that plaintiff may sue in his own name. Modified.

See Dorr v. Clark, 7 Mich. 310; Goebel v. Stevenson, 35 Mich. 172; Forrest v. O'Donnell, 42 Mich. 556.

**(13046). Return of Writ Personally Served.**

SEC. 19. Upon the return of such writ, if it appear that a copy thereof has been personally served on the defendants, or either of them, or if either of the defendants shall appear in the suit, the same proceedings may be thereupon had in such suit, in all respects as upon the return of an original writ of summons personally served, in a suit commenced by such summons.

HISTORY: Re-enacts Sec. 17, R. S. '46, Ch. 114, being C. L. '57, (4758); C. L. '71, (6413); How. 8002; C. L. '97, (10571). Unchanged.

CONSTRUED: As to personal service, see notes to Compilers' Section (14340). See further as to this section. Bower v. Town, 12 Mich. 233; Paddock v. Matthews, 3 Mich. 21; Showen v. J. L. Owens Co., 158 Mich. 333.

**(13047). When Notice to be Published.**

**SEC. 20.** If it appear by the return of such writ that any property has been attached thereon, and that neither of the defendants could be found, the plaintiff shall, within thirty days after such return, unless the defendants or some of them shall sooner appear in the suit, cause a notice to be published in some newspaper printed in the county for which said circuit court is held, and if no newspaper is printed in said county, then in some newspaper printed in the judicial circuit in which such writ shall be returned, which notice shall state the names of the parties, the time when, from what court, and for what sum the writ was issued, and when the same was returnable, and shall be published for six successive weeks, and if any plaintiff shall neglect to cause such notice to be so published, as required in this section, the attachment shall be dismissed with costs: *Provided*, That such notice may be personally served on any defendant wherever found, and in case of such service no publication thereof shall be required.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 114, being C. L. '57, (4759); C. L. '71, (6414); How. 8003; As Am. '91, p. 7, Act 8, Eff. Oct. 2; As Am. '95, p. 259, Act 129, Eff. Aug. 30; C. L. '97, (10572). Unchanged.

**FORMER LAW:** Amendment of '91. *Savidge v. Ottawa Circuit Judge*, 105 Mich. 257. By the amendment of '95 the section is restored to its original form, with the addition of the proviso.

**THIRTY DAYS:** The statute probably intends that the thirty days shall be computed from the return day and not that either the sheriff or the attorney shall be at liberty to extend the time indefinitely by delaying to put the writ on file. *Watson v. Toms*, 42 Mich. 562. See also *McLaughlin v. Jackson Circuit Judge*, 147 Mich. 380.

**PUBLICATION:** The statute does not contemplate a search in the sense that the sheriff must make a tour of the entire county to find the defendant, but a determination by the sheriff that he has been unable to find him within the life of the writ. *Horton v. Monroe*, 98 Mich. 197. See *Hitchcock v. Hahn*, 60 Mich. 459; *White v. Prior*, 88 Mich. 647. A defendant cannot be brought in by publication, unless it appears from the return that property has been attached thereon and that the defendant cannot be found. *Cochrane v. Johnson*, 95 Mich. 67. Where joint property is seized and service made upon one joint debtor, it is not necessary to proceed by publication against the other. *Lumb. Co. v. Covert*, 35 Mich. 254. Publication is required only where neither defendant is found. *Smith v. Runnells*, 94 Mich. 620. Where there is no personal service, the publication of notice is necessary to jurisdiction. *King v. Harrington*, 14 Mich. 541. See *Millar v. Babcock*, 29 Mich. 527. Publication is permitted as a substitute for personal service. *Thompson v. Thomas*, 11 Mich. 274; *Millar v. Babcock*, 29 Mich. 527; *King v. Harrington*, 14 Mich. 541. *Wells v. Walsh*, 25 Mich. 344. Misnaming defendant in the published notice is jurisdic-

tionally defective. *Schoenfeld v. Bourne*, 159 Mich. 139. The defendant has the same time in which to serve notice of retainer and to plead, after the filing of affidavit of publication, as he has after a return of the writ, personally served. *Thompson v. Thomas*, 11 Mich. 274; *Wells v. Walsh*, 25 Mich. 344. The statute must be strictly complied with to give the court jurisdiction. *Cochrane v. Johnson*, 95 Mich. 70; *Merrill v. Montgomery*, 25 Mich. 73; *Woolkins v. Hald*, 49 Mich. 301, and cases cited; *Nugent v. Nugent*, 70 Mich. 56; *Steere v. Vanderberg*, 67 Mich. 530; *Johnson v. Delbridge*, 35 Mich. 436; *Rolfe v. Dudley*, 58 Mich. 208. Substituted service cannot be made until after the expiration of the time for personal service. *Farr v. Kilgour*, 117 Mich. 227. When affidavit of publication may be filed. *Kurtz v. Gartner*, 141 Mich. 262. See also *Goodspeed v. Smith*, 161 Mich. 688.

**(13048). Bond to be Returned and Filed by Officer.**

SEC. 21. If any bond shall have been given to the sheriff or other officer serving the writ, as hereinbefore provided, he shall state the fact in his return to the attachment, and return and file such bond therewith; and if any such bond shall be given after the return of the writ, and before judgment, such sheriff or other officer shall immediately cause the same to be filed in the clerk's office to which such writ was returned, and give notice thereof to the plaintiff or his attorney.

HISTORY: Re-enacts Sec. 19, R. S. '46, Ch. 114, being C. L. '57, (4760); C. L. '71, (6415); How. 8004; C. L. '97, (10573). Unchanged.

**(13049). Issue of Attachment in Actions of Tort.**

SEC. 22. In all actions based upon tort, if in addition to the affidavit hereinbefore required, the plaintiff shall also in such affidavit set forth in detail his cause of action, the circuit judge of the circuit in which such action is commenced, may make an order authorizing the issuance of an attachment in said cause, specifying in such order the amount or value of the property which may be attached by virtue thereof; and it shall be required in such order that the plaintiff file a sufficient bond, with a penalty fixed in said order, and with sureties to be approved by the clerk of the court, conditioned that said plaintiff prosecute said suit with diligence, and will pay any damages and costs that may be awarded to the defendant in said attachment, either in said suit, or in any action brought by said defendant for damages accruing by reason of such attachment. Except as herein otherwise provided, the proceedings under such attachment shall be the same as in other attachment cases.

HISTORY: New section.

**ATTACHMENTS IN TORT CASES:** In tort actions, if in addition to the usual averments in the affidavit, the plaintiff shall set forth in detail his cause of action, the circuit judge of the circuit may make an order authorizing the issuance of an attachment, specifying the amount or value of the property which may be attached, and requiring that the plaintiff file a sufficient bond with a penalty fixed in said order and with sureties to be approved by the clerk of the court, conditioned that the plaintiff prosecute his suit with diligence and pay any damages and costs that may be awarded to the defendant, either in the attachment case or in any action brought by the defendant for damages by reason of such attachment. In other respects the proceedings are the same as in other attachment cases.

**(13050). Filing Declaration.**

**SEC. 23.** The plaintiff shall file his declaration in said attachment in the same manner and within the same time and serve the same as is provided by the rules and practice governing proceedings in circuit court in other cases in assumpsit. If a copy of the attachment shall not have been served upon any of the defendants and none of them shall appear in the suit, the plaintiff, on filing an affidavit of publication of the notice hereinbefore required for six successive weeks, or on filing due proof of personal service of such notice on any defendant not less than fifteen days prior to the filing of such proof, may proceed in such suit as if a copy of such attachment had been personally served upon the defendants.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 114, being C. L. '57, (4761); C. L. '71, (6416); How. 8005; As Am. '95, p. 259, Act 129, Eff. Aug. 30; C. L. '97, (10574); As Am. '07, p. 33, Act 30, Eff. Sept. 28. Unchanged.

**CONSTRUED:** The declaration cannot be filed prior to the filing of affidavit of publication. *Steere v. Vanderberg*, 67 Mich. 530; *Nugent v. Nugent*, 70 Mich. 52. See *King v. Harrington*, 14 Mich. 532; *Wells v. Walsh*, 25 Mich. 344; *Thompson v. Thomas*, 11 Mich. 274; *Woolkins v. Haid*, 49 Mich. 299. The filing of the declaration within 15 days is not mandatory. *Goodspeed v. Smith*, 161 Mich. 688.

**CITED:** *Kurtz v. Gartner*, 141 Mich. 263.

**(13051). Appearance of Defendant not Served.**

**SEC. 24.** If any defendant not served with a copy of the attachment, shall appear at any time before judgment, he may be admitted by the court to defend the suit, upon such terms as such court may deem reasonable.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 114, being C. L. '57, (4762); C. L. '71, (6417); How. 8006; C. L. '97, (10575). Unchanged.

**CONSTRUED:** This section does not make it necessary to apply to the court for leave to defend, nor authorize the court to impose terms, in any stage of the case when such leave would not have been

required and terms imposed had the suit been commenced by ordinary summons personally served. *Thompson v. Thomas*, 11 Mich. 277. Power of the court to set aside judgment and permit defendant to plead. *Hurlbut v. Reed*, 5 Mich. 30; *Loree v. Reeves*, 2 Mich. 133. Who may appear and defend. *People v. Judges*, 1 Doug. 417; *Hale v. Chandler*, 3 Mich. 531.

**(13052). Procedure When Defendant Personally Served.**

SEC. 25. When a copy of the attachment shall have been personally served on the defendant, or such defendant shall have appeared in the suit, judgment shall be rendered, and execution shall issue thereon, in the same manner and with the like effect as in a suit commenced by summons, in which the summons shall have been returned personally served, except that by virtue of such execution, the officer to whom the same shall be directed and delivered may sell any property attached in the suit, and remaining in the hands of the officer who served the attachment, wherever the same may be in this state.

HISTORY: Re-enacts Sec. 22, R. S. '46, Ch. 114, being C. L. '57, (4763); C. L. '71, (6418); How. 8007; C. L. '97, (10576).

CONSTRUED: The defendant can be held liable to a personal judgment, binding in all respects, only when he has been personally served or shall appear. *Hyde v. Nelson*, 11 Mich. 355. Irregularities in attachment proceedings can be waived by the defendant's *condu* Payment v. Church, 38 Mich. 776. See further *Smith v. Runnells*, 94 Mich. 619; *Fletcher v. Morrell*, 78 Mich. 179; *Showen v. J. L. Owens Co.*, 158 Mich. 334.

**(13053). In Case of No Service and Appearance.**

SEC. 26. When a copy of the attachment shall not have been served, and the defendant shall not have appeared in the suit, judgment shall be rendered, and execution may issue in the same form as if such copy had been personally served, but such judgment shall not be conclusive against the defendant, and such execution shall only authorize the officer to whom it is directed to sell the property attached in such suit.

HISTORY: Re-enacts Sec. 23, R. S. '46, Ch. 114, being C. L. '57, (4764); C. L. '71, (6419); How. 8008; C. L. '97, (10577).

CITED: *Hitchcock v. Hahn*, 60 Mich. 462. Execution on judgment in attachment on substituted service, can be levied only on the property seized. *Peterson v. Swennington*, 178 Mich. 294, 20 D. L. N. 1041, 144 N. W. 550. A creditor's bill cannot be maintained by one whose judgment in attachment was based upon a levy upon real estate claimed to be held in trust for the defendant who was not personally served and did not appear. *Bliss v. Tyler*, 159 Mich. 502, 124 N. W. 560. See *Bradford & Co. v. Baxter*, 203 Mich. 239.

**(13054). Endorsement on Execution.**

SEC. 27. In the case specified in the last section, the attorney issuing the execution shall indorse thereon or annex thereto a description of the property so attached, with a direction to the officer to sell the same, or so much thereof as may be sufficient to satisfy the execution, and not to levy the same or any part thereof upon any other property.

HISTORY: Re-enacts Sec. 24, R. S. '46, Ch. 114, being C. L. '57, (4765); C. L. '71, (6420); How. 8009; C. L. '97, (10578). Unchanged.  
CITED: Hitchcock v. Hahn, 60 Mich. 462.

**(13055). When Issue of Execution not Necessary to Suit on Bond.**

SEC. 28. If a bond shall have been given to the officer, conditioned for the payment of the judgment, as provided in the fifteenth and sixteenth sections of this chapter, and judgment be rendered in favor of the plaintiff, it shall not be necessary to issue any execution upon such judgment, to entitle such plaintiff to sue on such bond.

HISTORY: Re-enacts Sec. 25, R. S. '46, Ch. 114, being C. L. '57, (4766); C. L. '71, (6421); How. 8010; C. L. '97, (10579), making only necessary changes in phraseology in reference to preceding sections. Unchanged.

**(13056) Order for Sale of Perishable Property.**

SEC. 29. When any of the property taken in an attachment shall consist of animals or perishable property, the court, or any judge thereof, may make an order, directing such property to be sold, and the money arising from such sale to be brought into court, to abide the order of such court.

HISTORY: Re-enacts Sec. 26, R. S. '46, Ch. 114, being C. L. '57, (4767); C. L. '71, (6422); How. 8011; C. L. '97, (10580), adding, however, the unnecessary "of" in the first line. Unchanged.

PERISHABLE PROPERTY: Lumber is not such perishable property. Mosher v. Bay Circuit Judge, 108 Mich. 579.

**(13057). Sale and Disposition of Proceeds.**

SEC. 30. Upon such order for a sale being made, the officer having such property shall advertise and sell the same, in the same manner that personal property of like character is required to be advertised and sold on execution, and shall deposit the proceeds thereof with the clerk to whose office the attachment is required to be returned.



**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 114, being C. L. '57, (4768); C. L. '71, (6423); How. 8012; C. L. '97, (10581), inserting "of like character." Unchanged.

**(13058). To Whom Proceeds Paid.**

**SEC. 31.** If the plaintiff recover judgment, the court may order such money to be paid to the plaintiff thereon; but if judgment be rendered against the plaintiff, or the suit be discontinued, or the attachment dismissed, the court shall order such money to be paid to the defendant, or person entitled thereto.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 114, being C. L. '57, (4769); C. L. '71, (6424); How. 8013; C. L. '97, (10582). Unchanged.

**(13059). Practice. ■**

**SEC. 32.** The practice in actions commenced by attachment shall be the same in all respects as in personal actions commenced by summons, as near as may be, except as otherwise provided by law.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 114, being C. L. '57, (4770); C. L. '71, (6425); How. 8014; C. L. '97, (10583). For points of practice, see cases cited under the preceding sections of this chapter. Unchanged.

**CITED:** *Goodspeed v. Smith*, 161 Mich. 689.

**(13060). Attachment Against Property of Joint Obligors.**

**SEC. 33.** When two or more persons are jointly indebted as joint obligors, partners, or otherwise, and an affidavit shall be made, as provided in section two of this chapter, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the provisions of said section; and the officer shall be also directed in said writ to summon all such joint debtors as may be named in the affidavit attached thereto, to answer to the said actions as in other cases of attachment.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 114, being C. L. '57, (4771); As Am. '61, p. 480, Act 229, Eff. June 15; C. L. '71, (6426); How. 8015; C. L. '97, (10584). Unchanged.

**CONSTRUED:** This section as it originally stood and as amended in '61 is fully discussed in *Jaffray v. Jennings*, 101 Mich. 515. See *Cottrell v. Hathaway*, 108 Mich. 619. Joint judgment cannot be entered against several defendants, when service of process against a portion

of them, has neither been made nor attempted. *Proctor v. Lewis*, 50 Mich. 329. Motion to quash attachment for not complying with this section. *Warren v. Winterstein*, 114 Mich. 647. To sustain an attachment under this section, upon an affidavit that defendants have disposed of, or are about to dispose of "their" property with intent to defraud, etc., plaintiff must show joint action, or intended action, on the part of defendants, to dispose of joint property. *Cottrell v. Hathaway*, 108 Mich. 619. The use of the word "their" has several times been construed by this court to import a joint obligation. *Cottrell v. Hathaway*, 108 Mich. 619, citing *Edwards v. Hughes*, 20 Mich. 289; *Miller v. Bay Circuit Judge*, 41 Mich. 326; *Geiges v. Greiner*, 68 Mich. 155; *Sword v. Lenawee Circuit Judge*, 71 Mich. 285; *Bliss v. Caille Bros. Co.*, 149 Mich. 602.

**(13061). Sale in Case of Incumbrance Removed Before Sale.**

SEC. 34. If any estate which shall be attached shall be subject to a mortgage, or other incumbrance, and the mortgage shall be redeemed, or the incumbrance removed before the sale on the execution, such estate may be sold on such execution in the same manner and with the same effect as if the mortgage or other incumbrance had never existed.

HISTORY: Re-enacts Sec. 31, R. S. '46, Ch. 114, being C. L. '57, (4772); C. L. '71, (6427); How. 8016; C. L. '97, (10585). Unchanged.

**(13062). Attachment When Debt not Due.**

SEC. 35. Whenever the plaintiff shall be entitled to a writ of attachment by virtue of sections one and two of this chapter, except that the debt owing to him by the debtor is not due, he may begin and prosecute his suit by attachment by complying with the provisions of this chapter: *Provided, however*, That before any such writ of attachment shall issue, the plaintiff, or some person in his behalf, shall make an affidavit in compliance with section two of this chapter, except that instead of stating that such indebtedness is due, such affidavit shall state when the same will become due, and show reasons for the immediate issuance of said writ to the satisfaction of a circuit judge, and obtain his order indorsed on such affidavit that such writ may issue and be proceeded with; and no other or further affidavit shall be required, and said lien so created shall continue until the final decision in said cause, unless otherwise discharged: *Provided further*, No judgment shall be taken upon such indebtedness until the same shall have matured by the terms thereof.

HISTORY: Re-enacts Sec. 32 of R. S. '46, Ch. 114, as Added '89, p. 169, Act 149, Eff. Oct 2, being How. 8016a; C. L. '97, (10586), changing "Act" to "Chapter." Unchanged.

**CONSTITUTIONALITY:** This act does not contravene Const. II, 9, nor does it forbid the issue of writs of attachment upon the same kind of affidavits as were previously sufficient, viz., where the requisite facts, except that of indebtedness, are shown upon information and belief. It attempts to enlarge the remedy by applying it to debts not yet due. *Mosher v. Bay Circuit Judge*, 108 Mich. 503.

**CONSTRUED:** When the facts alleged in the affidavit are consistent with an honest purpose on the part of creditors to secure their just claims, no case is made to authorize the seizure of a debtor's property by attachment. *Pierce v. Johnson*, 93 Mich. 128. Not a sufficient statement of facts for the issuance of this writ. *Id.* 125. For a defective affidavit and a statement of what the affidavit must show, see *Howell v. Muskegon Circuit Judge*, 88 Mich. 361. The insufficiency of the affidavit must be objected to before plea in bar, for all objections to process are waived by such a plea. *Hardware Co. v. Denison*, 83 Mich. 40, and authorities cited in plaintiff's brief.

**CITED:** *E. H. Chase & Co. v. Wayne Circuit Judge*, 118 Mich. 358.

**(13063). Attachment After Suit Commenced.**

**SEC. 36.** In any action, which has been or may hereafter be commenced by summons or declaration, in any court of record in this state, the plaintiff may, at any time before judgment shall be rendered therein, proceed by attachment, in the same action, against the property of the defendant in the manner hereinafter provided.

**HISTORY:** Re-enacts Sec. 1 of Act 193 of '67, being C. L. '71, (6432); How. 8018; C. L. '97, (10558), omitting "founded on contract, expressed or implied." Modified.

**(13064). Affidavit of Plaintiff.**

**SEC. 37.** At any time after said summons or declaration shall have been personally served on the defendant or defendants, or either of them, the plaintiff, or some person in his behalf, may make and file with the clerk of the court in which such action shall have been commenced, an affidavit, which affidavit shall conform to and be governed by the provisions of section two of this chapter, and of section twenty-two in an action of tort.

**HISTORY:** Re-enacts Sec. 2 of Act 193 of '67, being C. L. '71, (6433); How. 8019; C. L. '97, (10589), making, however, necessary changes in phraseology in reference to preceding sections. Unchanged.

**AFFIDAVIT:** See *Beebe v. Morrell*, 76 Mich. 120.

**(13065). Issue of Writ.**

**SEC. 38.** Upon filing such affidavit, said clerk shall issue a writ of attachment, which writ shall recite the commencement

of said action, and shall command the sheriff to attach so much of the lands, tenements, goods, chattels, moneys and effects of the defendant, not exempt from execution, wherever the same may be found in the county, as shall be sufficient to satisfy the plaintiff's demand and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in such action; and in case any property of the defendant is found and seized in said county, but not sufficient to satisfy the demand and costs, to attach other property of the defendant subject to attachment, sufficient with that seized within his county, to satisfy the demand and costs, wherever the same may be found within this state; and such writ of attachment may be made returnable in not less than fourteen nor more than thirty days from the issue thereof: *Provided*, That if the action be one of tort the provisions of section twenty-two of this chapter shall be complied with.

**HISTORY:** Re-enacts Sec. 3 of Act 193 of '67, being C. L. '71, (6434); How. 8020; As Am. '85, p. 227, Act 163, Eff. Sept. 19; C. L. '97, (10590), adding the above proviso. Unchanged.

**CITED:** Beebe v. Morrell, 75 Mich. 120.

**(13066). Subsequent Proceedings.**

**SEC. 39.** The subsequent proceedings by virtue of such attachment, so far as the same are not herein provided for, shall be the same as in suits commenced by attachment, so far as the same are applicable, except that no additional declaration shall be made necessary by such writ of attachment; and any judgment recovered in the action, in favor of the plaintiff, shall be conclusive against the defendant, who shall have been personally served with the original summons or declaration; and the execution issued thereon shall authorize the levying upon and selling of any property of the defendant so personally served, not exempt from execution, as well as the property attached, whether such attachment shall have been personally served or not.

**HISTORY:** Re-enacts Sec. 4 of Act 193 of '67, being C. L. '71, (6435); How. 8021; C. L. '97, (10591), making the necessary changes in phraseology in referring to preceding sections. Unchanged.

**(13067). Effect of Dissolution of Attachment.**

**SEC. 40.** The defendant shall have the same right to procure said attachment to be dissolved as in other cases; but the dissolution of such attachment shall have no effect on the proceedings other than to release the property attached.

**HISTORY:** Re-enacts Sec. 5 of Act 193 of '67, being C. L. '71, (6436); How. 8022; C. L. '97, (10592), making, however, a slight change in phraseology. Unchanged.

**(13068). Defendant's Bond for Discharge of Property.**

Sec. 41. The bond to be given by the defendant for the discharge of the property so attached, shall be in a penalty at least double the amount specified in the affidavit filed in the cause, as due to the plaintiff, and shall be conditioned for the payment of any judgment, which may be recovered by the plaintiff in the cause in which such writ of attachment is issued, within sixty days after such judgment shall be rendered; or in a penalty double the appraised value of the property attached, and conditioned that such property shall be produced to satisfy any execution that may be issued, on any judgment to be recovered by the plaintiff in said cause.

**HISTORY:** Re-enacts Sec. 6 of Act 193 of '67, being C. L. '71, (6437); How. 8023; C. L. '97, (10593). Unchanged.

**(13069). Attachment Not to Say Suit.**

Sec. 42. The issuing of said writ of attachment, and the proceedings under and by virtue of the same, shall in no manner stay the proceedings commenced by the original summons or declaration, but the defendant may, aside from the proceedings made necessary by such attachment, proceed in the cause in the same manner as though no attachment had been issued.

**HISTORY:** Re-enacts Sec. 7 of Act 193 of '67, being C. L. '71, (6438); How. 8023a; C. L. '97, (10594). Unchanged.

**(13070). Attachment Against Foreign Corporation.**

Sec. 43. In suits commenced by attachment in favor of a resident of this state, against any corporation created by or under the laws of any other state, government or country, if a copy of such attachment, and of the inventory of property attached, shall have been personally served on any officer, member, clerk or agent of such corporation within this State, the same proceedings shall be thereupon had, and with the like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 114, being C. L. '57, (4841); C. L. '71, (6550); How. 8143; C. L. '97, (10474). Unchanged.

**CITED:** Davidson v. Fox, 120 Mich. 387; Showen v. J. L. Owens Co., 158 Mich. 333. See Lutz v. Davidson Cycle Co., 121 Mich. 108.

**(13071). Action for Taking Timber, Trespass on Lands, May be Commenced by Attachment.**

SEC. 44. In all cases where a party has a right of action for the taking of timber, or other trespass on lands, or for any injury to lands, where the tort is waived and an action of assumpsit is brought therefor, the plaintiff may commence his suit by attachment against the property of the defendant as in other cases, and his affidavit for such attachment shall state the amount due him as near as may be, and the fact that the damages are unliquidated shall not prevent the bringing and maintaining of such writ.

**HISTORY:** Re-enacts a part of and supersedes Secs. 1 and 2 of Act 165 of '75; As Am. '81, p. 255, Act 211, Eff. Sept. 10, being How. 8024-5; C. L. '97, (11207)-(11208). Unchanged.

**CONSTRUED:** This act (C. L. '97, 11207), applies only where damages have been sustained and the declaration must show that the damages accrued from the trespass. *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 536. Waiving the tort and suing in assumpsit amounts to an election to regard defendant as owner of the property converted. *Nield v. Burton*, 49 Mich. 53. Recovery may be had, on a count for money had and received, for the proceeds of timber cut and taken by a trespasser. *Nelson v. Kilbride*, 113 Mich. 637. Where a landowner waives the tort and brings assumpsit for cutting timber, the action is not local but transitory. *Bradley-Watkins Co. v. Kalamazoo Circuit Judge*, 144 Mich. 147. Where defendant purchases from trespasser wood cut and removed from plaintiff's land by trespasser, plaintiff has no authority for bringing assumpsit. *St. John v. Antrim Iron Co.*, 122 Mich. 69.

**(13072). Action for Trespass on State Lands.**

SEC. 45. Whenever a cause of action shall have accrued to the state for any trespass committed upon any of the lands owned or held in trust, or otherwise, by the state; and whenever the prosecuting attorney, or any person duly authorized to prosecute for such trespass, shall make an affidavit that any person, naming him, has committed such trespass on any of such lands, as he verily believes, and stating, as near as may be, the amount of damages occasioned thereby, and that he is either not a resident of this state, or has absconded therefrom, or is about to abscond, to avoid the service of process, and shall present the same to the clerk of the circuit court in which such lands are situate, a writ of attachment shall be issued, and such affidavit be attached thereto, as the commencement of suit against such alleged trespasser, in the same form, as nearly as applicable, as provided in this chapter, and all the provisions of this chapter, and the practice under the same

shall be applicable to regulate the proceedings therein, and to make the same effectual.

**HISTORY:** Re-enacts in part and follows the phraseology of Sec. 63, R. S. '46, Ch. 60, being C. L. '57, (2505); As Am. '61, p. 467, Act 219, Eff. June 15; As Am. '63, p. 52, Act 44, Imd. Eff. Feb. 25; C. L. '71, (3878); How. 5323; C. L. '97, (1396). Changed.

**(13073). Action Against Itinerant Venders.**

**SEC. 46.** The right to bring action against itinerant venders by attachment in the manner and form provided for in section eleven of act one hundred ninety-one of the Public Acts of nineteen hundred one, is preserved.

**HISTORY:** Section 11 of Act 191, '01, above referred to is Compilers' Section (6994). Unchanged.

**(13074). Discharge of Attachment.**

**SEC. 47.** Any attachment on real estate shall be discharged upon the record thereof by the register of deeds in whose custody it shall be, whenever there shall be presented to him a certificate executed by the plaintiff, his personal representatives or assigns, or his attorney of record in said cause, duly acknowledged, specifying that such attachment has been removed or otherwise satisfied or discharged; or upon the presentation to such register of deeds of the certificate of the circuit court for the county, signed by the clerk of said court and under seal thereof, certifying that it has been made to appear to said court that said attachment has been duly removed or otherwise settled.

**HISTORY:** Re-enacts Sec. 1 of Act 114 of '73, being How. 8017; C. L. '97, (10587), omitting "also" and adding the above clause relating to whom, may execute the certificate "or his attorney of record in said cause." Modified.

**Dissolution of Attachments.**

**(13075). Application for Dissolution.**

**SEC. 48.** In all cases where a writ of attachment has been or shall be issued and served under the provisions of law, it shall be lawful for any defendant whose property may be attached by virtue of such writ, to apply to the judge of the circuit court or to the circuit court commissioner of the county where such writ issued, for a dissolution of such attachments;

which application shall be in writing, and shall contain the reasons for such application.

**HISTORY:** Re-enacts Sec. 1 of Act 125 of '51, being C. L. '57, (4773); C. L. '71, (6428); How. 8026; C. L. '97, (10595). Unchanged.

**CONSTRUED:** For cases bearing upon the construction of this section and the four following, and the practice under the same, see note to *Iosco County Sav. Bank v. Barnes*, 100 Mich. 1. This and the preceding sections of this chapter, to which this section and the four following are amendatory, must be construed together. *Bower v. Town*, 12 Mich. 233. This statute provides an additional mode of releasing property taken by attachment. *Paddock v. Matthews*, 3 Mich. 22. It applies equally to justices' and circuit courts. *Albertson v. Edsall*, 16 Mich. 203. Its language is very broad and embraces any property which can be levied upon by attachment, real or personal. *Edgerton v. Hinchman*, 7 Mich. 354; *Smith v. Collins*, 41 Mich. 172. The term "attachment" is evidently used in this statute in its common law sense of a levy or seizure, and not to designate the writ under which the seizure is made. *Hyde v. Nelson*, 11 Mich. 356. It was held in *Paddock v. Matthews*, 3 Mich. 18, that the object of the application to dissolve an attachment under this statute is merely to release the property, although, if done before appearance, it will, unless otherwise ordered, carry the suit with it. *Hyde v. Nelson*, 11 Mich. 356.

**OTHER REMEDIES DISTINGUISHED:** If it is desired to contest the truth of the grounds alleged in the affidavit for the issuance of the writ, resort must be had to this section; but such defects as are apparent upon the face of an affidavit for attachment may be brought to the attention of the trial court by motion to quash. *John D. Gruber Co. v. Montcalm Circuit Judge*, 183 Mich. 477. See also *Martin Lumber Co. v. Menominee Circuit Judge*, 116 Mich. 354.

**ASSIGNEE OF INSOLVENT DEBTOR:** The remedy of an assignee of an insolvent debtor for the dissolution of an attachment upon the assigned property is in chancery. *Turner v. Hatch*, 100 Mich. 65. See also *Emerson v. Steel & Spring Co.*, 100 Mich. 130.

**JURISDICTION OF COMMISSIONER:** This act does not confer upon circuit court commissioners powers beyond those which may properly be exercised by a circuit judge at chambers, and is, therefore, constitutional. *Edgerton v. Hinchman*, 7 Mich. 354; *Schall v. Bly*, 43 Mich. 401. To maintain the jurisdiction of the commissioner, such jurisdiction must affirmatively appear upon the record. *Chandler v. Nash*, 5 Mich. 416, citing *Wight v. Warner*, 1 Doug. 384; *Clark v. Holmes*, 1 Doug. 390. Proceedings before commissioner of adjoining county, when the only commissioner of the county is disqualified. *Heyn v. Farrar*, 36 Mich. 258. As to jurisdiction where there are two commissioners, see *People v. Rix*, 6 Mich. 151-2.

**NATURE OF PROCEEDINGS:** They are special and must be strictly complied with. *Osborne v. Robbins*, 10 Mich. 278. They are judicial and not according to the course of the common law. *Bank v. Barge Co.*, 52 Mich. 166; *Chandler v. Nash*, 5 Mich. 416. They need not be entitled in the original cause; the commissioner acts as an independent judicial officer and not as a referee in the cause itself. *Heyn v. Farrar*, 36 Mich. 260. So far as the original suit is concerned, the application to dissolve is entirely an interlocutory proceeding and does not touch



or affect the merits thereof. *Bank v. Barge Co.*, 52 Mich. 167; *Edgarton v. Hinchman*, 7 Mich. 352; *Gray v. York*, 44 Mich. 415. It is in the nature of a motion and may be disposed of at chambers. *Bank v. Barge Co.*, 52 Mich. 167; *Gray v. York*, 44 Mich. 415. The only mode by which a defendant can contest the truth of the facts stated in the affidavit is by application for a dissolution of the attachment. *Bower v. Town*, 12 Mich. 230; *John D. Gruber Co. v. Montcalm Circuit Judge*, 183 Mich. 479.

**APPLICATION:** As a prerequisite to the dissolution of an attachment, a sworn petition denying the existence of the facts alleged must be filed, and more than one ground may exist. *Bane v. Keys*, 115 Mich. 244. The application need not be entitled in the original cause. *Heyn v. Farrar*, 36 Mich. 258. Must set forth the property. *Osborne v. Robbins*, 10 Mich. 279; *Nelson v. Hyde*, 10 Mich. 521. Should be verified. *Osborne v. Robbins*, 10 Mich. 279. Must state the reasons for the dissolution. *Osborne v. Robbins*, 10 Mich. 277. Must show that the property of the petitioner has been attached, as this fact is, by the statute, made the very ground of the jurisdiction. *Macumber v. Beam*, 22 Mich. 401, citing *Chandler v. Nash*, 5 Mich. 509; *Osborne v. Robbins*, 10 Mich. 277. See, also, *Price v. Reed*, 20 Mich. 72; *Johnson v. De Witt*, 36 Mich. 95; *Zook v. Blough*, 42 Mich. 487. It must appear from the petition that the party is entitled to the possession and restoration of the property levied upon; but this, for the purpose of jurisdiction, may sufficiently appear from clear and distinct allegations of present ownership. *Zook v. Blough*, 42 Mich. 487. But, since a levy on land does not dispossess the owner, a petition for a dissolution of an attachment thereon need not set up a right to restoration. *Smith v. Collins*, 41 Mich. 173. A petition for the dissolution of an attachment, in which the petitioner denies that he has assigned, disposed of, or concealed his property with intent to defraud his creditors, is not objectionable on the ground that such denial is in the alternative. *Bank v. Steele*, 81 Mich. 93. As to sufficiency of petition. *Cottrell v. Hathaway*, 108 Mich. 619.

**TIME IN WHICH TO APPLY:** Defendant by appearing and pleading to the action, does not preclude himself from taking proceedings for the dissolution of an attachment. *Hyde v. Nelson*, 11 Mich. 353. There are no restrictions in the statute as to when a petition for dissolution may be filed. *John D. Gruber Co. v. Montcalm Circuit Judge*, 183 Mich. 479. Proceedings for the dissolution of an attachment are not superseded by the rendition of judgment in the case and defendant is entitled to a hearing, unless he has in some way debarred himself from insisting upon a dissolution. *Gore v. Ray*, 73 Mich. 390, citing *Surgical Association v. Printing Co.*, 58 Mich. 487; *Calvert, etc., Pub. Co. v. Association*, 61 Mich. 337. But when the defendant has executed a bond to the sheriff and procured the release of the goods as provided for in Compilers' Sections (13042-3-4), he is estopped from having the attachment dissolved. *Paddock v. Matthews*, 3 Mich. 18.

**WHO MAY APPLY:** The right to make such application is confined to the defendant; it is further confined to cases where the plaintiff has no sufficient cause for suing out the writ. *Gott v. Hoschna*, 57 Mich. 417. If a defendant conceives that the attachment is unauthorized, he should cite the plaintiff, under this statute, to show cause why it should not be dissolved. *Roelofson v. Hatch*, 3 Mich. 279. To entitle him to petition for a dissolution of an attachment, he must be in a

position to be entitled to an order for the restoration of the property, because the statute contemplates that that order shall be made in every case in which the petitioner is successful. *Price v. Reed*, 20 Mich. 72; *Gott v. Hoschna*, 57 Mich. 417. If he is entitled to have restored to him a portion of the property, he may move for a dissolution. *Patterson v. Goodrich*, 31 Mich. 225. The existence of other attachment levies is not such an impediment as ought to bar the defendant from this remedy. *Sheldon v. Stewart*, 43 Mich. 574. Before he can be debarred from his remedy where double levies exist, the court must be able to say that he has lost his right to a return, and it has no right to make an arbitrary assumption of that sort. *Id.*; see *Schall v. Bly*, 43 Mich. 401; *Bank v. Whittle*, 41 Mich. 365. A partner not implicated in the grounds on which a writ of attachment has been issued, is entitled to have the attachment dissolved and the property restored to him. *Edwards v. Hughes*, 20 Mich. 289.

*Certiorari*, and not *mandamus*, is the proper remedy to review the ruling of the circuit court on the question of dissolving a writ of attachment. *Martin Lumber Co. v. Menominee Circuit Judge*, 116 Mich. 356.

This statute relates to proceedings to dissolve if the facts alleged in plaintiff's affidavit are to be contested; under this section the application may be made at any time; it in no way affects a motion to dissolve for defects that appear on the face of the writ or proceedings. *Gruber Co. v. Montcalm Circuit Judge*, 183 Mich. 477; 21 D. L. N. 1150; 149 N. W. 990.

#### (13076). Citation to Plaintiff.

SEC. 49. Upon the presentation of such application, the judge or said commissioner shall issue a citation to the plaintiff in attachment, requiring him to show cause on a day and at a time and place in said citation to be named, before said judge or commissioner, why the said attachment should not be dissolved, and the property be restored to the defendant in attachment.

HISTORY: Re-enacts Sec. 2 of Act 125 of '51, being C. L. '57, (4774); C. L. '71, (6429); How. 8027; C. L. '97, (10596). Unchanged.

CONSTRUED: Unless a party follows up his petition in attachment with a citation, his proceedings will be considered as abandoned. *Pearson v. Creslin*, 16 Mich. 281. See *Paddock v. Matthews*, 3 Mich. 22; *Bower v. Town*, 12 Mich. 233.

#### (13077). Service of Citation.

SEC. 50. The citation shall be served three days at least before the return day thereof, by delivering a copy thereof to the plaintiff in attachment (or to either of them, if there be more than one), if found within the county, and if not, then the same may be served upon the agent or attorney of the plaintiff, by the sheriff, either of his deputies, or any constable

or other person authorized by such judge or commissioner, and on the return day thereof, or at such other day thereafter as the judge or commissioner shall appoint for that purpose, he shall proceed to hear the proofs and allegations of the parties; and if said judge or commissioner shall be satisfied that such plaintiff had not a good and legal cause for suing out such writ, the said judge or commissioner may order such attachment to be dissolved, and the property attached to be restored to the defendant, and may, at his discretion, require the said defendant to enter his appearance to the plaintiff's action prior to the dissolution of such attachment.

**HISTORY:** Re-enacts Sec. 3 of Act 125 of '51, being C. L. '57 (4775); C. L. '71, (6430); How. 8028; C. L. '97, (10597), changing "reading it" to "by delivering a copy thereof." Unchanged.

**SERVICE OF CITATION IN DISSOLUTION PROCEEDINGS:** Heretofore the law has required that the citation in proceedings for dissolution of attachment should be served by *reading* the same to the plaintiff. This has been changed to provide for service by delivering a copy thereof as in the case of the service of other process.

**SERVICE OF CITATION:** A citation served on the 24th and returnable on the 28th, a Sunday intervening, is not sufficient. *First National Bank of St. Ignace v. Milling Co.*, 110 Mich. 15; *Cupfield v. Cook*, 92 Mich. 626. The service is to be made in the same manner, whether upon plaintiff, attorney, or agent, by reading it to him. *Cleland v. Clark*, 111 Mich. 336.

**HEARING:** A hearing is required and a trial of a question of fact must be had; and there is no reason why the rules governing the trial of such issues should not be applied by the court upon the hearing. Questions both of law and fact are to be adjudicated by the commissioner. (*Chandler v. Nash*, 5 Mich. 416.) *Bank v. Barge Co.*, 52 Mich. 167. Aside from jurisdictional defects in the affidavit, the question presented on proceedings to dissolve an attachment is one purely of fact, and is confined to the inquiry whether the plaintiff has a good and legal cause for suing out such writ. *Carver v. Chappell*, 70 Mich. 51. The commissioner can dissolve an attachment only for reasons going to show that the plaintiff "has not a good and legal cause for suing out such writ." This includes nothing but an inquiry into the facts or the sufficiency of the affidavit, and all other defects in the proceedings must be passed upon by the court and not by the commissioner at chambers. *Vinton v. Mead*, 17 Mich. 388. The "good legal cause," which alone can sustain the writ on the hearing, must be a cause existing in fact, and not merely in the belief of the plaintiff, however well founded that belief may have appeared to him to be. *Folsom v. Teichner*, 27 Mich. 109. And this is determined by the state of facts made to appear at the hearing. *Id.* Testimony tending to show that part of the property was exempt from execution and that part belonged to defendant's wife is admissible to rebut the alleged fraud. *Carver v. Chappell*, 70 Mich. 49. On the hearing the burden of proof is upon the plaintiff to sustain the averments in the affidavit for the writ, as to the statutory causes authorizing its issuance. *Iosco County Sav. Bank v. Barnes*, 100 Mich. 13; *Macumber v. Beam*,

22 Mich. 395; *Brown v. Blanchard*, 39 Mich. 790; *Powers v. O'Brien*, 44 Mich. 317; *Genesee County Sav. Bank v. Michigan Barge Co.*, 52 Mich.

**DISSOLUTION:** The commissioner can dissolve an attachment only for reasons going to show that the plaintiff "has not a good and legal cause for suing out such writ." *Vinton v. Mead*, 17 Mich. 388. Attachments will not be upheld, where the complaint or affidavit sets forth several causes of action, some of which are without the statute. *Estlow v. Hanna*, 75 Mich. 224. A writ of attachment issued on the ground that the debt was fraudulently contracted will be dissolved, if it appears that a portion of said claim is not affected by such fraud. *Estlow v. Hanna*, 75 Mich. 219. If it appears that the applicant is not entitled to the possession of the property, the attachment cannot be dissolved. *Johnson v. DeWitt*, 36 Mich. 95; *Price v. Reed*, 20 Mich. 72; *Macumber v. Beam*, 22 Mich. 401; *Chandler v. Nash*, 5 Mich. 509; *Osborne v. Robbins*, 10 Mich. 277; *Zook v. Blough*, 42 Mich. 488-9. If the petition is sustained the attachment is dissolved and the property ordered restored. *Price v. Reed*, 20 Mich. 74. The dissolution of the attachment on the ground set up in the plea, and the delivery of the property to the defendant, does not affect the plaintiff's right to proceed with the suit in the same manner as if commenced by summons, if the defendant has appeared in the suit or enters his appearance under the order of the judge or commissioner. *Bower v. Town*, 12 Mich. 233. See, also, *Hyde v. Nelson*, 11 Mich. 356; *Gray v. York*, 44 Mich. 415. Dissolution of attachment does not oust jurisdiction if personal service has been had. *Hills v. Moore*, 40 Mich. 210. A sheriff's lien and right of custody under an execution cannot be disturbed by the order of the commissioner, on dissolving an attachment for its return to defendant. *State Bank of Fenton v. Whittle*, 41 Mich. 365.

**CERTIORARI:** Certiorari and not mandamus is the proper remedy to review a ruling of the circuit judge upon an application to dissolve a writ of attachment. *S. K. Martin Lumber Co. v. Menominee Circuit Judge*, 116 Mich. 354. The decision of the judge or commissioner on the testimony will not be reviewed on certiorari, unless there is an entire absence of proof on some material point. *Bank v. Barge Co.*, 52 Mich. 167; citing *Brown v. Blanchard*, 39 Mich. 790; *Cicotte v. Morse*, 8 Mich. 424; *Berry v. Lowe*, 10 Mich. 9; *Hyde v. Nelson*, 11 Mich. 353; *Linn v. Roberts*, 15 Mich. 443; *State Bank of Fenton v. Whittle*, 41 Mich. 365; *Schall v. Bly*, 43 Mich. 401. See, also, *Iosco County Sav. Bank v. Barnes*, 100 Mich. 15. *Loder v. Littlefield*, 39 Mich. 512, would seem to give countenance to the practice of reviewing the facts upon certiorari; but in *Sheldon v. Stewart*, 43 Mich. 576, it is stated, by the same justice who delivered the opinion in *Loder v. Littlefield*, that the decision was not so intended. *Carver v. Chapell*, 70 Mich. 51. See, also, *Powers v. O'Brien*, 44 Mich. 317. Questions of law arising in the case, when properly presented, are open to review. *Bank v. Barge Co.*, 52 Mich. 167, citing *Hyde v. Nelson*, 11 Mich. 353; *McGraw v. Schwab*, 23 Mich. 18; *Johnson v. DeWitt*, 36 Mich. 95. But the commissioner's rulings in regard to admitting testimony on the hearing are not reviewed on certiorari. *Carver v. Chapell*, 70 Mich. 49; *Schall v. Bly*, 43 Mich. 403. On certiorari to a circuit court commissioner to bring up for review proceedings for the dissolution of an

attachment, objections not taken before the commissioner will not be favored. *Patterson v. Goodrich*, 31 Mich. 225. Circuit courts may issue the common law certiorari to bring up these proceedings for review. *Taylor v. Judge*, 32 Mich. 95. A circuit court commissioner has power to allow a writ of certiorari to bring up these proceedings and a circuit court has jurisdiction to issue it. *Zook v. Blough*, 42 Mich. 487. Error does not lie on the affirmance by the circuit court of a commissioner's order dissolving an attachment. *Gray v. York*, 44 Mich. 415. See *Finley Brewing Co. v. Prost*, 111 Mich. 636.

**(13078). Attendance of Witnesses.**

SEC. 51. The judge or commissioner shall have full power to issue subpoenas, and if necessary, attachments to compel the attendance of witnesses to testify in such cases, and may, in his discretion, require the party moving for such dissolution to give security for the costs of such proceedings; and may order the costs of such proceedings to be paid by the party against whom the decision shall be in the premises, and may issue execution therefor, returnable in sixty days from its date.

HISTORY: Re-enacts Sec. 4 of Act 125 of '51, being C. L. '57, (4776); C. L. '71, (6431); As Am. '75, p. 39, Act 44, Eff. Aug. 3; How. 8029; C. L. '97, (10598). Unchanged.

**Appeal.**

**(13079). Appeal to Circuit Court.**

SEC. 52. Either party conceiving himself aggrieved by the determination, order or judgment of any circuit court commissioner under the provisions of this chapter, may appeal therefrom to the judge of the circuit court for the same county, and a return may be compelled, and the same proceedings shall be thereupon had as near as may be and with the like effect as in cases of appeal from judgments rendered before justices of the peace, and costs shall be awarded and collected in the circuit court in the same manner, and on perfecting the said appeal said attachment proceedings and the levy thereunder shall be held in the same condition and of the same force and validity as when said proceedings for a dissolution of said attachment were commenced, and the officer executing said attachment shall continue to have the same rights and duties under said attachment as regards the property attached as if said proceedings had never been commenced, and any order or judgment made by such commissioner dissolving said attachment shall have no force or effect to release the attached

property from the attachment levy until the same shall be affirmed by the circuit judge, if appealed from, and no such order shall be issued in any case by any commissioner until the expiration of five days after the making of the same; and the said circuit judge shall also have full power and jurisdiction over said cause and proceedings to hear and determine the same and render judgment therein, as if the said proceedings had been originally commenced before the said circuit judge thereof.

**HISTORY:** Re-enacts Sec. 5 of Act 125 of '51; As Am. '81, p. 337, Act 247, Eff. Sept. 10; How. 8030; C. L. '97, (10599), with slight changes in phraseology and omitting the last sentence of the old section relating to a trial by jury on such appeals at the election of either party. Unchanged.

**APPEAL FROM DISSOLUTION PROCEEDINGS:** Heretofore if dissolution proceedings were instituted before a circuit judge, there was no appeal to the court and no right of jury trial, but if instituted before a commissioner, an appeal to the court was provided and the right to jury trial given. Under the new practice the only appeal allowed is from the commissioner to the judge and the right to a jury trial has been eliminated.

**APPEAL:** No appeal lies from the determination of the circuit judge on an application to dissolve an attachment. This section applies only to circuit court commissioners. *Harvey v. Pealer*, 63 Mich. 572. See *Risser v. Hoyt*, 53 Mich. 196; *Iosco County Savings Bank v. Barnes*, 100 Mich. 1; *Cleland v. Clark*, 111 Mich. 336; *Finley Brewing Co. v. Prost*, 111 Mich. 636. For review of proceedings by certiorari, see Note ("certiorari," to Compilers' Section (13077)).

## CHAPTER XXVII.

### OF THE ACTION OF REPLEVIN.

#### (13080). When Replevin may be Brought.

SECTION 1. Whenever any goods or chattels shall have been unlawfully taken, or unlawfully detained, an action of replevin may be brought for the recovery thereof, and for the recovery of the damages sustained by such unlawful taking or detention, except in the cases hereinafter excepted.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 124, being C. L. '57, (5005); C. L. '71, (6726); How. 8315; C. L. '97, (10648). Unchanged.

REPLEVIN: See notes to Judicature Act (14332), post. At common law, replevin could be maintained only where the original taking was unlawful, but the object of this section was to extend the remedy to cases where the taking was lawful, but the property was wrongfully detained. In both cases there must be an unlawful detention at the commencement of the suit, that being the gist of the action. *Gildas v. Crosby*, 61 Mich. 413, citing *Hickey v. Hinsdale*, 12 Mich. 103. Replevin is founded on an unlawful detention, whether there was unlawful taking or not. *Sexton v. Dowd*, 38 Mich. 148. The action, in form, is always in the detinet. *Le Roy v. East Saginaw City Ry.*, 18 Mich. 240. Replevin is peculiarly a possessory action, and its primary object is to enable the plaintiff to obtain the actual possession of property wrongfully detained from him by the defendant at the time the action is brought. The statute and the whole theory of the action go upon the assumption that the plaintiff is not in actual possession of the property and that the defendant wrongfully withholds that possession from him. *Hickey v. Hinsdale*, 12 Mich. 103; *Clark v. West*, 23 Mich. 248; *Hatch v. Fowler*, 28 Mich. 209; *Bacon v. Davis*, 30 Mich. 157. See *Hunt v. Strew*, 33 Mich. 89; *Burt v. Burt*, 41 Mich. 82; *Woolston v. Smead*, 42 Mich. 54; *Hess v. Griggs*, 43 Mich. 397; *Colby v. Portman*, 115 Mich. 95. See also *Reid, Murdoch & Co. v. Parks*, 122 Mich. 363. *Eldredge v. Sherman*, 70 Mich. 266; *Henry v. Ferguson*, 55 Mich. 403; *Adriance v. Rutherford*, 57 Mich. 170; *Pearl v. Garlock*, 61 Mich. 419; *Rose v. Eaton*, 77 Mich. 247. The rule is well settled that in replevin no recovery can be had for goods not in possession of the defendant at the time the writ issues, except where the goods have been fraudulently disposed of or concealed to avoid the writ. *Reid, Murdoch & Co. v. Ferris*, 112 Mich. 693, citing *Sexton v. Dowd*, 38 Mich. 152; *Hinchman v. Doak*, 48 Mich. 168; *Abner v. Bratton*, 60 Mich. 357; *Burt v. Burt*, 41 Mich. 83; *Morrison v. Lombard*, 48 Mich. 548; *Bacon v. Davis*, 30 Mich. 157; *Gildas v. Crosby*, 61 Mich. 413, 115 Mich. 95. Replevin can be maintained only by a person entitled to the possession of the property at the time of the commencement of action. See cases just cited. And a mere present right of possession, without any

further valuable interest is sufficient. *Woolston v. Smead*, 42 Mich. 57. And possession is prima facie lawful. *Id.* See *Van Baalen v. Dean*, 27 Mich. 104. The object of the action is to determine the right of possession, at the commencement of the action, as well as title to the property for temporary or permanent purposes connected with that possession. Anything going to show that the plaintiff had no right to the possession when he commenced suit, is a complete bar to the action. *Clark v. West*, 23 Mich. 247; *Belden v. Laing*, 8 Mich. 503; *Breitenwisher v. Clough*, 111 Mich. 6. Defendant may attack plaintiff's title. *Nicholson v. Dyer*, 45 Mich. 610; *Hatch v. Fowler*, 28 Mich. 205; *Town v. Tabor*, 34 Mich. 262. See *Steere v. Vanderberg*, 90 Mich. 187. Plaintiff must recover, if at all, on the strength of his own title or right of possession. *Upham v. Caldwell*, 100 Mich. 264. The state of facts existing at the time of commencement of action will ordinarily control its determination. *Carey v. Hewitt*, 26 Mich. 228; *Rosenfield v. Case*, 87 Mich. 299; *Merrill v. Denton*, 73 Mich. 628. As a general rule a party in the actual and undisputed possession of property cannot be required, as against a mere intruder, to show how he became possessed of the title, or even that he has any title at all. *Hatch v. Fowler*, 28 Mich. 209; *Burk v. Webb*, 32 Mich. 173; *Steere v. Vanderberg*, 90 Mich. 187; *Whitney v. Hyde*, 91 Mich. 13. Replevin will lie for damages, where property taken by defendant has been wrongfully transferred by him and is not in his hands when the writ issues. *McBrian v. Morrison*, 55 Mich. 351. Replevin cannot be maintained by a person already in possession of the property. *Hickey v. Hinsdale*, 12 Mich. 99; *Morrison v. Lumbard*, 48 Mich. 548; *Bacon v. Davis*, 30 Mich. 157. Replevin is the only remedy for getting specific chattels. *Corbitt v. Broug*, 44 Mich. 150. Replevin by trustee in bankruptcy. *Gordon v. Farrington*, 46 Mich. 420; *Coats v. Farrington*, 46 Mich. 422. Parties defendant, see *Colby v. Portman*, 115 Mich. 99. Where crops or timber are severed from the realty they become personal property, and one entitled to the possession thereof may have recourse to the action of replevin. *Cronk v. Mulvaney*, 168 Mich. 349. A human corpse cannot be replevined. *Keyes v. Konkel*, 119 Mich. 550. Replevin against U. S. marshal. *Cooper v. Tompkins*, 43 Mich. 406; *Heyman v. Covell*, 44 Mich. 332. For various questions as to the nature and use of the action of replevin, see *Fitch v. Newberry*, 1 Doug. 1; *Bancroft v. Peters*, 4 Mich. 619; *Tucker v. Mowrey*, 12 Mich. 378; *Wilbur v. Flood*, 16 Mich. 40; *Grover v. Huckins*, 26 Mich. 476; *Pierce v. Hill*, 35 Mich. 194; *Eberstein v. Camp*, 37 Mich. 176; *Coomer v. Gale Mfg. Co.*, 40 Mich. 691; *Wakeman v. Barrows*, 41 Mich. 363; *Gavigan v. Scott*, 51 Mich. 373; *Smith v. Smith*, 52 Mich. 538; *Ash v. Mathes*, 52 Mich. 615; *Coe v. Gregory*, 53 Mich. 19; *McGuire v. Galligan*, 53 Mich. 453; *Lentz v. Railway Co.*, 53 Mich. 444; *Berger v. Clippert*, 23 Mich. 468; *Sandler v. Bresnahan*, 53 Mich. 567; *Tandler v. Saunders*, 56 Mich. 142; *Barmon v. Clippert*, 58 Mich. 377; *Hanselman v. Kegel*, 60 Mich. 540; *Smith v. Brennan*, 62 Mich. 349; *O'Connor v. Gidday*, 63 Mich. 630; *Fisher v. Busch*, 64 Mich. 180; *Williams v. Bresnahan*, 66 Mich. 634. *Wattles v. Dubois*, 67 Mich. 313; *Busch v. Nester*, 70 Mich. 525; *Warren v. Gutches*, 71 Mich. 407; *Hill v. Graham*, 72 Mich. 659; *Chair Co. v. Lyon*, 73 Mich. 438; *Merrill v. Denton*, 73 Mich. 628; *Railway Co. v. Reid*, 74 Mich. 366; *Charpentier v. Bresnahan*, 74 Mich. 48; *Koch v. Lyon*, 82 Mich. 513; *Hallgren v. Campbell*, 82 Mich. 255; *Fix v. Sissung*, 83 Mich. 561; *Hopkins v. Bishop*, 91 Mich. 328; *Mich. Mutual Life Ins.*



Co. v. Cronk, 93 Mich. 49; Thirby v. Rainbow, 93 Mich. 164; Bateman v. Railroad Co., 96 Mich. 441; Robinson v. Stewart, 97 Mich. 454; Gamble v. Gates, 97 Mich. 465; Freese v. Arnold, 99 Mich. 13; Simon v. Leland, 105 Mich. 226; Gamble v. Cook, 106 Mich. 561; House v. Turner, 106 Mich. 240; Eklund v. Toner, 123 Mich. 393; Anderson v. Pendl, 153 Mich. 694.

**JUSTICES' COURT:** As to the application of this chapter to justices' courts, see note to Compilers' Section (14336).

**DEMAND:** Demand before bringing replevin is not necessary, where defendant's possession is wrongful. Bertwhistle v. Goodrich, 53 Mich. 457. Demand and refusal, before bringing replevin, will not make defendant's lawful possession unlawful. Adams v. Wood, 51 Mich. 411. The action originally was confined to a wrongful distress or taking, and no demand was ever necessary in such a case. (Le Roy v. East Saginaw City Ry., 18 Mich. 234). It was afterwards extended to a wrongful detention of property as well, but in such case the wrongful detention in some way must always be made to appear before the plaintiff can maintain his suit. (Hickey v. Hinsdale, 12 Mich. 99; Burt v. Burt, 41 Mich. 82). When the taking is lawful, and there has been no wrongful conversion by the defendant, there is nothing to put him in the wrong until the person entitled has made a demand for the property and the defendant has refused to give up. (Cadwell v. Pray, 41 Mich. 307). When the original taking is felonious, no matter in whose hands the property may be subsequently found, the owner is entitled to his writ, without demand, because no person can acquire a rightful possession through a felonious taking. (Trudo v. Anderson, 10 Mich. 357; Ballou v. O'Brien, 20 Mich. 304). And the same is true when the original taking is a trespass, so long as the trespass remains unsatisfied and the owner is not in some way estopped from asserting the wrong. (Jackson v. Dean, 1 Doug. 519). A different rule prevails when the taking, though wrongful, arises out of contract relations with the rightful owner and is claimed to be in pursuance thereof. In all such cases, before any wrong can be imputed to the party in possession in good faith, and before he can be subjected to the expenses of a suit, he must be requested to give up the property and refuse to do so. (Campbell v. Quackenbush, 33 Mich. 288). Adams v. Wood, 51 Mich. 413-4. Demand before suit is necessary in all cases where defendant's possession is lawful. Darling v. Tegler, 30 Mich. 54; Campbell v. Quackenbush, 33 Mich. 287; Cadwell v. Pray, 41 Mich. 312. But not when his taking was wrongful. Trudo v. Anderson, 10 Mich. 357; LeRoy v. East Saginaw City Ry., 18 Mich. 233; Ballou v. O'Brien, 20 Mich. 304; Whitney v. McConnell, 29 Mich. 12; Parish v. Morey, 40 Mich. 417. Nor when action is brought against an officer for seizure of property by abuse of authority. Vanderhorst v. Bacon, 38 Mich. 669. See, further, as to demand, New Home Sew. Mach. Co. v. Bothane, 70 Mich. 443; Smith v. Smith, 52 Mich. 538; Becker v. Vandercook, 54 Mich. 114; Carl v. McGonigal, 58 Mich. 567; Brown v. Coon, 59 Mich. 596; Barnes v. Gardner, 60 Mich. 133; Gildas v. Crosby, 61 Mich. 413; Havey v. Petrie, 100 Mich. 190; McGregor v. Cole, 100 Mich. 262; Aspell v. Hosbein, 98 Mich. 117 (and note); Ellis v. Simpkins, 81 Mich. 1; Kane v. Hutcheson, 93 Mich. 488; Reeder v. Moore, 95 Mich. 594; Farrah v. Bursley, 100 Mich. 547; Congdon v. Bailey, 121 Mich. 570; Log-Owners Booming Co. v. Hubbell, 135 Mich.

65. A demand and refusal are circumstances only tending to show a wrongful detention. *Adams v. Wood*, 51 Mich. 415; *McCabe v. Loons-foot*, 119 Mich. 324; *Anderson v. Boneman*, 199 Mich. 535.

**(13081). When Replevin Does Not Lie.**

SEC. 2. No replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this state.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 124, being C. L. '57, (5008); C. L. '71, (6729); How. 8318; C. L. '97, (10651). Unchanged.

SEIZED FOR TAX: See notes to Compilers' Section (14332). The object of this law is to prevent interference with the officer collecting taxes in the performance of his duty by a proceeding which would indefinitely postpone the completion of his official action and prevent the speedy realization of public revenues. *Hill v. Wright*, 49 Mich. 230-31; *Curtiss v. Witt*, 110 Mich. 131. It does not cover cases in which the tax levy is unlawful on its face. *Id.* Nor prohibit replevin by one who is a stranger to the tax and not in privity with the person assessed. *Id.*; *Tousey v. Post*, 91 Mich. 634; *Travers v. Inslee*, 19 Mich. 98; *Whittaker v. Fuller*, 96 Mich. 141; *Hall v. Moriarty*, 57 Mich. 345. And this statute has been held not to apply to cases where the officer assessing or collecting could not, by any possibility, have a right to act. *Lantis v. Reithmiller*, 95 Mich. 47, (citing *Le Roy v. East Saginaw City Ry.*, 18 Mich. 234; *McCoy v. Anderson*, 47 Mich. 502; *Hood v. Judkins*, 61 Mich. 583); *Curtiss v. Witt*, 110 Mich. 131; *Boyce v. Cutter*, 70 Mich. 539. But replevin will not lie for property seized by the proper officer under a tax roll and warrant fair upon their face, to satisfy a tax. *Boyce v. Peterson*, 84 Mich. 490, (citing *Hill v. Wright*, 49 Mich. 229; *Hood v. Judkins*, 61 Mich. 575); *Boyce v. Stevens*, 86 Mich. 549; *Thayer Lumber Co. v. Dean*, 73 Mich. 463; *Hill v. Graham*, 72 Mich. 659; *Gray v. Finn*, 96 Mich. 62; *Curtiss v. Witt*, 110 Mich. 131; *Mogg v. Hall*, 83 Mich. 578; *Northwestern Lumber Co. v. Scott*, 123 Mich. 359. The collector's warrant is a protection to him in seizing and selling the property, if fair on its face. *Curtiss v. Witt*, 110 Mich. 131, citing *Tweed v. Metcalf*, 4 Mich. 579; *Byles v. Genung*, 53 Mich. 504; *Wood v. Thomas*, 38 Mich. 686; *Moss v. Cummings*, 44 Mich. 359; *Bird v. Perkins*, 33 Mich. 28. In replevin for property, duly seized by a village marshal for a municipal tax regularly assessed, the validity of the village organization and charter cannot be tried, they having been recognized for a dozen years. *Coe v. Gregory*, 53 Mich. 19. In an action of replevin for property taken under a tax warrant, plaintiff cannot go behind the warrant and show the invalidity of the tax. *Roberts v. Denis*, 118 Mich. 544. See also *Michigan, etc. Power Co. v. Atwood*, 126 Mich. 651.

CITED: *Hill v. Graham*, 72 Mich. 668; *Forster v. Brown*, 119 Mich. 88; *Gow v. Stoddard*, 164 Mich. 338.

**(13082). When Replevin Does Not Lie.**

SEC. 3. No replevin shall lie at the suit of the defendant in any execution or attachment, to recover goods or chattels

seized by virtue thereof, unless such goods or chattels are exempted by law from such execution or attachment; nor shall a replevin lie at the suit of any other person, unless he shall, at the time, have a right to reduce into his possession the goods taken or detained.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 124, being C. L. '57, (5010); C. L. '71, (6731); How. 8320; C. L. '97, (10653), omitting the form of writ as given in the old section. Unchanged.

**FORM OF WRIT:** See Circuit Court Rule 18, Section 4, '16.

**DESCRIPTION OF PROPERTY:** The description is of first importance and, if not given in the writ, the court has no jurisdiction. *Pingree v. Steere*, 68 Mich. 206, citing *Denison v. Smith*, 33 Mich. 155; *Wilson v. Arnold*, 5 Mich. 98; *Stevens v. Osman*, 1 Mich. 92; *Farwell v. Fox*, 18 Mich. 166; *Paterson v. Parsell*, 38 Mich. 607. But the description need not be so explicit and exclusive as to supersede recourse to extrinsic help, if, with such aid as the plaintiff usually affords, the officer can identify the property. *Pingree v. Steere*, 68 Mich. 205; *Sexton v. McDowd*, 38 Mich. 148; *Farwell v. Fox*, 18 Mich. 166. For descriptions held sufficient, see *Farwell v. Fox*, 18 Mich. 166; *Kelso v. Saxton*, 40 Mich. 666; *Wattles v. Dubois*, 67 Mich. 313; *Proper v. Conkling*, 67 Mich. 244; *Pingree v. Steere*, 68 Mich. 204; *Burt v. Addison*, 74 Mich. 730; *Peterson v. Fowler*, 76 Mich. 258; *Simmons v. Robinson*, 101 Mich. 240, citing *Humphrey v. Bayn*, 45 Mich. 565.

**RETURNABLE:** The objection that a writ was made returnable on Sunday was held to be waived by defendant's appearance, plea to the merits and proceeding to trial without objection. *Pierce v. Reh-fuss*, 35 Mich. 53.

**SERVICE:** Must be served within the county. *Craig v. Grant*, 6 Mich. 455. See *Carr v. Phillips*, 39 Mich. 322. The appearance of non-residents cannot be forced by successive writs issued without expectation of service. The writ may run against any person in possession, and the claimant is thereby fully protected. Alias and pluries writs should issue seasonably and with reference to a prospective service. *Lanahan v. Kent Circuit Judge*, 106 Mich. 685.

**CITED:** *Trudo v. Anderson*, 10 Mich. 370.

#### (13083). How Commenced.

Sec. 4. Actions of replevin shall be commenced by writ, which shall be in the form prescribed by rule of the supreme court.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 124, being C. L. '57, (5009); C. L. '71, (6730); How. 8319; C. L. '97, (10652). Unchanged.

**EXECUTION:** Replevin lies for property seized upon an execution issued in void garnishment proceedings. *Iron Cliffs Co. v. Lahais*, 52 Mich. 394.

**EXEMPT PROPERTY:** As to what is exempt see Compilers' Section (12858) and notes. When property thus exempted is seized upon execution, replevin will lie at the instance of the judgment debtor. *Elliott v. Whitmore*, 5 Mich. 536. And the question of exemption from

seizure and sale upon execution can be properly raised under the statutory form of declaration. *Id.* 537. Plaintiff must establish the exemption. *O'Donnell v. Segar*, 25 Mich. 370-71. Exemptions being intended for the benefit of the family, a joint replevin suit by husband and wife, to preserve such benefit, is admissible. *Shepard v. Cross*, 33 Mich. 96. *Gottesman v. Chipman*, 125 Mich. 63.

**RIGHT TO POSSESSION:** As to the possessory nature of this action and defenses based thereon, see notes to Compilers' Section (13080). A tenant in common of chattels cannot maintain possession against his co-tenant. *Wetherell v. Spencer*, 3 Mich. 123; *Kindy v. Green*, 32 Mich. 310. See *Coan v. Mole*, 39 Mich. 454; *Kline v. Kline*, 49 Mich. 419. But a defendant having no interest in the other undivided half cannot raise the question of undivided interests in the property. *Crapo v. Seybold*, 36 Mich. 444. Where defendant rests his claim to the property upon a seizure by virtue of an execution, he must show a valid judgment. *Beach v. Botsford*, 1 Doug. 199; *Adams v. Hubbard*, 30 Mich. 104; *Gidday v. Witherspoon*, 35 Mich. 368; *Stilson v. Gibbs*, 40 Mich. 42; *Andrews v. Smith*, 41 Mich. 683; *Wilson v. Martin*, 44 Mich. 509. Since the writ of execution goes only to the extent of protecting the officer from personal responsibility as a trespasser or wrongdoer and cannot be made the foundation of a right to property against others. *Le Roy v. East Saginaw City Ry.*, 18 Mich. 239; *Adams v. Hubbard*, 30 Mich. 104; *Gidday v. Witherspoon*, 35 Mich. 368; *Rogers v. Raynor*, 102 Mich. 475.

**(13084). Affidavit to be Attached.**

Sec. 5. Such writ shall not be executed in any case, unless the plaintiff in the action, or some other person having a knowledge of the facts, shall make and annex to the writ an affidavit, stating that the plaintiff in such action is then lawfully entitled to the possession of the property described in the writ; that the same has not been taken for any tax, assessment or fine, levied by virtue of any law of this state; nor seized under any execution or attachment against the goods and chattels of such plaintiff, liable to execution; and that such goods and chattels are unlawfully detained by the defendant in such writ.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 124, being C. L. '57, (5011); C. L. '71, (6732); How. 8321; C. L. '97, (10654). Unchanged.

**AFFIDAVIT:** See notes to Compilers' Section (14332). The writ cannot be served without the affidavit annexed. *Belden v. Laing*, 8 Mich. 503. While the statute requires the affidavit to be attached to the writ, the issuance of the writ does not depend upon the affidavit. *Taylor v. Kalamazoo Circuit Judge*, 100 Mich. 182; *Baker v. Dubois*, 32 Mich. 92. Amendment of affidavit. *Taylor v. Kalamazoo Circuit Judge*, 100 Mich. 182. Filing new affidavit. *Parks v. Barkham*, 1 Mich. 95. Clerical errors in affidavit. *Smith v. Dodge*, 37 Mich. 354. A replevin suit begins as soon as a writ has been in good faith taken out and the required affidavit attached thereto. *McMillan v. Larned*, 41 Mich. 524. See also as to affidavit in replevin, *Travers v. Inslee*, 19

Mich. 99; *Stever v. Brown*, 119 Mich. 196; *Reid, Murdock & Co. v. Parks*, 122 Mich. 364.

**VALUE OF PROPERTY:** The value stated in the affidavit is presumptively the real value until shown to be erroneous in subsequent proceedings. *Peterson v. Fowler*, 76 Mich. 258; *Henderson v. Desborough*, 28 Mich. 170; *Carew v. Matthews*, 41 Mich. 579. See note, "One hundred dollars," to Compilers' Section (14332).

#### (13085). How Writ Executed.

**SEC. 6.** Upon the receipt of such writ, with the affidavit hereinbefore required annexed, the sheriff shall proceed to seize and take into his custody the property described therein, and for that purpose may break open any house, stable, outhouse or other building in which such property may be concealed, having first demanded deliverance thereof at the building or place where the same is concealed.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 124, being C. L. '57, (5012); C. L. '71, (6733); How. 8322; C. L. '97, (10655). Unchanged.

**CONSTRUED:** It is the duty of the officers to see that no articles are taken except those described in the writ. *Kane v. Hutchinson*, 93 Mich. 488. Officer's right to break open building, see *Rentschler v. Fox*, 130 Mich. 498.

#### (13086). Appraisal.

**SEC. 7.** The officer executing the writ shall cause the property so seized to be appraised by one or more disinterested persons, on oath to be administered by him, as soon as may be after the taking thereof on such writ.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 124, being C. L. '57, (5013); C. L. '71, (6734); How. 8323; C. L. '97, (10656). Unchanged.

**APPRAISAL:** The appraisal is prima facie evidence of the value of the property, but to have that effect it must be offered in evidence. *Williams v. Bresnahan*, 66 Mich. 634. Not conclusive evidence of value, but accepted in the absence of more satisfactory evidence. *Mueller v. Provo*, 80 Mich. 482. For no other purpose than for an assessment of value in defendant's favor does the value become an issue in the suit. *Eldred v. Woolaver*, 46 Mich. 243. Where the plaintiff, his agent or attorney, in good faith commences his action in the circuit, believing the property to be of the value of \$100 or upwards, the fact that the appraisers, court or jury may find it to be of less value, will not deprive the court of jurisdiction. *Kittredge v. Miller*, 45 Mich. 479; *Eldred v. Woolaver*, 46 Mich. 243. But petty replevin cases cannot be brought in the circuit court. *Id.* 45 Mich. 478.

#### (13087). Bond to be Given Before Delivery of Property.

**SEC. 8.** Before the officer shall deliver such property to the plaintiff, such plaintiff or some one in his behalf, shall execute

a bond to such officer and his assigns, with the addition of his name of office, with sufficient sureties, to be approved by such officer, in a penalty not less than one hundred dollars, and at least double the appraised value of such property; conditioned that the plaintiff will prosecute the suit to effect, and that if the defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay the defendant all such sums of money as may be recovered by such defendant against him in the said action.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 124, being C. L. '57, (5014); C. L. '71, (6735); How. 8324; C. L. '97, (10657). Unchanged.

**BOND:** See note to Compilers' Section (14332). *Scott v. Scott*, 50 Mich. 373. When given in justice's court, the bond remains in force until the final disposition of the case. *Brabon v. Pierce*, 34 Mich. 39; *Monroe v. Standish*, 46 Mich. 12. When valid if containing principal's name only in the body. *Matter of Cahill's Appeal*, 48 Mich. 616. A transfer of the suit does not release the sureties. *Reusch v. Demass*, 34 Mich. 95. But dealings with the principal for his discharge, unknown to the sureties, will operate as a release of them. *Greenlee v. Lowing*, 35 Mich. 63. And any alteration, by which other property was inserted in the writ of replevin, after the execution of the bond, without the knowledge and consent of the sureties, and with the consent of the defendants in the replevin bond, will discharge the sureties from liability. *Bolton v. Nitz*, 88 Mich. 358, citing *Coman v. Thompson*, 43 Mich. 389; *Bullock v. Taylor*, 39 Mich. 137; *Michie v. Ellair*, 60 Mich. 73; *Evers v. Sager*, 28 Mich. 47; *People v. Brown*, 2 Doug. 9; *Fish v. Barbour*, 43 Mich. 19. And no recovery can be had unless it is made to appear that no change in the liability of the sureties was made by the amendment. *Id.* 88 Mich. 359. In an action against the sureties, no judgment can be recovered for an amount exceeding the penalty of the bond and costs. *Fraser v. Little*, 13 Mich. 195. The existence of a bond does not preclude a resort to other remedies, if the plaintiff wrongfully retains the goods. *Scott v. Scott*, 50 Mich. 372. When the sheriff takes a replevin bond, it is on his own responsibility and at his own risk, unless the statute for his relief has been strictly complied with. *Fletcher v. Lee*, 65 Mich. 562. A bond running to a deputy sheriff in his own name is a substantial compliance with the statute. *Wheeler v. Wilkins*, 19 Mich. 78. A covenant may be added to the condition of the bond, of the same tenor as the condition. *Prentiss v. Spalding*, 2 Doug. 84. The giving of the statutory bond by plaintiff does not operate to pass title to the plaintiff, and the defendant may repossess himself of the property, if it is in fact his property. *Lindsay v. Morse*, 129 Mich. 350. As to replevin bonds, see also, *Charpentier v. Bresnahan*, 74 Mich. 54; *Dudley v. Conely*, 125 Mich. 300; *Ludwick v. Kent Circuit Judge*, 138 Mich. 108; *Detroit, etc. R. Co. v. Alpena Circuit Judge*, 152 Mich. 206; *Donley v. Fowler*, 147 Mich. 290; *Peterson v. Harrington*, 197 Mich. 611.

**(13088). Failure to Execute Bond.**

SEC. 9. If the plaintiff shall fail to cause such bond to be executed and delivered to the officer within twenty-four hours after the appraisal of such property, or if the defendant or some one in his behalf, at any time before the delivery of the property to the plaintiff, shall execute a bond to such officer and his assigns, with the addition of his name of office, with sufficient sureties, to be approved by such officer, in a penalty not less than one hundred dollars, and at least double the appraised value of such property, conditioned that if the plaintiff recover judgment against him in the action he will produce and surrender the same property to the plaintiff, if such surrender be adjudged, and will pay the plaintiff all such sums of money as may be recovered by such plaintiff against him in the said action, the officer shall return the property to the same person from whom he took it; and the property shall in no case be delivered to the plaintiff without the consent of the defendant in writing, until the expiration of forty-eight hours after the appraisal thereof, and notice of such appraisal shall be given to the defendant: *Provided*, That if either party, before the delivery of the property by the officer to the opposite party, shall make and present to such officer an affidavit, setting forth that the property replevied, or any part thereof, has an especial value to him that cannot be satisfied in money, together with a notice in writing that the question of the custody thereof will be submitted to the judge of the circuit, or a circuit court commissioner of the county, at a time and place therein stated, not exceeding five days from the date thereof, and shall serve upon the opposite party, or his attorney, a copy of such affidavit and notice, at least two days before the time of hearing mentioned, the officer shall retain custody of such property until the time mentioned in such notice, and until the order of such judge or commissioner thereon. Such judge or commissioner, on proof of service of said affidavit and notice, shall hear the claims of the respective parties, and by order under his hand, award the possession of such property, pending the suit, to either party, on the execution of a bond as herein required, as he shall deem just. Any bond given by the defendants herein provided shall be filed in the office of the clerk of the court from which the writ issued on or before the return day of such writ.

HISTORY: Re-enacts and supersedes Sec. 11, R. S. '46, Ch. 124,

being C. L. '57, (5015); C. L. '71, (6726); How. 8325; C. L. '97, (10658); As Am. '99, p. 384, Act 246, Eff. Sept. 23. Unchanged.

**CONSTRUED:** The mere seizure of the goods and chattels does not constitute the replevin. It is only one step towards it. It is only when the property shall have been appraised and the bond given and property turned over to the plaintiff, that the act is complete and the replevin accomplished. *Charpentier v. Bresnahan*, 74 Mich. 54-5. The sheriff's return that plaintiff failed to file the bond is conclusive upon all parties to the suit. *Green v. Kindy*, 43 Mich. 279. Where no bond is given. *McBrian v. Morrison*, 55 Mich. 351. In the amendment of C. L. '97, (10658) in '99 the legislative intent was to put the parties in replevin cases upon an equality. *Detroit, etc. R. Co. v. Alpena Circuit Judge*, 152 Mich. 206.

**CITED:** *Gustin v. Embury-Clark Lumber Co.*, 145 Mich. 106; *Besser v. Alpena Circuit Judge*, 155 Mich. 631.

### (13089). How Defendant Summoned.

**SEC. 10.** The officer shall summon the defendant according to the command of the writ, by delivering to him personally a copy of such writ, if such defendant can be found; and if he cannot be found, then by leaving such copy at his usual place of abode, with some person of proper age.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 124, being C. L. '57, (5016); C. L. '71, (6737); How. 8326; C. L. '97, (10659), omitting "certify." Unchanged.

**CERTIFIED COPY:** The proper practice on a motion to dismiss, because of the failure of the officer to certify the copy served, is to allow an alias writ to issue and to complete the service, rather than to dismiss. *Anderson v. Lane*, 105 Mich. 89. The officer is not required to deliver a copy of the affidavit. *Paterson v. Parsel*, 38 Mich. 609.

**CITED:** *Chapelle v. Webster*, 122 Mich. 483. Where a paper was a true copy of the writ with the exception of the signature of the justice, service of it was irregular, and a motion to dismiss proceedings on this account should be granted. See *Griffin v. McGavin*, 117 Mich. 372; *Anderson v. Lenawee Circuit Judge*, 105 Mich. 90; *People v. Me-costa Circuit Judge*, 26 Mich. 414.

### (13090). Recovery of Goods or Value of Goods Not Found.

**SEC. 11.** If the goods and chattels specified in any writ of replevin shall not be found, or shall not be delivered to the plaintiff, he may proceed in the action for the recovery of the same, or the value thereof.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 124, being C. L. '57, (5017); C. L. '71, (6738); How. 8327; C. L. '97, (10660). Unchanged.

**CONSTRUED:** A judgment in replevin for such portion of the goods described in the writ, as were in defendant's possession when the writ was sued out is not a bar to an action of assumpsit for the value of the remainder. *Reid, Murdock & Co. v. Parks*, 122 Mich. 363; *Friedberg v. Bennett*, 166 Mich. 558.



CITED: *Hanselman v. Kegel*, 60 Mich. 549; *McBrian v. Morrison*, 55 Mich. 352; *Maxon v. Perrott*, 17 Mich. 334.

**(13091). Return of Writ.**

SEC. 12. The sheriff shall return the writ at or before the return day thereof, with the affidavit thereto annexed, and the names of the persons who executed the bond taken by him from the plaintiff, and their places of residence; and he shall state in his return in what manner he executed the writ; and if the goods and chattels specified therein shall not have been replevied, he shall state in his return the cause thereof.

HISTORY: Re-enacts Sec. 14, R. S. '46, Ch. 124, being C. L. '57, (5018); C. L. '71, (6739); How. 8328; C. L. '97, (10661). Unchanged.

RETURN: The return may be amended on due notice and proper showing, but, if not amended, it is conclusive as made. *Green v. Kindy*, 43 Mich. 279; *Michels v. Stork*, 52 Mich. 264. A return of service "by delivering a certified copy of said writ to his wife personally," it not appearing that defendant could not be found and that the service was at his dwelling, is bad. *Wheeler v. Wilkins*, 19 Mich. 78.

CITED: *Paterson v. Parsell*, 38 Mich. 608.

**(13092). Exemptions to Sureties.**

SEC. 13. Whenever any officer, upon the execution of a writ of replevin, shall take a bond from the plaintiff or defendant, pursuant to the provisions of sections eight or nine of this chapter, he shall, within two days after taking such bond, notify the opposite party or his attorney, or in case of bond given by the plaintiff the person from whose possession the property was taken, of the amount of such bond and the names of the sureties thereon; and if the party for whose benefit such bond is taken shall not be satisfied with the sufficiency of the sureties taken on such bond by the officer, on the delivery of the property to the opposite party he may, at any time after the taking of such bond, but not more than ten days after the receipt of notice thereof as aforesaid, serve upon such officer a notice that he excepts to such sureties, and such officer shall give notice thereof to the party giving such bond, or his attorney.

HISTORY: Re-enacts Sec. 15, R. S. '46, Ch. 124, being C. L. '57, (5019); C. L. '71, (6740); How. 8329; C. L. '97, (10662); As Am. '99, p. 385, Act 246, Eff. Sept. 23, making necessary changes in phraseology in referring to preceding sections. Unchanged.

CITED: *Fletcher v. Lee*, 65 Mich. 560; *Gottesman v. Chipman*, 125 Mich. 63.

**(13093). Justification of Sureties.**

SEC. 14. Within twenty days after service of such notice on the officer, the sureties in the bond so executed by the plaintiff or the defendant, shall each justify by making an affidavit that he is a freeholder in this state and is worth double the amount of the penalty of such bond over and above all demands and legal exemptions, or within the same time a new bond similar to that required by sections eight or nine of this chapter, as the case may be, shall be executed with new sureties, who shall justify in the same manner herein provided: *Provided*, That the party in whose favor such bond is taken may, at any time after the taking of such bond, make a motion in such suit that the court order a new bond to be given, to be approved by the court, or officer hearing such motion. Such motion may be heard in open court, or by the circuit judge at chambers, or upon the order of such judge, by a circuit court commissioner, and such court, judge, or circuit court commissioner on sufficient cause shown, may order such new bond, to be given, and in default thereof may make such further order for the custody of the property pending the suits as the court or such officer may deem necessary to protect the rights of the parties.

HISTORY: Re-enacts Sec. 16, R. S. '46, Ch. 124, being C. L. '57, (5020); C. L. '71, (6741); As Am. '77, p. 16, Act 25, Eff. Aug. 21; How. 8330; C. L. '97, (10663); As Am. '99, p. 385, Act 246, Eff. Sept. 23. Unchanged.

CITED: Fletcher v. Lee, 65 Mich. 560. See Lynch v. Bruce, 2 Doug. 123.

**(13094). Affidavit to be Filed.**

SEC. 15. Such affidavits, and such bond when executed, shall be filed in the office of the clerk of the court to which the writ shall have been returned, and notice thereof shall be served on the defendant or his attorney, within the twenty days herein specified.

HISTORY: Re-enacts Sec. 17, R. S. '46, Ch. 124, being C. L. '57, (5021); C. L. '71, (6742); How. 8331; C. L. '97, (10664). Unchanged.

**(13095). Judgment of Discontinuance.**

SEC. 16. If sureties shall not justify, or if such new bond shall not be executed and filed, and notice thereof given as herein provided, the court shall, at the next term after such default, render judgment of discontinuance against the plaintiff, and such other judgment as the state and nature of the

case may require, in order to restore to the defendant the property replevied, and to compensate him for his damages.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 124, being C. L. '57, (5022); C. L. '71, (6743); How. 8332; C. L. '97, (10665), omitting "such." Unchanged.

**(13096). Court May Allow New Bond Filed.**

**SEC. 17.** But the court may allow the plaintiff to file such new bond, with sureties, who shall justify in the same manner herein prescribed, at the term at which application for such judgment is made, on such reasonable terms as the court shall impose; and upon such bond being filed, the cause shall proceed.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 124, being C. L. '57, (5023); C. L. '71, (6744); How. 8333; C. L. '97, (10666). Unchanged.

**(13097). When Sheriff Discharged From All Liability.**

**SEC. 18.** If no exception shall be taken to the sureties in the bond given by a plaintiff in replevin, as herein provided, the sheriff shall be discharged from all liability for the sufficiency of such sureties; and the bond of the plaintiff shall be held by such sheriff for the benefit of the defendant, and shall be assigned to such defendant or his personal representatives, if judgment be rendered for him in such action.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 124, being C. L. '57, (5024); C. L. '71, (6745); How. 8334; C. L. '97, (10667). Unchanged.

**CONSTRUED:** Relief of sureties in equity in case of collusion between plaintiff and defendant. *Wright v. Hake*, 38 Mich. 525.

**(13098). Liability and Remedy of Sheriff in Certain Cases.**

**SEC. 19.** If such exception shall have been taken, and judgment of discontinuance shall be rendered against the plaintiff for his sureties not justifying the sheriff shall be liable for the sufficiency of such sureties, as provided by law; and such sheriff shall be entitled to the same remedy on the bond taken by him, as in cases of bonds given on the arrest of a defendant in personal actions; and all the provisions of law respecting the staying of proceedings against the sheriff, shall be applicable to actions by the sheriffs on such replevin bond, and to actions against him in relation thereto.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 124, being C. L. '57, (5025); C. L. '71, (6746); How. 8335; C. L. '97, (10668), making immaterial changes in phraseology. Unchanged.

**CITED:** *Fletcher v. Lee*, 65 Mich. 560.

**(13099). Proceedings on Return of Writ.**

SEC. 20. If the sheriff return to the writ of replevin that the defendant has been duly summoned in either of the modes hereinbefore prescribed, the plaintiff shall declare within the same time as in personal actions, and the further practice and proceedings in the case shall be the same as in actions begun by summons.

**HISTORY:** Re-enacts Sec. 22, R. S. '46, Ch. 124, being C. L. '57, (5026); C. L. '71, (6747); As Am. '81, p. 159, Act 161, Eff. Sept. 10; How. 8336; C. L. '97, (10669). Unchanged.

**CONSTRUED:** Issue of alias writs. *Bell v. Mecosta Circuit Judge*, 26 Mich. 414; *Maxon v. Perrott*, 17 Mich. 332; *Anderson v. Lane*, 105 Mich. 89; *Lanahan v. Kent Circuit Judge*, 106 Mich. 685.

**(13100). Form of Declaration.**

SEC. 21. It shall be sufficient for the plaintiff in his declaration, whether the original taking was lawful or otherwise, to allege with requisite certainty of time, place and value, that the defendant received the property to be delivered to the plaintiff when thereunto afterwards requested, and that the defendant, although requested so to do, has not delivered the same to the plaintiff, but has unlawfully detained the same, to the damage of the plaintiff such sum as he may specify.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 124, being C. L. '57, (5028); C. L. '71, (6749); How. 8337; C. L. '97, (10670). Unchanged.

**DECLARATION:** The jurisdiction of the circuit court depends upon the amount claimed in the declaration. See note. "Jurisdiction" to Compilers' Section (14166). Whether the goods be unlawfully taken or wrongfully detained, the declaration is the same in form, and under it every question can be tried that is triable in the action of replevin. *Elliott v. Whitmore*, 5 Mich. 537. *Riley v. Littlefield*, 84 Mich. 26. See *Trudo v. Anderson*, 10 Mich. 370. Where the descriptions of none of the articles are identical in the writ and declaration, it is too late after plea to take advantage of the variance. *Reeder v. Moore*, 95 Mich. 594.

**(13101). Unnecessary to Allege Place of Detention.**

SEC. 22. It shall not be necessary for the plaintiff to state in his declaration, a place certain within the township, city or village, as that where the property was detained.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 124, being C. L. '57, (5029); C. L. '71, (6750); How. 8338; C. L. '97, (10671). Unchanged.

**(13102). Plea and Notice.**

SEC. 23. The defendant may plead the general issue to such

declaration, which shall be in the same form as in personal actions, and shall put in issue not only the detention of the property, but also the property of the plaintiff therein, and his right to the possession thereof at the time of the commencement of the suit, and under such plea the defendant may give notice of any special matter of defense to the action.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 124, being C. L. '57, (5030); C. L. '71, (6751); How. 8339; C. L. '97, (10672). Unchanged.

**NONSUIT:** Sec. 27 of Chap. 124, R. S. '46, (C. L. '97, 10673), provided that if neither party noticed the case for trial the defendant could move for judgment as in case of nonsuit. See *Storey & Cheney v. Child*, 2 Mich. 107; *Hill v. Webber*, 50 Mich. 144; *Anderson v. Henderson*, 167 Mich. 425. This provision is now superseded by Compilers' Section (12573).

**GENERAL ISSUE:** See notes to Compilers' Section (12463). *Farrah v. Bursley*, 100 Mich. 553; *Dearing Boller Co. v. Thompson*, 156 Mich. 368. Under R. S. '38. *Loomis v. Foster*, 1 Mich. 165. Defenses admissible under general issue. *Snook v. Davis*, 8 Mich. 156; *Craig v. Grant*, 6 Mich. 455; *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330. Anything going to show that the plaintiff in replevin had no right to the possession when he commenced his suit is a complete bar to the action. *Belden v. Laing*, 8 Mich. 503; *Clark v. West*, 23 Mich. 247. But where the law does not necessarily imply that the party sustained the peculiar damages complained of, it is essential that such damages should be specially pleaded. *Bateman v. Blake*, 81 Mich. 231-2, citing *Chandler v. Allison*, 10 Mich. 460; *Shaw v. Hoffman*, 21 Mich. 151; *Howser v. Melcher*, 40 Mich. 185; *Allen v. Kinyon*, 41 Mich. 281; *Brink v. Freoff*, 44 Mich. 69; *Heiser v. Loomis*, 47 Mich. 16; *Hitchcock v. Pratt*, 51 Mich. 263; *Krueger v. LeBlanc*, 62 Mich. 70. As to waiver of defects, by plea of the general issue, see notes to Compilers' Section (12463). A verdict in replevin that, "defendant did not unlawfully detain," based on a plea of the general issue does not entitle defendant to a return of the property. *Harris v. O'Gorman*, 118 Mich. 553; *Luce v. Stott Realty Co.*, 201 Mich. 599.

### (13103). Assessment of Damages for Plaintiff.

**SEC. 24.** If, upon the trial of the cause, the verdict be in favor of the plaintiff, the same jury shall assess the damages which he has sustained by the unlawful taking and detention, or by the unlawful detention of the property; but if judgment pass for the plaintiff by default, or upon an issue of law, the damages may be assessed by the court, in the same manner as in personal actions.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 124, being C. L. '57, (5032); C. L. '71, (6753); How. 8341; C. L. '97, (10674). Unchanged.

**VALUE:** When the property has been delivered to the plaintiff and he recovers a verdict, there is no authority given by the statute either to the court or to the jury to assess the value of the property so replevined. *Merrill v. Butler*, 18 Mich. 294.

**TROVER FOR PART:** Recovery of part of a fraudulent purchase of goods, in replevin, being all that were in defendant's possession when the writ issued, is no bar to trover for the rest. *Reid, Murdoch & Co. v. Ferris*, 112 Mich. 693, citing and comparing *Farwell v. Myers*, 59 Mich. 183; 64 Mich. 234.

**DAMAGES:** The expense of replacing a building on land, from which it was unlawfully taken, is part of the damage and can be recovered under this section. *Byrnes v. Palmer*, 113 Mich. 17. The value of an attorney's services and fees paid for such services constitute no part of the damages contemplated. *Hatch v. Hart*, 2 Mich. 289. In replevin for a race horse seized on an attachment, plaintiff may recover damages arising from depreciation in value, by reason of not being properly cared for. *Riley v. Littlefield*, 84 Mich. 22. Whether damages are allowable for detention of the property after the writ issues and before the seizure of the property. *Quaere*. *English v. Caldwell*, 30 Mich. 362. Where there is no proof of damages, only nominal damages are presumed. *Phenix v. Clark*, 2 Mich. 327. See also as to damages, *Eitzen v. Palmer*, 113 Mich. 19.

#### (13104). Part Ownership or Lien of Special Property.

**SEC. 25.** When either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter; and the finding of the jury, or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 124, being C. L. '57, (5033); As Am. '65, p. 325, Act 195, Eff. June 22; C. L. '71, (6754); How. 8342; C. L. '97, (10675). Unchanged.

**SPECIAL PROPERTY:** It is error to render a judgment for the value of the property in favor of a defendant in replevin who has only a special interest therein by virtue of its seizure on legal process, and the judgment should be for the value of such special interest. *Williams v. Bresnahan*, 66 Mich. 637, citing *Kohl v. Lynn*, 34 Mich. 360; *Farmers' L. & T. Co. v. St. Clair*, 34 Mich. 518; *Chadwick v. Broadwell*, 27 Mich. 6; *Weber v. Henry*, 61 Mich. 399; *Fowler v. Hoffman*, 31 Mich. 215; *Alderman v. Manchester*, 49 Mich. 48. Under this statute the exact extent of the subsisting claim of a mortgagee who brings replevin is a legitimate subject of inquiry. *Kohl v. Lynn*, 34 Mich. 360. The purpose of this legislation was to permit such special property or part ownership to be proved and determined upon the trial of the case, and by the same jury, if a jury trial were had, or on the assessment of value, where a demurrer had been interposed, or on the assessment of damages, in cases of judgment by default and other like cases. *Quackenbush v. Henry*, 38 Mich. 370. Where the defendant was in possession, without any valuable interest, and recovered judg-

ment for want of a proper demand, he can recover only nominal damages. *Darling v. Tegler*, 30 Mich. 54. See, also, *Weber v. Henry*, 16 Mich. 399; *Ellis v. Simpkins*, 81 Mich. 1; *Hinchman v. Doak*, 48 Mich. 168. Parties may stipulate the value of defendant's special interest and it will be binding upon the court. *Macomber v. Saxton*, 28 Mich. 516. Defendant mortgagee cannot have judgment for more than the value of the goods, as shown by the appraisal, in the absence of other proof of value. *Walrath v. Campbell*, 28 Mich. 111. See *Chadwick v. Broadwell*, 27 Mich. 6. Where a sheriff seizes property on execution and a third party replevies, judgment for the sheriff should be for the full value. *First National Bank v. Crowley*, 24 Mich. 492; *Mueller v. Provo*, 80 Mich. 484; *Simmons v. Robinson*, 101 Mich. 243. A party with a special interest may, as against a stranger, recover full value of property. *Davidson v. Gunsolly*, 1 Mich. 388. And a mortgagee may maintain replevin for the entire property against one having no right to assail the mortgage. *Hendrickson v. Walker*, 32 Mich. 68. Judgment cannot be rendered in the same suit on separate liens. *Sweetzer v. Mead*, 5 Mich. 107. Where the purchaser of property under a title clause contract is in default on his payments and the seller replevies the goods, defendant cannot in the same action recover for payments made. *Ryan v. Wayson*, 108 Mich. 519. Where each of two defendants has a lien against the property replevied, and waives a return of the same, a separate judgment may be given in favor of each defendant, *Duke v. Beatty*, 147 Mich. 665. Where property is replevied by one of two adverse claimants, from one claiming a lien, the lienholder, after the amount of his claim is paid, cannot maintain a bill of interpleader. *Grant Bros. Auto Co. v. Cotter*, 161 Mich. 522; *Luce v. Stott Realty Co.*, 201 Mich. 600.

**VERDICT:** The verdict should specify the amount of the special interest. *F. L. & T. Co. v. St. Clair*, 34 Mich. 518. And must be sufficiently definite to enable the rendering of a proper judgment. *Alderman v. Manchester*, 49 Mich. 48. See *Moore v. Vrooman*, 32 Mich. 526. The statute requires a lien on special property to be specially found; and where it is not found the court cannot recognize it by the judgment. *Gidday v. Witherspoon*, 35 Mich. 369. But unless the facts require a special finding, a general one is sufficient. *Smith v. Dodge*, 37 Mich. 354. See also *Whitney v. Hyde*, 91 Mich. 13; *Steele v. Matteson*, 50 Mich. 313; *Williams v. Vall*, 9 Mich. 162, and many of the cases, bearing on this section, considered in note to *Upham v. Caldwell*, 100 Mich. 264.

**CITED:** *Anderson v. Henderson*, 167 Mich. 428; *Salter v. Southerland*, 125 Mich. 665; *Kelsey v. Ming*, 118 Mich. 441; *Guerold v. Holtz*, 103 Mich. 122; *Olin v. Lockwood*, 102 Mich. 445; *Steere v. Vanderberg*, 90 Mich. 187; *Charpentier v. Bresnahan*, 74 Mich. 55; *Warren v. Gutches*, 71 Mich. 414; *Berger v. Clippert*, 53 Mich. 469; *Frederick v. Judge*, 52 Mich. 529; *Cary v. Hewitt*, 26 Mich. 228; *Brown v. Fifield*, 4 Mich. 328.

### (13105). Judgment in Case of Non-Delivery of Goods.

**SEC. 26.** If the goods and chattels specified in the declaration, shall not have been replevied and delivered to the plaintiff, such plaintiff, in case he shall recover upon the whole

record, shall be entitled, in addition to his damages and costs, to a further judgment that such goods and chattels be replevied and delivered to him without delay; or in default thereof, that such plaintiff do recover from the defendant the value of such goods and chattels, as the same shall have been assessed.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 124, being C. L. '57, (5034); C. L. '71, (6755); How. 8343; C. L. '97, (10676). Unchanged.

**CONSTRUED:** We have here a judgment containing the same requirements as to the specific property, as those provided where a defendant becomes entitled to return. *Rathbun v. Ranney*, 14 Mich. 387. Where defendant in replevin is personally served but nothing is taken on the writ, the action becomes merely personal. *Clark v. Dunlap*, 50 Mich. 492.

**CITED:** *Friedberg v. Bennett*, 166 Mich. 560; *Reid, Murdock & Co. v. Parks*, 122 Mich. 364; *Hanselman v. Kegel*, 60 Mich. 550; *Maxon v. Perrott*, 17 Mich. 335. The judgment of a justice of the peace "in favor of the plaintiffs and against the defendant for the right of possession of the goods and chattels mentioned in the writ, to be in the plaintiffs, with \$3.00 costs" is not a final judgment. *Friedberg v. Bennett*, 166 Mich. 559; *Reid, Murdock & Co. v. Park*, 122 Mich. 364.

#### (13106). Execution in Such Case.

**SEC. 27.** The execution to be issued upon such judgment shall command the sheriff to levy the plaintiff's damages and costs, of the goods and chattels, lands and tenements of the defendant, as in other executions against property; and also to replevy the goods and chattels described in the declaration, which shall also be specified in the execution, and to deliver them to the plaintiff, if they can be found within his county, and if the same cannot be found, then that he levy the value of such goods and chattels, specifying the same, together with the aforesaid damages and costs, of the goods and chattels, lands and tenements of the defendant, as above provided.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 124, being C. L. '57, (5035); C. L. '71, (6756); How. 8344; C. L. '97, (10677). Unchanged.

**CONSTRUED:** A writ of return in replevin cannot be issued to the sheriff of any county, except that in which the judgment was rendered. *Rathbun v. Ranney*, 14 Mich. 382. A *capias ad satisfaciendum* cannot issue on a circuit court judgment. *Fuller v. Bowker*, 11 Mich. 204. Although imprisonment of defendant in replevin is allowed on an execution issued on a justice's judgment, it is not allowed in the same action in the circuit court and can, therefore, be avoided by an appeal. *Tomlin v. Fisher*, 27 Mich. 524.

**CITED:** *Friedberg v. Bennett*, 166 Mich. 561; *Guerold v. Holtz*, 103 Mich. 122; *Hanselman v. Kegel*, 60 Mich. 550.



**13107). Powers and Duties of Sheriff.**

**SEC. 28.** The sheriff shall proceed in the same manner to collect any monies directed to be collected upon such execution, as upon executions against property in personal actions, and he shall possess the same powers in respect to the replevying of the property described therein, as are herein provided upon the execution of writs of replevin; and if the goods and chattels described in the execution, are replevied and delivered to the plaintiff, they shall be irrepleviable.

**HISTORY:** Re-enacts Sec. 32, R. S. '46, Ch. 124, being C. L. '57, (5036); C. L. '71, (6757); How. 8345; C. L. '97, (10678). Unchanged.

**(13108). Judgment for Defendant on Non-Suit.**

**SEC. 29.** If the property specified in the writ shall have been delivered to the plaintiff, and the defendant recover judgment by discontinuance or nonsuit, such judgment shall be, that the defendant have return of the goods and chattels replevied, unless he shall elect to waive such return as herein-after provided; and also that he recover the damages sustained by him by reason of the detention of such goods and chattels, which damages shall be assessed by a jury in the proper court.

**HISTORY:** Re-enacts Sec. 33, R. S. '46, Ch. 124, being C. L. '57, (5037); C. L. '71, (6758); How. 8346; C. L. '97, (10679). Unchanged.

**CONSTRUED:** The theory of our replevin statute is to provide a remedy for settling the rights to the property in one suit, and to avoid multiplicity of suits. *Cavanaugh v. Sanderson*, 152 Mich. 12.

**JUDGMENT FOR DEFENDANT:** The action of replevin being statutory, defendant can have only such judgment as the statute authorizes. *Bateman v. Blake*, 81 Mich. 232. Setting aside service of writ after return day operates as a discontinuance and entitles defendant to judgment. *Forbes v. Judge*, 23 Mich. 497.

**-WAIVER:** Waiver of return is not, in practice, required to be made before trial or in writing. No entry thereof need be made beyond the proper recital in the judgment. *Kline v. Kline*, 49 Mich. 419. Acceptance of a verdict for value and entry of judgment thereon is sufficient evidence of election of waiver. *Mueller v. Provo*, 80 Mich. 484. When plaintiff discontinues, defendant must elect whether he will claim or waive a return. *Wheeler v. Wilkins*, 19 Mich. 78. The record should show affirmatively and distinctly the election to take the value instead of a return; it cannot be left to inference. *Adams v. Champion*, 31 Mich. 233. In justice's court a waiver of return, entered by the justice at the request of defendant in open court is sufficient. *Humphrey v. Bayn*, 45 Mich. 565.

**RETURN OF PROPERTY:** This statute expressly provides for a return of the property to the defendant, if he so elect. The bond also expressly provides for a return. These provisions were idle if it were

the intention to give the plaintiff the absolute right to a disposal of the property. Although the property is delivered to the plaintiff, it still remains in the custody of the law, and, if judgment be for defendant, he may recover it by execution, if found within the jurisdiction of defendant; if not, then by replevin. A person having no title cannot obtain one by suing out a writ of replevin. *Mannausau v. Wallace*, 87 Mich. 544-5. Judgment for the return of goods replevied from a buyer by the seller restores to the buyer the possession without impairing the seller's rights under the contract of sale. *Adams v. Wood*, 51 Mich. 412. As no return could be adjudged, replevin cannot be maintained for a human corpse. *Keyes v. Konkel*, 119 Mich. 550. Where defendant in justices' court pleads simply the general issue and recovers merely because his possession was lawful on account of no demand having been made for the property, and there is nothing in the record to show his ownership or right to continued possession, he is not entitled to a return of the property. *Farrah v. Bursley*, 100 Mich. 547. Defendant may be denied a judgment for a return where the record shows that he has no right to it. *Gidday v. Witherspoon*, 35 Mich. 368; *Hinchman v. Doak*, 48 Mich. 168; *Farrah v. Bursley*, 100 Mich. 548-9. And when it appears affirmatively, from the findings of the jury, that the defendant has no title to the property, or right to continued possession, and that the plaintiff has title, there would seem to be no occasion for a judgment of return. *Farrah v. Bursley*, 100 Mich. 550, citing *Ellis v. Simpkins*, 81 Mich. 10; *Darling v. Tegler*, 30 Mich. 54. A judgment for a return vests the title to the property in defendant and he may bring trover for its value. *Smith v. Demarais*, 39 Mich. 14.

**DAMAGES:** If defendant waives a judgment for a return or for the value of the property, he is not entitled to judgment for damages. *Bateman v. Blake*, 81 Mich. 227. Where plaintiff, after appealing from a justice, discontinues on payment of costs, defendant can, on proper notice, waive return and elect to take judgment for value and damages. *Soper v. Hawkins*, 56 Mich. 527. Defendant entitled to damages for detention, *Id.*, citing *Delevan v. Bates*, 1 Mich. 98. In case of a span of horses, the proper measure of defendant's damages is the value of their use during the time he has been deprived of them. *Hutchinson v. Hutchinson*, 102 Mich. 637. On an assessment of damages, on waiver of return, the true condition of the title may be shown. *Treadwell v. Paddock*, 75 Mich. 286. On such assessment all questions concerning the amount recoverable by the defendant must be settled, and the assessment becomes the conclusive measure of liability in a suit on the bond. *Id.*, citing *Ryan v. Akeley*, 42 Mich. 516. See, also, *Williams v. Vail*, 9 Mich. 162; *Simmons v. Robinson*, 101 Mich. 243; *Pearl v. Garlock*, 61 Mich. 419. Where, on defendant's motion, the writ is quashed for not describing the property, defendant cannot have assessment of damages, that being confined to cases where "the property specified in the writ" has been delivered to plaintiff. *Parsell v. Judge*, 39 Mich. 542, distinguished in *Humphrey v. Bayne*, 45 Mich. 567. A defendant who takes judgment for the return of the property, but refuses to assess his damages cannot afterwards maintain a separate action therefor. *Drewyour v. Merrell*, 122 Mich. 681; *Griggs v. De Young*, 205 Mich. 628.

**CITED:** *Barlow v. Riker*, 138 Mich. 609; *Cagney v. Wattles*, 121 Mich. 474; *Hill v. Webber*, 50 Mich. 145. See also relative to this sec-

tion. *National Cash Register Co. v. Richards*, 159 Mich. 128; *Salter v. Sutherland*, 125 Mich. 662; *McCabe v. Loonsfoot*, 119 Mich. 323; *Webster v. Auditor General*, 121 Mich. 674; *Frank v. Brown*, 119 Mich. 633.

**(13109). Judgment for Value of Property.**

SEC. 30. Whenever the plaintiff or defendant shall be entitled to a return or surrender of the property replevied, instead of taking judgment for such return or surrender as above provided, he may take judgment for the value of the property replevied, in which case such value shall be assessed on the trial, or upon the assessment of damages, as the case may be, subject to the provisions of section twenty-five of this chapter. And in such case he shall be entitled to a judgment against the sureties in the bond given by the opposite party, on the delivery of the property to him by the officer, as well as against the principal. When judgment shall be rendered against a party and his sureties, pursuant to the provisions of this section, any execution issued thereon shall direct the officer to whom it is directed to make the amount thereof out of the goods, chattels, lands and tenements of the principal, naming him, and for want thereof, out of the goods, chattels, lands and tenements of the sureties.

HISTORY: Re-enacts Sec. 34, R. S. '46, Ch. 124, being C. L. '57, (5038); As Am. '65, p. 325, Act 195, Eff. June 22; C. L. '71, (6759); How. 8347; C. L. '97, (10680); As Am. '99, p. 386, Act 246, Eff. Sept. 23. Modified.

JUDGMENT FOR VALUE: On waiving a return, defendant is entitled to judgment for the value of the property, less any lien the plaintiff may have. *Kennedy v. Dawson*, 96 Mich. 82. To show himself entitled to a judgment for the value, defendant need not, in addition to showing possession under claim of title, prove his title as against all the world, when no right or title whatever appears in plaintiff. *Steere v. Vanderberg*, 90 Mich. 187. When defendant is not limited to the value of goods described in the writ. *Charpentier Bresnahan*, 74 Mich. 48. The measure of defendant's damages is the value of the property at the time of the unlawful taking, with interest to date of verdict. *Just v. Porter*, 64 Mich. 565, citing *Hanselman v. Kegel*, 60 Mich. 541. The value may be assessed by the court. It is only where damages are sought that the intervention of a jury is required. *Pearsons v. Eaton*, 18 Mich. 81. Defendant's right to judgment for value. *Dewey v. Hastings*, 79 Mich. 263; *Frederick v. Mecosta Circuit Judge*, 52 Mich. 529; *Mueller v. Provo*, 80 Mich. 483. Defendant may take judgment for the value of property replevied even if the officer has made no return to the writ. *Frank v. Brown*, 119 Mich. 631. A defendant who obtains judgment in justice's court for a return of property, may upon plaintiff's appeal to the circuit court take instead a judgment for the value of the property. *McCabe v. Loonsfoot*, 119 Mich. 323. The defendant upon discontinuance by the plaintiff, may

waive the return of the property and have his damages and value of the property assessed. *Soper v. Hawkins*, 56 Mich. 527.

The filing of a discontinuance in a replevin suit in justice's court by the plaintiff did not deprive the justice of the right to proceed upon the adjourned day to hear evidence of the defendant as to the value of the property taken under the writ; defendant having waived a return of the property. *Griggs v. DeYoung*, 205 Mich. 627, 172 N. W. 433.

CITED: *Anderson v. Henderson*, 167 Mich. 428; *Gustin v. Embury-Clark Lumber Co.*, 145 Mich. 106; *Williams v. Vall*, 9 Mich. 163. See also *Kelsey v. Ming*, 118 Mich. 439; *Keyes v. Konkel*, 119 Mich. 551; *Drewyour v. Merrell*, 112 Mich. 681.

### (13110). Notice of Assessment of Damages.

SEC. 31. Whenever any damages shall be assessed, pursuant to any provisions contained in this chapter, the same notice thereof shall be given to the adverse party, as is required by law, and the practice of the court in the like cases in personal actions.

HISTORY: Re-enacts Sec. 35, R. S. '46, Ch. 124, being C. L. '57, (5039); C. L. '71, (6760); How. 8348; C. L. '97, (10681). Unchanged.

CITED: *Soper v. Hawkins*, 56 Mich. 528; *Anderson v. Henderson*, 167 Mich. 429. See *Drewyour v. Merrell*, 112 Mich. 681.

### (13111). Judgment for Costs Only.

SEC. 32. If the property specified in the writ shall not have been replevied and delivered to the plaintiff, and the defendant recover judgment, such judgment shall be for costs only.

HISTORY: Re-enacts Sec. 36, R. S. '46, Ch. 124, being C. L. '57, (5040); C. L. '71, (6761); How. 8349; C. L. '97, (10682), as amended by P. A. '99, Act No. 246. Unchanged.

CITED: *Bateman v. Blake*, 81 Mich. 233.

### (13112). Effect of Judgment for Return

SEC. 33. Whenever judgment shall pass against the plaintiff in replevin, whether by default or otherwise (except when the case shall be dismissed by reason of some default in the writ or the service thereof, or in the affidavit), and a return of the property is awarded, no writ of second deliverance shall be allowed, nor shall any second or other writ of replevin be brought for the same cause, but the plaintiff in replevin shall not thereby be barred from bringing an action for the same property, unless the judgment in the action of replevin shall have passed against him on the merits.

HISTORY: Re-enacts Sec. 37, R. S. '46, Ch. 124, being C. L. '57,



(5041); C. L. '71, (6762); As Am. '73, p. 131, Act 99, Eff. July 31; How. 8350; C. L. '97, (10683), eliminating, however, "of trespass or trover." Unchanged.

**CONSTRUED:** A writ of return cannot be issued to the sheriff of any county, except that in which the judgment was rendered. *Rathbun v. Ranney*, 14 Mich. 382. See *Farrah v. Bursley*, 100 Mich. 551.

**(13113). Property Held Subject to Attachment in Certain Cases.**

**SEC. 34.** If any goods or chattels which are replevied, had been attached, they shall, in case of judgment for a return, be held liable to the attachment, until final judgment in the suit in which they were attached, and for thirty days thereafter, in order to their being taken in execution; and if such final judgment be rendered before the return of the property, or if the property when replevied was seized and held on execution, it shall be held subject to the same attachment or seizure for thirty days after the return, in order that the execution may be served thereon, or the service thereof completed, in like manner as it might have been if such property had not been replevied.

**HISTORY:** Re-enacts Sec. 38, R. S. '46, Ch. 124, being C. L. '57, (5042); C. L. '71, (6763); How. 8351; C. L. '97, (10684). Unchanged.

**CITED:** *Tannahill v. Tuttle*, 3 Mich. 113; *Frederick v. Mecosta Circuit Judge*, 52 Mich. 531; *Berger v. Clippert*, 53 Mich. 469.

**(13114). Who May Have Action on Bond.**

**SEC. 35.** If any writ of return or other execution issued in favor of either party in the action shall be returned unsatisfied in whole or in part, the party in whose favor such writ is issued, or his representatives, may have an action upon the bond executed by or on behalf of the opposite party, to recover against the obligors therein the value of the property replevied, and the moneys, damages and costs awarded to such party and such bond shall be assigned to such party, so entitled to an action thereon, or his representatives, on their request.

**HISTORY:** Re-enacts Sec. 39, R. S. '46, Ch. 124, being C. L. '57, (5043); C. L. '71, (6764); How. 8352; C. L. '97, (10685); As Am. '99, p. 386, Act 246, Eff. Sept. 23. Unchanged.

**ACTION ON BOND:** A statutory replevin bond supports an action only when the writ of return, or other execution issued in defendant's favor has been returned unsatisfied. *Scott v. Scott*, 50 Mich. 372; *Williams v. Vall*, 9 Mich. 163; *Phillips v. Waterhouse*, 40 Mich. 273. The abatement of the replevin suit does not give the right to sue on the bond. *Id.*; *Kidder v. Merryhew*, 32 Mich. 470. And the remedy of defendant in such case is by replevin to recover the property, or possibly by trover for its value. *Id.* 32 Mich. 470. The remedy on the

replevin bond is not exclusive; defendant may bring trover. *Smith v. Demarrais*, 39 Mich. 14. The judgment in the replevin suit should be put in evidence. *Phillips v. Waterhouse*, 40 Mich. 273. And the fact that judgment was entered by consent will not defeat the action on the bond. *Estey v. Harmon*, 40 Mich. 645. Unless it was by a secret confession of judgment, fraudulently and collusively made. *Wright v. Hake*, 38 Mich. 525. See, also, *Greenlee v. Loring*, 35 Mich. 63, and *Green v. Kindy*, 43 Mich. 279, as to when the sureties cannot be held. No judgment can be rendered against the sureties beyond the penalty of the bond and costs. *Fraser v. Little*, 13 Mich. 195. The plaintiffs in the replevin suit are estopped, in an action on the bond, from setting up in defense any infirmity in the proceedings by which they obtained possession of the property. *Jennison v. Haire*, 29 Mich. 207.

### (13115). Proceedings.

SEC. 36. In such action the plaintiff shall assign breaches of the condition of such bond as in other cases; and the return of the sheriff to the execution issued in the action of replevin shall be evidence of such breach; the amount recovered in such action of replevin, and remaining uncollected, shall be the measure of the damages, if the value of the property replevied shall have been so recovered, and if not so recovered and a return or surrender thereof shall have been awarded, such value shall be added to the damages and costs recovered in the action of replevin, and the amount of such value, damages and costs, remaining uncollected, shall form the measure of damages.

HISTORY: Re-enacts Sec. 40, R. S. '46, Ch. 124, being C. L. '57, (5044); C. L. '71, (6765); How. 8353; C. L. '97, 10686; As Am. '99, p. 386, Act 246, Eff. Sept. 23. Unchanged.

CONSTRUED: The amount of the judgment is the measure of the recovery in a suit on the bond. *Simmons v. Robinson*, 101 Mich. 243; *Ryan v. Akeley*, 42 Mich. 516. Where the statute provides the exact measure of damages, there is no authority to reduce it. *Williams v. Vail*, 9 Mich. 163. See *Anderson v. Henderson*, 167 Mich. 427.

### (13116). Mitigation of Damages.

SEC. 37. In any action prosecuted on such bond given by either party in action of replevin for the deliverance of any property, the defendant may show, in mitigation of the damages, that the obligee in such bond had only a lien upon it, or special property or part ownership in said property at the time of commencement of suit in replevin, and that the defendants, or either of them, had at the same time a part ownership or other valuable interest in said property; and if such lien, special property, part ownership, or other interest of said obligee, with interest thereon, amount to less than the value of

the property replevied, a corresponding reduction shall be made from such value.

**HISTORY:** Re-enacts Sec. 41, R. S. '46, Ch. 124, being C. L. '57, (5045); As Am. '65, p. 325, Act 195, Eff. June 22; C. L. '71, (6766); How. 8354; C. L. '97, (10687); As Am. '99, p. 387, Act 246, Eff. Sept. 23. Unchanged.

**INTEREST IN PROPERTY:** The true interest may be shown in case suit is brought on the replevin bond. *Treadwell v. Paddock*, 75 Mich. 237. See also *Cary v. Hewitt*, 26 Mich. 228; *Nixon v. Hood*, 201 Mich. 136.

**REDUCTION IN VALUE:** *Henry v. Ferguson*, 55 Mich. 399; *Henry v. Quackenbush*, 48 Mich. 415; *Lindner v. Brock*, 40 Mich. 618; *Ryan v. Akeley*, 42 Mich. 516.

### Replevin of Beasts Distrained.

#### (13117). Proceedings When Beasts are Distrained.

**SEC. 38.** Any person whose beasts are distrained or impounded, in order to recover any penalty or forfeiture supposed to have been incurred by their going at large, or to obtain satisfaction for any damages alleged to have been done by them, may have a writ of replevin therefor out of the proper court, and the same proceedings shall be had thereon as in other cases of replevin, except as hereinafter provided.

**HISTORY:** Re-enacts and supersedes Sec. 18, R. S. '46, Ch. 124, being C. L. '57, (5063); C. L. '71, (6784); How. 8372; C. L. '97, (10705), though such section was not expressly repealed by this act. Unchanged.

**REPLEVIN:** The remedy here given is a special proceeding adapted to this case of distress of property, and it expressly negatives a remedy by replevin in any other manner. *Johnson v. Wing*, 3 Mich. 172; *Hamlin v. Mack*, 33 Mich. 103; *Campau v. Konan*, 39 Mich. 362; *Marx v. Woodruff*, 50 Mich. 361; *Cox v. Chester*, 77 Mich. 494. But a mere claim that beasts had been distrained damage feasant—a mere pretense—an afterthought—will not defeat the right to replevin under the general statute. *Campau v. Konan*, 39 Mich. 365. And this form of action is confined to cases arising under this chapter. *Barrett v. Rowe*, 78 Mich. 648. If dissatisfied with the damages demanded, the owner may have them assessed under Compilers' Section (14789), or may replevy and have the damages assessed in the replevin suit. *Norton v. Rockey*, 46 Mich. 462; *Jones v. Dashner*, 89 Mich. 248. The sums allowed in Compilers' Section (14780) are in the nature of a penalty and come within the meaning of this section. *Marx v. Labadie*, 51 Mich. 606. Where property is taken in bad faith and the claim of distraint is a mere pretext, action under the general replevin statute will lie. *Eklund v. Toner*, 123 Mich. 302; *Spiegel v. Straw*, 196 Mich. 576; *Id.* 196 Mich. 582.

**(13118). Affidavit to be Annexed.**

**SEC. 39.** Such writ shall not be executed in any case, unless the plaintiff in the action, or some person knowing the facts, shall make and annex to the writ an affidavit stating therein that the beasts, describing them, have been distrained or impounded, and are detained by the defendant, and that the plaintiff therein is the owner of such beasts, or that he has a lawful right to the possession thereof.

**HISTORY:** Re-enacts and supersedes Sec. 19, R. S. '46, Ch. 124, being C. L. '57, (5064); C. L. '71, (6785); How. 8373; C. L. '97, (10706), though such section was not expressly repealed by this act. Unchanged.

**(13119). Bond.**

**SEC. 40.** The writ shall be served, and the property shall be appraised, and before delivery thereof to the plaintiff, a bond shall be given in like manner, and with the same effect as in other cases of replevin; but such property shall not be removed by the officer until such bond shall be given; and if such bond be not given within the time limited for that purpose, the property shall be relinquished by the sheriff, and such failure shall be deemed a discontinuance of the suit by the plaintiff.

**HISTORY:** Re-enacts and supersedes Sec. 20, R. S. '46, Ch. 124, being C. L. '57, (5065); C. L. '71, (6786); How. 8374; C. L. '97, (10707), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** It was error for the court, on its own motion, to discontinue a suit, because plaintiff's bond had only one surety. He had a right to amend under Sections (10409)-(10410). *Bublitz v. Trombley*, 113 Mich. 413. Where plaintiff by mistake has given an indemnity bond instead of the bond required by this section, he may even after the property is replevied file a new bond. *Donley v. Fowler*, 147 Mich. 290.

**(13120). Judgment for Defendant.**

**SEC. 41.** If the beasts shall be replevied and delivered to the plaintiff, and judgment of nonsuit or of discontinuance be rendered against the plaintiff, or if it appear on the trial that the beasts were lawfully distrained, the defendant shall have judgment for such sum as shall be due from the plaintiff, for the penalty or forfeiture, or for the damages for which the beasts were impounded, together with all the lawful fees, costs, charges and expenses incurred by reason of the distress, to be assessed as in other cases, and also his costs of the action of replevin.



**HISTORY:** Re-enacts and supersedes Sec. 21, R. S. '46, Ch. 124, being C. L. '57, (6066); C. L. '71, (6787); How. 8375; C. L. '97, (10708), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Under this section the defendant, on nonsuit of the plaintiff, who has replevied the beasts, may have an assessment covering every claim arising out of the distress and damages done him by the beasts. *Sterner v. Hodgson*, 63 Mich. 419; *Spiegel v. Straw*, 196 Mich. 578.

**(13121). Judgment for Plaintiff.**

**Sec. 42.** If the plaintiff shall recover judgment against the defendant by default, or if it shall appear upon the trial that the beasts were distrained without any sufficient or justifiable cause, the plaintiff shall recover his damages caused by the unlawful detention of such beasts to be assessed as in other actions of replevin, together with his costs of suit.

**HISTORY:** Re-enacts and supersedes Sec. 22, R. S. '46, Ch. 124, being C. L. '57, (5067); C. L. '71, (6788); How. 8376; C. L. '97, (10709), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** *Campau v. Konan*, 39 Mich. 365; *Spiegel v. Straw*, 196 Mich. 578.

## CHAPTER XXVIII.

### GARNISHMENT IN COURTS OF RECORD.

#### (13122). Issue of Writ of Garnishment.

SECTION 1. In all personal actions arising upon contract brought in the several courts or in municipal courts of civil jurisdiction, whether commenced by declaration, writs of capias, in summons or attachment, and in all cases where there remains any sum unpaid upon any judgment or decree rendered in any of the several courts hereinbefore mentioned or upon any transcript of a judgment filed in said courts, if the plaintiff, his agent or attorney, shall file with the clerk of said circuit court at the time of, or after the commencement of suit, or at any time after rendition of judgment or decree or the filing of a transcript of judgment, an affidavit stating that he has good reason to believe, and does believe, that any person (naming him) has property, money, goods, chattels, credits or effects in his hands or under his custody or control, belonging to the defendant or any or either of the defendants, or that such person is indebted to the defendants, or any or either of the defendants, whether such indebtedness is due or not, and that the principal defendants (naming him or them), is justly indebted to the plaintiff on such contract, judgment, decree or transcript, in a given amount, over and above all legal set-offs and that the plaintiff or affiant is justly apprehensive of the loss of the same, unless a writ of garnishment issue to the aforesaid person, a writ of garnishment shall be issued, sealed, and tested in the same manner as writs of summons, and directed to the sheriff, reciting the commencement of said suit, or the rendition of judgment or decree against the principal defendant, or any or either of the defendants, or the filing of a transcript of judgment, and the filing of the affidavit aforesaid, and thereupon commanding said sheriff to summon such person to appear before said court on or before a day to be named therein, which day shall not be less than fourteen days from the date of issuing the same, to make disclosure in writing under his oath to be filed with the clerk of said court, touching his liability as garnishee of the principal defendant, or any or either of the defendants (naming him or them), as

charged in said affidavit, and thenceforth pay no money and deliver no property to the principal defendant, or any or either of the defendants, and of said writ make due return.

**HISTORY:** Re-enacts Sec. 1 of Act 264 of '61; As Am. '63, p. 395, Act 231, Eff. June 22; As Am. '71, p. 238, Act 154, Eff. July 18, being C. L. '71, (6465); As Am. '73, p. 170, Act 123, Imd. Eff. Apr. 19; As Am. '77, p. 63, Act 81, Imd. Eff. Apr. 28; As Am. '77, p. 193, Act 179, Eff. Aug. 21; As Am. '79, p. 269, Act 256, Eff. Aug. 30; As Am. '81, p. 1, Act 1, Imd. Eff. Jan. 28; How. 8058; As Am. '85, p. 130, Act 128, Eff. Sept. 19; As Am. '89, p. 78, Act 73, Eff. Oct. 2; As Am. '97, p. 10, Act 6, Eff. Aug. 30; C. L. '97, (10600), omitting after "contract" "express or implied," and changing "commanding said sheriff to warn and summon" to "commanding said sheriff to summon." Modified.

**AFFIDAVIT IN GARNISHMENT:** The provision requiring the affidavit to contain a statement as to whether the indebtedness of the principal defendant to the plaintiff is upon express or implied contract is repealed. It is sufficient to state that such indebtedness is upon contract.

**FORMER LAW:** (See history above). Prior to amendment of '85. *Farwell v. Wayne Circuit Judge*, 62 Mich. 316; *Ford v. Dry Dock Co.*, 50 Mich. 358. Amendment of '79. *Weimeister v. Manville*, 44 Mich. 408; *Weimeister v. Singer*, 44 Mich. 406.

**NOTE:** For further authorities on the nature of garnishment proceedings, points of practice, garnishee's liability, what may be reached by garnishment, etc., see notes to Compilers' Sections (14361-96).

**GARNISHMENT PROCEEDINGS:** See notes to Compilers' Section (14361). Garnishee proceedings are statutory and must be strictly pursued. *Foster v. Judge*, 116 Mich. 285. *Kennedy v. McLellan*, 76 Mich. 598; *Weimeister v. Manville*, 44 Mich. 408; *Peninsular Stove Co. v. Judge*, 85 Mich. 406; *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 334; *Farwell v. Wayne Circuit Judge*, 62 Mich. 321. Garnishment process is in the nature of an equitable attachment of assets belonging to a defendant, but held by a third person, the purpose of such attachment being to apply the assets in discharge of defendant's debt. *Bethel v. Superior Court Judge*, 57 Mich. 379. See *Newland v. Wayne Circuit Judge*, 85 Mich. 154. Where defendant's wife is made garnishee defendant. *Berles v. Kent Circuit Judge*, 102 Mich. 495. None of the substantial requirements of the statute can be waived in any of the proceedings by the debtor garnisheed, because others have an interest in the result quite equal with those of the parties to the suit. *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 334. Garnishment proceedings cannot be revived against the garnishee's administrator. *White v. Ledyard*, 48 Mich. 264. Defense by principal defendant. *McDougal v. Lamb*, 113 Mich. 69. An action upon a foreign judgment is an action upon a contract within the meaning of this statute. *Wattles v. Wayne Circuit Judge*, 117 Mich. 662. *Union Nat. Bank of Chicago v. Muskegon Circuit Judge*, 117 Mich. 678. Money in the hands of a third person belonging to one of two joint defendants may be garnished to satisfy a claim against both defendants. *Roof v. Blake*, 187 Mich. 38. Citing *Meigs v. Weller*, 90 Mich. 629.

**MEANING OF "PLAINTIFF:"** When the legislature used the word "plaintiff," it intended to give the remedy of garnishment to the person

who recovered judgment or decree, whether he be plaintiff, complainant or defendant, and that the word "plaintiff," as used in the statute, must be construed to mean the party moving in the garnishment proceedings. *Eslar v. Kent Circuit Judge*, 108 Mich. 543.

**AFFIDAVIT:** See notes to Compilers' Section (14361). Under amendment of '79 and prior. *Weimeister v. Manville*, 44 Mich. 408. An affidavit for garnishment in the circuit court need not aver that the principal suit is pending, or that the principal debt is due when the affidavit is made. *State Sav. Bank of Detroit v. Wayne Circuit Judge*, 95 Mich. 100. Where the affidavit is made upon the same day with the commencement of suit, the court acquires jurisdiction. *Millard v. Lenawee Circuit Judge*, 107 Mich. 134. Two or more, severally liable, may be joined in one affidavit and in the writ, and on filing their several answers the affidavit will stand as a declaration against each (Compilers' Section 13132), and the proceedings will thereafter be prosecuted against each, as provided by Compilers' Section (13154). *State Sav. Bank of Detroit v. Wayne Circuit Judge*, 95 Mich. 100. Garnishment proceedings are founded upon the affidavit required by the statute. If that is defective, the court acquires no jurisdiction. It is not a case wherein jurisdiction can be acquired by voluntary appearance to the parties or aided by presumptions. *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 334. As to defective affidavits, see *Id.* 331; *Weimeister v. Manville*, 44 Mich. 408; *Conway v. Ionia Circuit Judge*, 46 Mich. 28; *Duryea v. Raymond*, 146 Mich. 488. The language, at the time of, or after the commencement of suit," was clearly intended to refer to the filing of the declaration, or other act entitling plaintiff to process. *McDonald v. Alanson Mfg. Co.*, 107 Mich. 10. Amendment of affidavit. *Sachs v. Norn*, 139 Mich. 364; *Duryea v. Raymond*, 146 Mich. 488. Amendment of date of affidavit. *Union Nat. Bank of Chicago v. Muskegon Circuit Judge*, 117 Mich. 678; *Wattles v. Wayne Circuit Judge*, 117 Mich. 662.

**INDEBTEDNESS AND PROPERTY:** Garnishment proceedings may embrace claims for money due, and property belonging to the principal defendant, both of which questions may be tried in one suit, and the verdict and judgment rendered conformably to the facts developed. *Peninsular Stove Co. v. Judge*, 85 Mich. 401.

See also *Nachtegall v. Reilly*, 165 Mich. 347.

**SUMMONS:** See notes to Compilers' Section (14361).

A clerical error, unmistakably shown to be such upon the face of the garnishee summons, held not fatal. *Millard v. Lenawee Circuit Judge*, 107 Mich. 134. An alias summons can be taken out against the principal defendant, even though the return of the first summons was informal; the return may be amended. *Axtell v. Gibbs*, 52 Mich. 639. And the alias summons may be treated as a new writ, if the first suit has gone down. *Id.* Two grounds for issue of writ. *Botsford v. Simmons*, 32 Mich. 352.

**CITED:** *Wilson v. Wayne Circuit Judge*, 82 Mich. 171; *Old Second Nat. v. Williams*, 112 Mich. 568; *Klock v. Pack*, 112 Mich. 672.

An assignee may garnish his assignor under this statute if the assignor is indebted to the principal defendant. See C. L. '97, (10054). *Barlow v. Lincoln-Williams Twist Drill Co.*, 186 Mich. 46; 22 D. L. N. 444; 152 N. W. 1034.

**(13123). Liability of Garnishee.**

**SEC. 2.** From the time of the service of such writ, the garnishee shall be liable to the plaintiff to the amount of property, money, goods, chattels and effects under his control, belonging to the principal defendant, or of any debts due or to become due from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former, and for all property, personal and real, money, goods, evidences of debt, or effects of the principal defendant, which such garnishee defendant holds, by conveyance, transfer or title that is void as to creditors of the principal defendant, and for the value of all property, personal and real, money, goods, chattels, evidences of debt or effects of the principal defendant, which such garnishee defendant received or held by a conveyance, transfer, or title that was void as to creditors of the principal defendant; and such garnishee defendant shall also be liable on any contingent right or claim against him in favor of the principal defendant.

**HISTORY:** Re-enacts Sec. 2, of Act 264 of '61; As Am. '63, p. 396, Act 231, Eff. June 22; being C. L. '71, (6466); As Am. '79, p. 270, Act 256, Eff. Aug. 30; How. 8059; As Am. '89, p. 366, Act 244, Eff. Oct. 2; C. L. '97, (10601). Unchanged.

**CONSTITUTIONALITY:** This section is constitutional. *Webber v. Haves*, 117 Mich. 256.

**CONSTRUED:** See *Iron Cliffs Co. v. Lahals*, 52 Mich. 394. Application of amendment of '89, (see history above). *Heineman v. Schloss*, 83 Mich. 153.

**GARNISHEE'S LIABILITY:** See notes to *Compilers' Section* (14365). The right to hold the garnishee depends upon the state of the claim, as one garnishable or not, at the time of the serving of the process. *Old Second Nat. Bank v. Williams*, 112 Mich. 564; citing *Martz v. Detroit Fire & Marine Ins. Co.*, 28 Mich. 204; *Hopson v. Dinan*, 48 Mich. 612; *Bethel v. Superior Court Judge*, 57 Mich. 379. As to liability, see *Allen v. Hazen*, 26 Mich. 142. The garnishee is not liable, when service upon the principal defendant has not been secured within the statutory period. *Axtell v. Gibbs*, 52 Mich. 641, citing *Noble v. Bourke*, 44 Mich. 194. See *Fisher v. Hall*, 44 Mich. 493.

**WHAT MAY OR MAY NOT BE REACHED:** See notes to *Section 991*. The maker of a promissory note may be garnished after its maturity, if it is then owned by the principal defendant. *Old Second Nat. Bank v. Williams*, 112 Mich. 564. *Somers v. Losey*, 48 Mich. 294. And a note past due may be reached. *Serviss v. Judge*, 116 Mich. 101. Garnishment does not lie against executors, when no order for payment has been made and the executors are not yet directly accountable to defendant. *Hudson v. Saginaw Circuit Judge*, 114 Mich. 116.

Where a debtor has sold his stock of goods without complying with the "bulk sales act," his creditor is entitled to proceed against the purchaser by garnishment. *Musselman Co. v. Kidd, Dater Co.*, 151

Mich. 478. The proceeds of the sale of exempt personal property, intended to be reinvested in other exempt property, are not subject to garnishment. *Cullen v. Harris*, 111 Mich. 20. Money unlawfully taken from a prisoner while searching him cannot be garnished in the officers hands. *Hubbard v. Garner*, 115 Mich. 406. Accounts which have been assigned or mortgaged cannot be garnished, whether existing or future accounts. *Dunn v. Swan*, 115 Mich. 409. Nor a debt actually due and as signed verbally in good faith, with the debtor's assent. *Neumann v. Calumet & Hecla Mining Co.*, 57 Mich. 97. Under the provisions of Compiler's Sections (12873)-(13129), and this section, stock in a corporation is subject to garnishment. *Old Second Nat. Bank v. Williams*, 112 Mich. 564. Garnishment will not lie on an unperformed executory contract upon which nothing was due when the writ issued. *Kiely v. Bertrand*, 67 Mich. 335; *Webber v. Bolte*, 51 Mich. 113. As to contingent claims, compare *Thorp v. Preston*, 42 Mich. 511; *Martz v. Detroit Fire & Marine Ins. Co.*, 28 Mich. 201; *Webber v. Bolte*, 51 Mich. 113; *Cohnen v. Sweeney*, 105 Mich. 646. As to questions of joint indebtedness, see note to Compiler's Section (14365), and *Bethel v. Superior Court Judge*, 57 Mich. 379; *Farwell v. Wayne Circuit Judge*, 62 Mich. 316; *Hamilton v. Rogers*, 67 Mich. 135; *State Sav. Bank of Detroit v. Wayne Circuit Judge*, 95 Mich. 104.

Garnishment process will not reach personal property assigned by the principal debtor, if in his hands it would have been exempt from execution. *Anderson v. Odell*, 51 Mich. 492. A recovery for libel does not furnish an indebtedness which can be garnished until judgment is entered on the verdict. *Post & Tribune Co. v. Reilly*, 46 Mich. 459. A tenant cannot be garnished for rent payable in the future and not absolutely due at the time of garnishment. *Thorp v. Preston*, 42 Mich. 511. Further, as to what may or may not be reached, *Spear v. Rood*, 51 Mich. 140; *Bethel v. Linn*, 63 Mich. 464; *Oliver & Roberts Wire Co. v. Wheeler*, 106 Mich. 408; *Ruhl v. A. Ruoff Brewing Co.*, 113 Mich. 291; *Ferry v. Bank*, 114 Mich. 321; *Wheeler v. Dime Sav. Bank*, 116 Mich. 271. Garnishment of price of property after sale and before delivery. *Case v. Dewey*, 55 Mich. 116. See also *Peninsular Sav. Bank v. Trust Co.*, 127 Mich. 356.

CITED: *Crippen v. Fletcher*, 56 Mich. 389; *Cohnen v. Sweeney*, 105 Mich. 646; *Sloman v. Goebel Brewing Co.*, 118 Mich. 445; *Baker v. Parkhurst*, 119 Mich. 546. See *Cullen v. Harris*, 111 Mich. 20.

### (13124). Special Interrogatories.

SEC. 3. Unless the plaintiff in such action shall within ten days after notice is served upon him or his attorney, of the filing of the garnishee's disclosure with the clerk of the court, file special interrogatories thereto, or file a demand for an examination of such garnishee before the judge of the court or a circuit court commissioner, such disclosure shall be deemed sufficient unless the judge or court on application and showing shall extend the time for filing such interrogatories or demand for such examination.

HISTORY: Re-enacts Sec. 3 of Act 264 of '61; As Am. '63, p. 396,

Act 231, Eff. June 22, being C. L. '71, (6467); As Am. '79, p. 270, Act 256, Eff. Aug. 30; How. 8060; C. L. '97, (10602). Unchanged.

**DISCLOSURE:** See notes to Compilers' Section (14369); *Hobson v. Kelley*, 87 Mich. 187; *Fearey v. Cummings*, 41 Mich. 376. A garnishee may admit away his own rights, but not another's. *Hebel v. Amazon Ins. Co.*, 33 Mich. 403. See *First Nat. Bank v. Mellen*, 45 Mich. 413; *Tabor v. Van Vranken*, 39 Mich. 793. A disclosure made before jurisdiction of the principal case has been obtained is of no force. *Iron Cliffs Co. v. Lahais*, 52 Mich. 394. Where the disclosure is not satisfactory, the only course is to proceed under this section to obtain a further disclosure. *Townsend v. Cass Circuit Judge*, 39 Mich. 407. If the garnishee dies before disclosure, the proceedings cannot be revived against his administrator. *White v. Ledyard*, 48 Mich. 264; *King v. Harrigan*, 142 Mich. 477.

**(13125). Copy of Special Interrogatories to be Served.**

**SEC. 4.** If special interrogatories shall be filed to such disclosure as aforesaid, the garnishee or his attorney in such action shall be served with a copy of the same, together with a notice from the plaintiff or his attorney that such garnishee is required to answer such interrogatories in writing within ten days after such service; said garnishee shall answer the same on oath and file such answer with the clerk of said court within said ten days: *Provided*, Such time may be extended on application and showing to said court. If plaintiff shall file in said cause a demand for the examination of such garnishee before said judge or a circuit court commissioner, and shall cause a copy of the same to be served on such garnishee defendant, with a notice from the plaintiff or his attorney requiring such garnishee to appear before the judge or a circuit court commissioner, at a time and place to be named in such notice, not less than three nor more than ten days after service of such notice, which time may be enlarged by the judge or commissioner on special cause shown, and submit to an examination, on oath, concerning all matters of his liability as such garnishee under this chapter, which copy shall be served, and such service proved when required, in the same manner as in cases of service of a declaration in suits commenced by declaration; such garnishee defendant shall appear and submit to such examination as required by such notice. And if such garnishee shall fail to appear for examination at the time and place appointed by such notice, or if such garnishee shall fail or refuse to file his answers to such written interrogatories as required by this chapter, or if such answers are not full and responsive to such written interrogatories, the judge of the court, or a circuit court commissioner, upon application of

the plaintiff, shall make an order that the garnishee appear before him and submit to such examination at a time and place to be named in such order. The testimony given on such personal examination shall be reduced to writing by the commissioner or judge, signed by the garnishee, and filed with the clerk of the court, and the same, and the answer to the written interrogatories, in cases where written interrogatories are filed and answered as above, shall be deemed part of the disclosure of such garnishee. The provisions of this section shall apply to foreign corporations doing business within this state, and service shall be valid when made upon the resident agent of said foreign corporation: *Provided, however,* That this section shall not be construed to require the personal attendance for examination of any officer, or agent of such foreign corporation not found within this State, but the personal examination of any officer, or agent of such corporation without this State, may be had in the state of his residence, in the same manner as depositions are taken of parties without the state.

**HISTORY:** Re-enacts Sec. 4 of Act 264 of '61; As Am. '63, p. 397, Act 231, Eff. June 22, being C. L. '71, (6468); As Am. '79, p. 270, Act 256, Eff. Aug. 30; How. 8061; C. L. '97, (10603); As Am. '13, p. 771, Act 406, Eff. Aug. 14, making slight changes in phraseology and adding the above proviso. Modified.

**EXAMINATION:** See notes to Compilers' Section (14369); *Hobson v. Kelly*, 87 Mich. 189. This provision for appearance before judge or commissioner, does not apply to a foreign corporation when summoned as garnishee. *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464.

A garnishee is plaintiff's witness so far as his answers are responsive, and though not conclusive, they constitute a part of the evidence of the case. *Whitfield v. Stiles*, 57 Mich. 410. The provision giving plaintiff the right to bring the garnishee before the court has reference to resident garnishees only. *Ranville v. Kent Circuit Judge*, 118 Mich. 196. Further as to disclosure of garnishee, see *King v. Harrigan*, 142 Mich. 477.

#### (13126). Failure of Garnishee to File Disclosure.

SEC. 5. If such garnishee does not appear and file his disclosure with the clerk of the court as aforesaid, on or before the return day of such writ, or if the time for so doing be extended, as hereinafter provided, then at the expiration of such extended period, or if special interrogatories shall be filed and served as provided by this chapter, and such garnishee does not file his answers thereto as required by the notice thereon, or if demand for his examination before a judge or a circuit court commissioner be filed and a copy served as provided by this chapter, and such garnishee does not appear and submit



to an examination, as required by the notice indorsed thereon, the default of such garnishee for want of appearance and disclosure, or want of answers to such special interrogatories, or for want of appearance and submission to such examination, may be entered in the cause, and made absolute as in other personal actions, and in case a final judgment against the principal defendant, judgment may be rendered and execution issued against such garnishee, his goods and chattels, lands and tenements, for such amount as the plaintiff shall recover against the principal defendant. Such defaults may be set aside for any cause for which defaults for want of appearance and plea may be set aside upon such terms as the court shall impose.

**HISTORY:** Re-enacts Sec. 5 of Act 264 of '61; As Am. '63, p. 398, Act 231, Eff. June 22; being C. L. '71, (6469); As Am. '79, p. 271, Act 256, Eff. Aug. 30; How. 8062; C. L. '97, (10604), making slight changes in phraseology. Unchanged.

**WHEN GARNISHEE DEFAULTS:** The law not only recognizes the garnishee's right to default, but provides what the practice shall be in such case. *Hebel v. Amazon Ins. Co.*, 33 Mich. 402; see also *Traveler's Ins. Co. v. Kent Circuit Judge*, 144 Mich. 688. Where he makes no active opposition and defaults, it is not the design of the law to inflict any costs against him up to judgment. *Johnson v. Delbridge*, 35 Mich. 436. But costs may be awarded against him, if he unsuccessfully contests his liability. *Strong v. Hollon*, 39 Mich. 411.

**GARNISHEE'S RIGHTS:** The garnishee defendant is entitled to his day in court. *Iron Cliffs Co. v. Lahais*, 52 Mich. 394.

#### (13127). Time for Disclosure Charged.

**SEC. 6.** A circuit court commissioner of the county where such proceedings shall be commenced, or the circuit judge, may, for proper cause shown, by affidavit of any credible person, make an order extending the time for the garnishee to file his disclosure, and such order shall be filed with the clerk of the court, and a copy thereof served on the plaintiff, or his attorney, but such time shall not be extended more than three times, except by consent.

**HISTORY:** Re-enacts Sec. 6 of Act 264 of '61; As Am. '63, p. 398, Act 231, Eff. June 22, being C. L. '71, (6470); How. 8063; C. L. '97, (10605), making slight changes in phraseology, and omitting the last clause in the old section. **Modified.**

**CITED:** *Foster v. Kent Circuit Judge*, 116 Mich. 286.

#### (13128). Notes Belonging to Principal Defendant.

**SEC. 7.** If upon the disclosure, or the trial of the statutory issue hereinafter provided for, it shall appear that the gar-

nishee had in his possession at the time of the service of the process upon him, or thereafter, any promissory note, bill of exchange, order, receipt, bond, or other written promise for the payment of money, or the delivery of property belonging to the principal defendant, the garnishee shall deliver the same to the commissioner or other person appointed by the judge or commissioner as a receiver, if by him or the courts so ordered; and it shall be his duty, under the direction of the court to collect and apply the proceeds upon any execution in favor of the plaintiff and against the garnishee, and to pay him the surplus, if any.

**HISTORY:** Re-enacts Sec. 8 of Act 264 of '61, being C. L. '71, (5471); How. 8064; C. L. '97, (10606). Unchanged.

**CONSTRUED:** This statute applies only in case the note, etc., belongs to the principal defendant. *Kennedy v. McLellan*, 76 Mich. 605; *Smith v. Menominee Circuit Judge*, 53 Mich. 561. Mandamus lies to vacate interlocutory orders under this section. *Townsend v. Cass Circuit Judge*, 39 Mich. 407.

**CITED:** *Barnes v. Wayne Circuit Judge*, 81 Mich. 377; *Peninsular Sav. Bank v. Union Trust Co.*, 127 Mich. 358.

#### (13129). Property Subject to Mortgage.

Sec. 8. If it shall appear, as aforesaid, that the garnishee had in his possession, as aforesaid, any personal property of the principal defendant, and that the same is subject to any pledge, lien or mortgage, and at the time of the disclosure has not been sold by the garnishee, the same shall be delivered by the garnishee to the commissioner or receiver, if the commissioner or judge so order, to be by him disposed of under the direction of the court, if a greater amount than the incumbrance can be obtained therefor, and after paying the amount of such incumbrance to apply the balance as aforesaid, or the plaintiff may be allowed by like order to pay or tender the amount due the garnishee.

**HISTORY:** Re-enacts Sec. 9 of Act 264 of '61, being C. L. '71, (6472); How. 8065; C. L. '97, (10607). Unchanged.

**CONSTRUED:** Receiver's powers and duties. *Smith v. Judge*, 53 Mich. 560.

**CITED:** *Daggett v. McClintock*, 56 Mich. 54; *Meigs v. Weller*, 90 Mich. 636; *Cohnen v. Sweenie*, 105 Mich. 643; *Old Second Nat. Bank v. Williams*, 112 Mich. 568; *Peninsular Sav. Bank v. Union Trust Co.*, 127 Mich., 358.

#### (13130). Liability of Garnishee for Refusal to Comply.

Sec. 9. If, in either of the cases specified in the two preced-

ing sections, the garnishee shall refuse to comply with the order of the judge or commissioner for delivering, such garnishee shall be held liable for the amount of the note, order, choses in action, or personal property, upon the report of the commissioner of such refusal and amount, and judgment shall be rendered and execution issued accordingly, as upon default.

**HISTORY:** Re-enacts Sec. 10 of Act 264 of '61, being C. L. '71, (6473); How. 8066; C. L. '97, (10608). Unchanged.

**(13131). Report to Include Statement of Order.**

**SEC. 10.** In either of said cases the judge, commissioner, or receiver, shall add to his report a statement of any order made by him, and the delivery to him of any property or thing, with a description and valuation thereof, to be ascertained by appraisement or inquiry upon oath, or in such mode as the commissioner or judge shall direct.

**HISTORY:** Re-enacts Sec. 11 of Act 264 of '61, being C. L. '71, (6474); How. 8067; C. L. '97, (10609), omitting the last clause of the old section which reads "to his satisfaction." Unchanged.

**(13132). Affidavit Held to be Declaration.**

**SEC. 11.** The affidavit for the writ of garnishment shall be held and considered as a declaration by the plaintiff against the garnishee as defendant; and upon the filing of the garnishee disclosure, or upon filing of the answers to such written interrogatories, in cases where the same are required and filed, or upon the filing of the report of the testimony or statement made by such garnishee on such personal examination in cases where such examination is had, the matter of such affidavit shall be considered as denied, except so far as the same is admitted by such disclosure, answers to interrogatories or report, which admission shall have the effect of admissions in a plea, and also shall be prima facie evidence of the matters therein admitted. And thereupon a statutory issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff. And judgment may be rendered against such garnishee defendant, as upon declaration and plea, or on plaintiff's motion to the court at any time after final judgment against the defendant in the principal cause, without further notice to such garnishee: *Provided, however,* If such plaintiff or such garnishee defendant shall within ten days after filing of such disclosure, answer, or statement, file with the clerk of

such court a demand for trial of the cause, said cause shall stand for trial in the manner provided by this act. A jury may be had on demand of either party. The time for filing said demand may be extended by the court upon application and showing.

**HISTORY:** Re-enacts Sec. 12 of Act 264 of '61, being C. L. '71, (6475); As Am. '79, p. 271, Act 256, Eff. Aug. 30; How. 8068; As Am. '95, p. 332; Act 178, Eff. Aug. 30; C. L. '97, (10610), making a number of changes in phraseology and adding the above proviso. Modified.

**CONSTRUED:** This section must be construed with Compilers' Section (13149). Where the garnishee declares that other persons than the defendant make claim to the fund or indebtedness and pays the same into court, he has no further interest in the proceedings, except to have the rights of such claimants and the principal defendant determined. And where the garnishee's statement is accepted as true, except as it relates to the third party's claim, there is no necessity or propriety in demanding, as against the garnishee, a trial of that question. The claimant must be brought in for that purpose. *Muncey v. Sun Ins. Office*, 109 Mich. 542.

**DECLARATION:** *Bethel v. Linn*, 63 Mich. 470. The statute, in providing that the affidavit shall be treated as a declaration, does not require as many separate affidavits as there are garnishees severally indebted. *State Sav. Bank of Detroit v. Wayne Circuit Judge*, 95 Mich. 103. Where the garnishee has made disclosure, a bill of particulars of what is to be established against him is not a matter of right. *Strong v. Hollon*, 39 Mich. 411.

**STATUTORY ISSUE:** Sufficiency of disclosure to entitle plaintiff to demand a trial. *Hobson v. Kelley*, 87 Mich. 187.

"Within ten days," see *Heald v. Montcalm Circuit Judge*, 166 Mich. 299. See also *Fearey v. Cummings*, 41 Mich. 376; *Serviss v. Washtenaw Circuit Judge*, 116 Mich. 101; *King v. Harrigan*, 142 Mich. 478; *Id.*, 145 Mich. 437.

### (13133). Judgment for Plaintiff Before Garnishment.

**SEC. 12.** In case judgment shall have been rendered in favor of the plaintiff in the principal action, before the commencement of such garnishee proceedings, or before the framing of such statutory issue, such issue shall be brought to trial in the same manner as a personal action; but in case judgment shall not have been so recovered in the principal action, then such statutory issue shall stand for trial at the term at which the issue against the principal defendant shall be tried and finally disposed of; and, if the latter issue be determined against the plaintiff at any time thereafter, upon motion of the garnishee, judgment shall be entered in his favor upon the statutory issue, and for costs against the plaintiff, reciting the framing of such issue, and the judgment in favor of the principal defendant.

**HISTORY:** Re-enacts Sec. 13 of Act 264 of '61; As Am. '67, p. 224, Act 172, Eff. June 27, being C. L. '71, (6476); How. 8069; C. L. '97, (10611). Unchanged.

**CONSTRUED:** A garnishee defendant waives the right secured to him, by this and the next section, to have the statutory issue tried at the same term at which judgment is rendered against the principal defendant, by noticing the case for trial for a subsequent term. *Cluett v. Rosenthal*, 100 Mich. 193. This act contemplates a speedy determination of the garnishee's liability, and any considerable delay by plaintiff, not consented to or acquiesced in by the garnishee, will be cause for a dismissal of the proceedings against him. *Kiely v. Bertrand*, 67 Mich. 333; *Blake v. Hubbard*, 45 Mich. 1. But pendency of a cause for fifteen months will not of itself warrant the dismissal of garnishment proceedings, if the defense have raised no question of laches. *Webber v. Bolte*, 51 Mich. 113.

#### (13134). When Statutory Issue Triable.

**SEC. 13.** If the plaintiff obtain judgment against the principal defendant, in the circuit court, and the latter does not, within two days thereafter, serve upon the garnishee notice of motion for new trial, or of his intention to remove the cause to the supreme court, the statutory issue shall stand for trial at any time thereafter the same as in other cases.

**HISTORY:** Supersedes and re-enacts in part Sec. 14 of Act 264 of '61, being C. L. '71, (7477); How. 8070; C. L. '97, (10612). Modified.

**CONSTRUED:** See notes to preceding section. Laches on the part of plaintiff in failing to bring the statutory issue to trial at the "next term," how waived. *Meigs v. Weller*, 90 Mich. 629. It is a question whether the notice to be served upon the "garnishee" was not meant to be given to the plaintiff. *Crippen v. Fletcher*, 56 Mich. 388. The issue in garnishment can be tried on the same day as the principal suit, if the garnishee is willing; but he cannot be forced to trial within two days from the trial of the principal suit. *Id.*

If the notice, as provided in this section, is served, the cause cannot be tried. *Wattles v. Wayne Circuit Judge*, 119 Mich. 357. See *Cluett v. Rosenthal*, 100 Mich. 193; *W. H. Warner Coal Co. v. Nelson*, 204 Mich. 317.

#### (13135). Evidence on Trial.

**SEC. 14.** Upon the trial, the report or any other competent evidence supporting or controverting it, may be offered by the plaintiff, and the garnishee may offer any evidence not controverting the disclosure, or in the discretion of the court he may be allowed to show errors and mistakes in his disclosure, and may also show the amount of the judgment and costs against the principal defendant.

**HISTORY:** Re-enacts Sec. 15 of Act 264 of '61, being C. L. '71, (6478); How. 8071; C. L. '97, (10613). Unchanged.

**TRIAL:** On the trial of the statutory issue, the controversy is between the garnishee and the creditor; subsequent attaching and garnishing creditors should not be permitted to intervene. *Keppel v. Moore*, 66 Mich. 292. Waiver of defects in affidavit. *Id.* The judgment against the principal debtor may be shown by the Judgment entry. *Strong v. Hollon*, 39 Mich. 411. Where the garnishee claims an issue, his denials of indebtedness or possession of property, in his disclosure, are not conclusive, but the plaintiff is entitled to prove such indebtedness or possession. *Fearey v. Cummings*, 41 Mich. 376.

How it may be shown. *Cummings v. Fearey*, 44 Mich. 39.

**GARNISHEE'S DISCLOSURE:** The garnishee is not permitted to show errors or mistakes in his disclosure, except in the discretion of the court. *Allen v. Hazen*, 26 Mich. 144.

### (13136). Amount of Judgment Against Garnishee.

**Sec. 15.** If by the verdict the garnishee be found liable, as such, for an amount equal to or greater than the judgment and costs against the principal defendant, judgment shall pass only for the latter amount; in other cases it shall pass for the amount of liability ascertained by the verdict.

**HISTORY:** Re-enacts Sec. 16 of Act 264 of '61, being C. L. '71, (6479); How. 8072; C. L. '97, (10614). Unchanged.

**CONSTRUED:** If the garnishee's disclosure does not show possession or control of property, or indebtedness, it will not support a judgment against him. *Townsend v. Cass Circuit Judge*, 39 Mich. 407. A judgment against a garnishee, rendered upon a false disclosure, may be vacated. *First National Bank v. Mellen*, 45 Mich. 413. Judgment cannot be rendered against a garnishee, until he has been summoned to show cause to the contrary, or has consented. *Iron Cliffs v. Lahais*, 52 Mich. 394. Judgment held erroneous, for want of definite proof of the money value of the property for which the garnishee was liable, *Keppel v. Moore*, 66 Mich. 292. No judgment can be rendered against garnishee, unless it will discharge him from liability to principal defendant. *Hamilton v. Rogers*, 67 Mich. 135.

See *Bethel v. Linn*, 63 Mich. 470.

### (13137). Costs.

**Sec. 16.** If on such trial judgment shall be rendered against the garnishee for a greater amount, or for other property than he would have been chargeable for on his disclosure, it shall carry full costs, otherwise the garnishee shall recover costs; execution shall issue as in ordinary cases.

**HISTORY:** Re-enacts Sec. 17 of Act 264 of '61, being C. L. '71, (6480); How. 8073; C. L. '97, (10615). Unchanged.

**CONSTRUED:** A garnishee, after denying indebtedness, is liable for costs, if judgment is rendered against him. *Jackson v. Leelanau Circuit Judge*, 107 Mich. 332; *Strong v. Hollen*, 39 Mich. 411. This section construed with Compilers' Section (13160). *Wolcott v. Lena-*

wee Circuit Judge, 107 Mich. 267. When the garnishee makes no active opposition and allows the case to go on by suffering default, it is not the design of the law to inflict costs against him up to the judgment. *Johnson v. Delbridge*, 35 Mich. 440. This section applies to all contested cases. *Wolcott v. Lenawee Circuit Judge*, 107 Mich. 268. *Peninsular Stove Co. v. Wayne Circuit Judge*, 85 Mich. 400.

**(13138). Trial of Statutory Issue After Confirmation of Principal Judgment.**

SEC. 17. Whenever, in case of recovery by the plaintiff against the principal defendant, he shall have removed the same to the supreme court, and the judgment shall have been affirmed, the statutory issue, in garnishment, shall stand for trial at any time thereafter, the same as in other cases.

HISTORY: Re-enacts Sec. 18 of Act 264 of '61, being C. L. '71, (6481); How. 8074; C. L. '97, (10616), changing the phraseology to that part of the section which relates to the time the statutory issue shall stand for trial. Modified.

CONSTRUED: The garnishee defendant cannot be compelled to go to trial while an appeal of the principal suit is pending. *Wattles v. Wayne Circuit Judge*, 119 Mich. 357. See *Blake v. Hubbard*, 45 Mich. 4. See note to (13134).

**(13139). When Indebtedness of Garnishee not Matured.**

SEC. 18. When the garnishee shall be found indebted to the principal defendant, and the time of payment shall not have arrived, no judgment shall pass until after the time of maturity, which shall be named in the finding or verdict.

HISTORY: Re-enacts Sec. 19 of Act 264 of '61, being C. L. '71, (6482); How. 8075; C. L. '97, (10617). Unchanged.

CITED: *Hobson v. Kelly*, 87 Mich. 189. See *Wattles v. Wayne Circuit Judge*, 119 Mich. 356.

**(13140). Judgment for Property not Subject to Lien.**

SEC. 19. When the garnishee shall be chargeable, by reason of any goods or chattels, other than money, which he holds or is bound to deliver to the principal defendant, not subject to any lien, judgment shall be rendered and execution issued against the garnishee for so much thereof as may be necessary to satisfy the same, and he shall make delivery to the officer, who shall sell and apply and account for the proceeds as usual in ordinary executions.

HISTORY: Re-enacts Sec. 20 of Act 264 of '61, being C. L. '71, (6483); How. 8076; C. L. '97, (10618). Unchanged.

CONSTRUED: The law regards the garnishee in the light of a

stakeholder of the property in his hands, and as being indifferent to which of the parties in the principal suit it shall be delivered; and, when he is adjudged liable as garnishee, it permits him to turn out such property to the officer holding the execution against him, and when he does so he is discharged from all further liability to the plaintiff and to the defendant in the principal suit. *Bethel v. Linn*, 63 Mich. 471.

See *Keppel v. Moore*, 66 Mich. 292.

**(13141). When Under Contract to Deliver Articles.**

SEC. 20. If the garnishee be found to be under contract for the delivery of any specific article to the principal defendant, or to make payment therein, judgment shall be rendered and execution issued against the garnishee for so much thereof as shall be necessary to satisfy such execution, which articles shall be paid and delivered to the plaintiff according to the contract.

HISTORY: Re-enacts Sec. 21, of Act 264 of '61, being C. L. '71, (6484); How. 8077; C. L. '97, (10619). Unchanged.

**(13142). When Contract Specifies Time of Delivery.**

SEC. 21. When such specific goods were to be delivered to the principal defendant at a certain time and place, the garnishee shall not be compelled, by reason of the garnishment, to deliver at any other time and place, but may deliver as provided for in the contract, unless previously adjudged liable as garnishee.

HISTORY: Re-enacts Sec. 22 of Act 264 of '61, being C. L. '71, (6485); How. 8078; C. L. '97, (10620). Unchanged.

**(13143). Plaintiff Deemed Agent of Principal Defendant.**

SEC. 22. The plaintiff shall be deemed the agent of the principal defendant for the purpose of recovering the goods, chattels and articles mentioned in the two preceding sections, and may levy his execution thereon to the amount of his debt and costs; and if no division of such goods, chattels or articles can be made, the whole may be sold; and the property unsold, and the surplus proceeds of the property sold, shall be delivered by the officer to the principal defendant on demand.

HISTORY: Re-enacts Sec. 23 of Act 264 of '61, being C. L. '71, (6486); How. 8079; C. L. '97, (10621), changing "overplus" to "surplus." Unchanged.



**(13144). When Garnishee Refuses to Expose Articles for Levy.**

SEC. 23. If any person adjudged liable as garnishee for any goods, chattels, or other property whatever shall refuse to expose the same so that the plaintiff may levy his execution thereon, the court shall, on return thereof made by the officer, grant a rule upon such garnishee to show cause why execution should not issue against said garnishee, his own goods and estate; and upon due service of such rule, and no sufficient cause shown to the contrary, execution shall be issued against him for such sum as the court may adjudge.

HISTORY: Re-enacts Sec. 24 of Act 264 of '61, being C. L. '71, (6487); How. 3080; C. L. '97, (10622). Unchanged.

**(13145). Bills of Exchange and Other Negotiable Instruments are Deemed Effects.**

SEC. 24. All bills of exchange and promissory notes, or other negotiable instruments, in the hands of the garnishee at the time of the service of the writ of garnishment, shall be deemed effects under the provisions of this chapter, and if it shall appear by the disclosure, that the garnishee at such time, or thereafter, and prior to the disclosure, is indebted to the principal defendant by such bill, note or negotiable instrument made payable in this state, or the parties to which, at the time of making the same, resided in this state, the judge or commissioner may issue a citation requiring the principal defendant to appear before him within ten days and answer on oath all interrogatories respecting the possession, transfer, or other disposition of said bills, notes or other negotiable instruments, and such order may contain the name of any other person supposed to claim an interest in such paper, so that he may appear and show that the same was transferred to him in good faith, and for an adequate consideration, before the service of the writ of garnishment; and such citation may be served by any person at least five days prior to the return day, service shown by affidavit, and annexed to the commissioner's report. Such citation shall also contain an order enjoining and restraining said principal defendant from selling, transferring, or in any way disposing of any such bill of exchange, promissory note or other negotiable instrument; and in case of any violation by said defendant of such order, he shall be deemed guilty of a contempt of the court in which such action is pending, and shall be punishable as in other cases of contempt.

**HISTORY:** Re-enacts Sec. 25 of Act 264 of '61, being C. L. '71, (6488); How. 8081; C. L. '97, (10623), making a number of changes in phraseology and adding the last sentence in the above section. Modified.

**RESTRAINING ORDER IN GARNISHMENT CASES:** Provision has been made for the making of an order, in garnishment cases, where the disclosure shows an indebtedness to the principal defendant upon any negotiable instrument, restraining the transfer of such instrument by the defendant and making a violation of such order a contempt of court.

**CONSTRUED:** Barnes v. Wayne Circuit Judge, 81 Mich. 374; Littlefield v. Hodge, 6 Mich. 326; Somers v. Losey, 48 Mich. 294; Serviss v. Washtenaw Circuit Judge, 116 Mich. 101.

**CITED:** Smith v. Holland, 81 Mich. 326.

**(13146). Examination.**

**SEC. 25.** The parties cited shall be examined in like manner as the garnishee, and if it shall not appear that the note or bill was so transferred the maker or acceptor shall be charged as garnishee, and the payment of the judgment rendered against him shall be a discharge from the note, or such part thereof as is equal to the amount so paid by him, together with all costs taxed in his favor.

**HISTORY:** Re-enacts Sec. 26 of Act 264 of '61, being C. L. '71, (6489); How. 8082; C. L. '97, (10624). Unchanged.

**CITED:** Barnes v. Wayne Circuit Judge, 81 Mich. 377.

**(13147). Refusal to Appear on Citation.**

**SEC. 26.** If the principal defendant, or other party cited shall refuse to appear upon such citation upon the filing of the report, he may be proceeded against as for a contempt, or brought before the court on a bench warrant, and fined in the discretion of the court, and held in custody until disclosure to the court, the same to be reduced to writing by the clerk and attached to the report.

**HISTORY:** Re-enacts Sec. 27 of Act 264 of '61, being C. L. '71, (6490); How. 8083; C. L. '97, (10625). Unchanged.

**CITED:** Barnes v. Wayne Circuit Judge, 81 Mich. 377.

**(13148). Use of Disclosure as Evidence in Criminal Proceedings.**

**SEC. 27.** No disclosure, as answer of any person, or any other proceeding under the provisions of this chapter, shall be used in evidence upon any criminal prosecution against such person, except upon a prosecution of the garnishee for perjury in making his disclosure.

**HISTORY:** Re-enacts Sec. 28 of Act 264 of '61, being C. L. '71, (6491); How. 8084; C. L. '97, (10626), changing "act" to "chapter." Unchanged.

**(13149). Proceedings of Third Parties Claiming Property.**

**SEC. 28.** When the answer of the garnishee shall declare that any other person than the defendant claims the indebtedness or property in his hands, or any part thereof, and the name and residence of such claimant, the court may, on motion, order that such claimant be inter-pleaded as a defendant to the garnishee action, and that notice thereof, setting forth the fact that a copy of such order in such form as the court shall direct, be served upon him; and after such service shall have been made, the garnishee may pay or deliver such indebtedness or property to the clerk of the court, and have a receipt thereof, which shall be a complete discharge from all liability to any party for the amount so paid or the property so delivered. Such notice shall be served within or without this state by any competent person, and proof of the fact of such service shall be made by affidavit and filed with the clerk of the court where such garnishee proceedings are commenced. If such personal service cannot be had, then such service shall be made as the court shall direct. Upon such service being made and proof thereof being filed in the cause, such claimant shall be deemed a defendant to the garnishee action and within twenty days shall answer, setting forth his claim or any defense which the garnishee might have made. In case of default, judgment may be rendered, which shall conclude any claim on the part of such defendant; for the purpose of trying the title as between the plaintiff and any defendant or defendants, and between two or more defendants so interpleaded, to the money, property or indebtedness paid to or delivered to the clerk as aforesaid, the court may order an issue to be formed and may proceed to try the same or direct the trial thereof by a jury as in other cases. Such issue may be in the form provided in this chapter for actions between the plaintiff and the garnishee; and the judgment or judgments entered therein shall have the same force and effect as in suits between the same parties relative to the same subject matter.

**HISTORY:** Re-enacts Sec. 29 of Act 264 of '61, being C. L. '71, (6492); How. 8085; As Am. '85, p. 242, Act 176, Eff. Sept. 19; As Am. '95, p. 332, Act 178, Eff. Aug. 30; C. L. '97, (10627); As Am. '01, p. 91,

Act 60, Eff. Sept. 5, making a number of changes in phraseology especially in that part of the section relating to service. Modified.

CONSTRUED: See first note to Compilers' Section (13132). The appearance by intervention is comparatively new practice. *Moore v. Graham*, 58 Mich. 27. Prior to amendment of '85, see *Butler v. Wendell*, 57 Mich. 62. See *Laidlaw v. Morrow*, 44 Mich. 549. The claimant has the burden of sustaining his claim. *Jackson v. People's Savings Bank*, 120 Mich. 703. Under such disclosure the garnishee has no further interest in the proceedings except to have the right as between such claimant and the principal defendant determined. *Muncey v. Sun Ins. Office*, 109 Mich. 544. This statute extends to any case where the disclosure and examination show a disputed claim to a fund in the garnishee's possession, which the plaintiff claims to be the property of the principal defendant or owing to him. *Marx v. Wayne Circuit Judge*, 119 Mich. 20; *Crampton v. Crampton*, 205 Mich. 235.

CITED: *Kennedy v. McLellan*, 76 Mich. 604; *Smith v. Holland*, 81 Mich. 471; *Burnham v. Home Ins. Co.*, 119 Mich. 589; *Stephens v. Penn. Casualty Co.*, 135 Mich. 195; *Nachtegall v. Reilley*, 165 Mich. 352.

### (13150). Proceedings Against Non-Residents.

SEC. 29. If the plaintiff, in addition to the allegations hereinbefore required to be contained in the affidavit for the writ of garnishment, shall set forth in such affidavit that the principal defendant is a non-resident of the county or state where the suit is commenced, or that one of the principal defendants is a non-resident of the county or state, where there is more than one principal defendant, or a foreign corporation created in any jurisdiction (naming it), the principal writ or declaration and affidavit may be filed of the day of issue, and the writ of garnishment may be served as in ordinary cases; and within sixty days after such service the plaintiff shall cause to be delivered to such non-resident defendant or defendants, or the president, secretary, cashier or treasurer of such foreign corporation residing out of this state, or upon any officer, clerk or agent residing or to be found within this state, a true copy of the principal writ or declaration, affidavit and writ of garnishment, with return of service thereon, and with a written or printed notice attached, signed by the plaintiff or his attorney, stating that said non-resident defendant or defendants, or foreign corporation, is notified to appear and defend within thirty days after such service, or default will be entered and judgment taken, and upon filing an affidavit of such service, further proceedings to judgment may be had as in ordinary personal actions. If there is more than one defendant, some of whom reside within this state, notice shall be served on the resident

defendants of the time and manner of giving notice to the non-resident defendants.

**HISTORY:** Re-enacts Sec. 31 of Act 264 of '61, being C. L. '71, (6494); How. 8087; C. L. '97, (10629); As Am. '01, p. 92, Act 60, Eff. Sept. 5. Unchanged.

**NON-RESIDENTS:** *Hamilton v. Rogers*, 67 Mich. 135; *Axtell v. Gibbs*, 52 Mich. 639. This section does not cover a case where there are several defendants, some of whom are residents of this state and who are personally served with process within the jurisdiction of the court. *Wilson v. Wayne Circuit Judge*, 82 Mich. 169. It was held in *Newland v. Wayne Circuit Judge*, 85 Mich. 151, that, where both plaintiff and principal defendant are non-residents of the state suit may be maintained in this state, and the credits of the defendants subjected to the jurisdiction of the courts of this state, in the county where a debtor of the principal defendant resides. *Stern v. Wayne Circuit Judge*, 105 Mich. 685. In such cases garnishment proceedings must be had in a county where the principal defendant has property or credits subject to garnishment. *Id.* It was held in *Moore v. Wayne Circuit Judge*, 55 Mich. 84, that the courts of this state had jurisdiction under this statute against the property of non-resident defendants by process of garnishment. *Newland v. Wayne Circuit Judge*, 85 Mich. 153. It was held in *Newland v. Wayne Circuit Judge*, 85 Mich. 151, that this statute points out the procedure to acquire jurisdiction over the principal defendant, not for the purpose of rendering a personal judgment against him, but to subject the choses in action in the hands of a third party; and to that extent it confers jurisdiction upon the court to proceed. *Serviss v. Washtenaw Circuit Judge*, 116 Mich. 101.

**FOREIGN CORPORATIONS:** The failure to describe defendant as a foreign corporation in the summons will not be fatal to jurisdiction. *Williams v. G. & S. Board*, 99 Mich. 80. But an affidavit that describes such foreign corporation by its corporate name, but fails to allege its corporate existence, or whether it is a co-partnership, or whether located in this state or country, or that it ever did any business, is fatally defective. *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 331.

**CITED:** *Butler v. Wendell*, 57 Mich. 64; *Moore v. Graham*, 58 Mich. 27; *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 157; *Bresnahan v. Nugent*, 92 Mich. 87; *McDonald v. Alanson Mfg. Co.*, 107 Mich. 10; *Coe v. Hinkley*, 109 Mich. 613; *Gorman v. Calhoun Circuit Judge*, 140 Mich. 231. Service on the President while inside the state good. *National C. Co. v. C. G. C. & M. Co.*, 168 Mich. 195.

### (13151). Proceedings Commenced by Attachment.

**SEC. 30.** Whenever the action shall be commenced by writ of attachment against a non-resident defendant or foreign corporation, and a writ of garnishment shall issue, the same proceedings shall be had in respect to personal service upon the principal defendant, as are specified in the previous section.

**HISTORY:** Re-enacts Sec. 32 of Act 264 of '61, being C. L. '71, (6495); How. 8088; C. L. '97, (10630). Unchanged.

**CITED:** *Axtell v. Gibbs*, 52 Mich. 639.

**(13152). Amount of Judgment Against Garnishee.**

SEC. 31. When the garnishee shall be adjudged liable as such except when it is otherwise specially provided, judgment shall be rendered and execution issue against such garnishee, his own goods and estate, for the amount of the judgment and costs against the principal defendant, if the garnishee's liability shall be for so much, otherwise for the amount thereof.

HISTORY: Re-enacts Sec. 34 of Act 264 of '61, being C. L. '71, (6497); How. 8090; C. L. '97, (10631), changing "account" to "amount." Unchanged.

CONSTRUED: See notes to Compilers' Section, (13136).

**(13153). Garnishee in Case of Title Void as to Creditors.**

SEC. 32. If any person garnisheed shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to creditors of the defendant, or if any person garnisheed shall have received and disposed of any of the property aforesaid of the principal defendant, which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable as garnishee on account of such property and for the value thereof, although the principal defendant could not have maintained an action therefor against him.

HISTORY: Re-enacts Sec. 35 of Act 264 of '61, being C. L. '71, (6498); How. 8091; As Am. '89, p. 366, Act 244, Eff. Oct. 2; C. L. '97, (10632). Unchanged.

CONSTRUED: Application of the amendatory Act of '89, see *Heineman v. Schloss*, 83 Mich. 153. As to what property may be reached and the garnishee may be liable for, see notes to Compilers' Sections (13123) and (14365). This section allows property conveyed in fraud of creditors to be reached. *Blake v. Hubbard*, 45 Mich. 4, citing *Fearey v. Cummings*, 41 Mich. 376; *Farrington v. Sexton*, 43 Mich. 454; *Cummings v. Fearey*, 44 Mich. 39. Garnishment process will not reach property transferred absolutely and in good faith by a public officer to the surety on his official bond, to enable the latter to secure his own and principal's liability. *Spear v. Rood*, 51 Mich. 140. See *Gumberg v. Treusch*, 103 Mich. 543.

BULK SALES LAW: Garnishment will lie for goods sold without complying with Sale-In-Bulk Law. *Pierson & Hough Co. v. Noret*, 154 Mich. 267; *Musselman v. Kidd*, 151 Mich. 478. Garnishee liable when the mortgage was void as to plaintiff. *Baker v. Parkhurst*, 119 Mich. 542. See *Banner Cigar Mfg. Co. v. Treusch*, 125 Mich. 265.

CITED: *Bethel v. Linn*, 63 Mich. 471; *Bresnahan v. Nugent*, 92 Mich. 87; *Baker v. Parkhurst*, 119 Mich. 547; *Musselman v. Kidd*, *Dater Co.*, 151 Mich. 481; *Pierson & Hough Co. v. Noret*, 154 Mich. 269.

**(13154). Several Garnishees.**

SEC. 33. Two or more persons, severally liable, may be garnisheed in the same action, and their disclosures and all other proceedings shall be several and judgment shall be rendered for such sum as the court shall order, for or against each severally, and execution may issue accordingly.

HISTORY: Re-enacts Sec. 36 of Act 264 of '61, being C. L. '71, (6499); How. 8092; C. L. '97, (10633). Unchanged.

CONSTRUED: Several persons cannot be held as joint garnishees unless the principal defendant is indebted to them jointly. *Ball v. Young*, 52 Mich. 476. Money in the hands of a third person belonging to one of two joint defendants may be garnished to satisfy a claim against both defendants. *Roof v. Blake*, 187 Mich. 38; citing, *Meigs v. Weller*, 90 Mich. 629. See also *Ferry v. Underwriters*, 111 Mich. 263.

CITED: *State Sav. Bank of Detroit v. Wayne Circuit Judge*, 95 Mich. 103.

**(13155). Execution Against Principal Defendant for Balance.**

SEC. 34. Execution may be issued by the court against the principal defendant for any balance due the plaintiff, on his judgment against such defendant, beyond the amount for which the garnishee or garnishees shall be found liable; and further execution may be issued from time to time, against such defendant, or any garnishee, as the court may order, until the satisfaction of the judgment in full.

HISTORY: Re-enacts Sec. 37 of Act 264 of '61, being C. L. '71, (6500); How. 8093; C. L. '97, (10634), changing "judgment is full" to "judgment in full." Unchanged.

**(13156). Effect of Judgment as Garnishee.**

SEC. 35. The judgment against any person, as the garnishee, shall acquit and discharge such garnishee, his executors or administrators, from all demands by the principal defendant, his executors or administrators, for all such moneys or property, as aforesaid, paid or delivered by the garnishee by force of such payment; and if any garnishee shall be sued therefor, or for anything done by virtue of the provisions of this chapter, he may, under the general issue, give the special matter in evidence.

HISTORY: Re-enacts Sec. 38 of Act 264 of '61, being C. L. '71, (6501); How 8094; C. L. '97, (10635). Unchanged.

**(13157). When Person Garnisheed Resides Out of County.**

SEC. 36. If any person named in the affidavit for the writ of

garnishment shall be stated to reside out of the county in which the suit in garnishment is brought, such writ may be served by any competent person, and any execution against the garnishee shall be directed to the sheriff of any county in this state in which such person may reside. Such sheriff shall serve said execution in the manner required to be served in other cases, and shall make return of his doings to the clerk of the county from which the execution issued.

**HISTORY:** Re-enacts Sec. 39 of Act 264 of '61; As Am. '67, p. 225, Act 172, Eff. June 27; being C. L. '71, (6502); How. 8095; C. L. '97, (10636), changing the phraseology of that part of the section relating to service. Modified.

**CONSTRUED:** This section contemplates the issue of the writ to different counties, but only when there is jurisdiction of the original suit in the county where the suit is planted, obtained either by personal service or attachment of property or credits within that county. *Stern v. Wayne Circuit Judge*, 105 Mich. 687; *Nichol v. Nevers*, 196 Mich. 208.

**CITED:** *Raniville v. Kent Circuit Judge*, 118 Mich. 198.

### (13158). Who Not Adjudged Garnishee.

**SEC. 37.** No person shall be adjudged a garnishee in either of the cases following, to-wit:

1. By reason of any money or thing received or collected by him as sheriff or other officer, by force of an execution or other legal process, in favor of the principal defendant;

2. By reason of any money in his hands as a public officer, for which he is accountable, merely as such officer, to the principal defendant;

3. Nothing in this chapter contained shall be applicable to any indebtedness of such garnishee to the principal defendant, for the personal labor of such defendant, or his family, unless such indebtedness exceed the amount allowed him as exempt under section five of chapter seventy-six of this act, and in case of such excess, only to the amount of such excess.

**HISTORY:** Re-enacts Sec. 40 of Act 264 of '61, being C. L. '71, 6503; As Am. '79, p. 272, Act 256, Eff. Aug. 30; How. 8096; C. L. '97, (10637), with a necessary change in phraseology in referring to a following section, and changing "act" to "chapter." Modified.

**SECOND:** A receiver is not a public officer under this statute. But the equitable doctrine against interfering with receivers is quite as broad as the statute and rests on the same policy. *Cohnen v. Sweeney*, 105 Mich. 645; *Tremper v. Brooks*, 40 Mich. 333; *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 278. Registers in chancery cannot be garnished. *Id.*; *Voorhees v. Sessions*, 34 Mich. 99.

**THIRD:** Prior to amendment. *Martz v. Detroit Fire & Marine Ins.*



Co., 28 Mich. 201; Thorp v. Preston, 42 Mich. 511. Sec. 5 of Ch. 76 of this act is Compilers' Section (14365).

**(13159). Garnishee Allowed Set-Off.**

SEC. 38. Every garnishee shall in his disclosure be allowed to claim any off-set which he may justly have against the principal defendant, of which he could have availed himself if he had not been garnisheed, and shall be liable only for the balance after adjustment of mutual demands: *Provided*, That in such adjustment no claims for unliquidated damages for wrongs or injuries shall be considered.

HISTORY: Re-enacts Sec. 41 of Act 264 of '61, being C. L. '71, (6504); How. 8097; C. L. '97, (10638), making a few changes in phraseology. Modified.

CONSTRUED: The garnishee's exemption of any demand to which he may be entitled as against the principal defendant does not apply when the property in his hands was wrongfully obtained. Cummings v. Fearey, 44 Mich. 39.

**(13160). Costs of Garnishee Allowed.**

SEC. 39. If the garnishee shall appear and make disclosure, as before provided, he shall be allowed his costs for trial and attendance as in case of a witness, and in case an attorney is employed to prepare such disclosure such further sum as the court shall think reasonable for his counsel fees and other necessary expenses; and in case he shall be adjudged liable, the same may be taxed and deducted from the property or money in his hands, and he shall be chargeable only for the balance, and if the garnishee shall be discharged, whether by reason of his having no money or property, or because the plaintiff shall not recover judgment against the principal defendant, or for any other cause, his said costs and charges shall be paid by the plaintiff, and the garnishee may have the same taxed, and judgment and execution therefor.

HISTORY: Re-enacts Sec. 42 of Act 264 of '61, being C. L. '71, (6505); How. 8098; C. L. '97, (10639), changing the phraseology of that part of the section relating to attorney's fees allowed garnishee. Modified.

CONSTRUED: An order allowing costs to a garnishee after the discontinuance of proceedings against him, and without notice to the defendants in the principal suit, is a nullity. Kaufman v. Hude, 37 Mich. 123. Further as to costs see notes to Compilers' Section (13137); and Moore v. Graham, 58 Mich. 29; Wolcott v. Lenawee Circuit Judge, 107 Mich. 267. The "costs and charges" are such as may be fixed in the circuit court upon motion. Globe Casket Mfg. Co. v. Wolcott, 106

Mich. 151. And are discretionary with the trial court. United States Life Insurance Co. v. Muskegon Circuit Judge, 117 Mich. 319.

**(13161). Penalty for False Answer.**

SEC. 40.\* If any person summoned as a garnishee, or if any officer, agent or other person who shall appear and answer for a corporation so summoned, shall, upon his disclosure or examination on oath, knowingly and wilfully answer falsely, he shall, out of his own goods and estate, pay to the plaintiff in garnishment, or to his executors and administrators, the full amount due on the judgment recovered therein, with interest, to be recovered in a special action on the case; and he shall, moreover, on conviction thereof, upon indictment, be adjudged guilty of perjury.

HISTORY: Re-enacts Sec. 43 of Act 264 of '61, being C. L. '71, (6506); How. 8099; C. L. '97, (10640). Unchanged.

**(13162). What Deemed Discontinuance.**

SEC. 41. A failure to recover judgment against the principal defendant, or a satisfaction of such judgment, in any manner, shall be deemed a discontinuance of all proceedings against the garnishee.

HISTORY: Re-enacts Sec. 44 of Act 264 of '61, being C. L. '71, (6507); How. 8100; C. L. '97, (10641). Unchanged.

CITED: Bethel v. Superior Court Judge, 57 Mich. 379; Foster v. Kent Circuit Judge, 116 Mich. 287.

**(13163). Reversal of Judgment.**

SEC. 42. Any judgment or final order in a suit in garnishment may be set aside or removed to the supreme court, in like manner with the same effect as in other personal actions.

HISTORY: Re-enacts Sec. 45 of Act 264 of '61, being C. L. '71, (6508); How. 8101; C. L. '97, (10642). Unchanged.

CITED: Writ of error lies as to order quashing the writ of garnishment. Record v. St. Clair Circuit Judge, 139 Mich. 157.

**(13164). Order for Amended Report.**

SEC. 43. Any party may have an order on the commissioner for amendment of his report, or for a further report upon a motion for cause shown and after like notice as in other cases; and upon like proceedings any party may have any other order on the commissioner to which he may be entitled, at any time, in the progress of the cause.

**HISTORY:** Re-enacts Sec. 46 of Act 264 of '61, being C. L. '71, (6509); How. 8102; C. L. '97, (10643), changing the phraseology of that part of the section relating to motion. Modified.

**(13165). Bond for Stay of Proceedings.**

**SEC. 44.** The principal defendant in any such action, where-in process of garnishment shall have been issued, may at any time after service of such process, and previous to the rendering of judgment thereon, file with the clerk of the court his bond, with at least two sufficient sureties, to the plaintiff as obligee in a penal sum equal to double the amount of the claim of the plaintiff, as sworn to in the affidavit filed for the writ of garnishment, and with conditions to pay any judgment obtained against the defendant or defendants in such action, and abide the order of the court therein, and which bond and the sureties thereof shall be previously approved by the judge of the court or circuit court commissioner, on a notice of at least twenty-four hours, to the plaintiff or his attorney, of the time and place of presenting such bond for approval; and if neither the plaintiff nor his attorney shall reside in the same city, village or township where said bond is to be presented for approval, such notice shall be a notice of at least four days, and at least one day shall be added to such notice, for each additional one hundred miles, or fraction thereof, of distance; and such judge or commissioner shall examine the defendant and sureties on oath as to their sufficiency and responsibility, and may take other evidence in relation thereto in his discretion, as either party may offer. On filing such bond so approved, with the clerk of the court, the proceedings in garnishment shall be thereby discontinued, and the costs thereof shall abide the event of the principal suit; and if the plaintiff shall recover judgment against the principal defendant, on application to the court, execution thereon may be ordered to issue against the sureties in such bond, as well as the defendant. Whenever any proceedings in garnishment shall be discontinued, by reason of the filing of such bond, as above provided, the clerk of the court shall forthwith notify the attorney for the plaintiff in such suit, of the filing of such bond, and such attorney shall, within twenty-four hours after the receipt of such notice from the clerk, give notice in writing, to the persons against whom process of garnishment shall have been issued, that the proceedings in garnishment in such suit have been discontinued, which notice shall be served upon the attorney for the garnishee, if he shall have appeared by attorney.

otherwise upon the garnishee, and may be served in the same manner as other notices are required to be served.

**HISTORY:** Re-enacts Sec. 49 of Act 264 of '61; As Added '63, p. 398, Act 231, Eff. June 22; As Am. '67, p. 228, Act 175, Eff. June 27, being C. L. '71, (6512); How. 8105; C. L. '97, (10646), making a number of changes in phraseology altering the practice slightly. **Modified.**

**CITED:** Loh v. Wayne Circuit Judge, 26 Mich. 186; Grosslight v. Crisup, 58 Mich. 533; Burt v. Wayne Circuit Judge, 82 Mich. 252; Foster v. Kent Circuit Judge, 116 Mich. 287; Hogle v. Wayne Circuit Judge, 160 Mich. 574.

#### (13166). Judgment Upon Default of Principal Defendant.

SEC. 45. In all cases where the principal defendant does not appear in the cause within the time fixed by the statute and rules of court for such appearance, the plaintiff shall proceed and perfect his judgment against such principal defendant as soon as he shall be entitled thereto under the rules and practice of the court, and in default thereof such court may, in its discretion, on motion of the garnishee defendant or any one interested in the proceedings, render judgment discontinuing such garnishee proceedings with costs against the plaintiff.

**HISTORY:** Re-enacts Sec. 50 of Act 264, of '61; As Added '73, p. 80, Act 68, Eff. July 31, being How. 8106; C. L. '97, (10647). **Unchanged.**

**CITED:** Blake v. Hubbard, 45 Mich. 4; Moore v. Wayne Circuit Judge, 55 Mich. 86; Foster v. Kent Circuit Judge, 116 Mich. 287.

See Noble v. Bourke, 44 Mich. 193; Axtell v. Gibbs, 52 Mich. 641.

#### (13167). Garnishment of Corporations.

SEC. 46. All corporations of whatsoever nature, *the State of Michigan and every county therein*, may be served and *proceeded* against as garnishees in the same manner and with like effect as individuals under the provisions of this chapter and the rules of law relative to proceedings against corporations: *Provided*, That when a municipal corporation, the State of Michigan, or any county therein, is proceeded against as provided for in this chapter, judgment shall have been obtained in a court of competent jurisdiction by the plaintiff against the principal defendant before garnishment proceedings shall be commenced against such municipal corporation, the State of Michigan or any county therein: *Provided further*, That in all cases of foreign corporations, if the officer or agent served shall neglect or refuse to file disclosure to said writ, as hereinbefore in this chapter provided, the default of said foreign corporation may be entered as in other cases, and

upon entry of judgment against the principal defendant, judgment may be entered in said garnishee proceedings against said foreign corporation for the amount thereof, including costs: *Provided further*. That no judgment on default shall be rendered against said foreign corporation until the expiration of sixty days after the entry of judgment against the principal defendant, and the plaintiff shall within twenty days after judgment against the principal defendant, serve notice by mail on the foreign corporation at its home office that judgment had been obtained against the principal defendant; and that at the expiration of sixty days from the date of said judgment application would be made for judgment against it, as hereinbefore provided. Said notice shall be substantially as follows:

In the circuit court for the county of .....  
 ....., plaintiff,

v.

....., defendant.  
 ....., garnishee defendant.

To said garnishee defendant:

Take notice, that on the .....day of.....Anno Domini..... judgment for the sum of..... dollars including costs, was entered in said court against the above named principal defendant, and at the expiration of sixty days from the entry of said judgment, application will be made to said court for the entry of judgment against you as garnishee defendant in said cause.

Yours, etc.,

.....  
 Plaintiff's Attorney.

**HISTORY:** Re-enacts Sec. 30 of Act 264 of '61, being C. L. '71, (6493); How 8086; As Am. '89, p. 400, Act 266, Eff. Oct. 2; C. L. '97, (10628); As Am. '03, p. 91, Act 68, Eff. Sept. 17; As Am. '11, p. 369, Act 214, Eff. Aug. 1; Sec. 46 of Chap. 28 of Act No. 314, P. A. '15, as amended by Act No. 233, P. A. '19, omitting, however, that part of the section relating to service and disclosure, and changing "act" to "chapter"; therefore slightly modified before the last amendment. The latter is shown by italics.

**CONSTRUED:** Prior to the amendment of '89, there was no statute in this state providing for the service of a writ of garnishment upon a foreign corporation. *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 155; *Drueke-Lynch Co. v. Corson*, 204 Mich. 180; qualified in *German-American Ins. Co. v. Chippewa Circuit Judge*, 105 Mich. 566; See *National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co.*, 168 Mich. 196. As to "general agent," see *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464; *Lake Shore & Mich. S. Ry. v. Hunt*,

39 Mich. 471; Kirby-Carpenter Co. v. Trombley, 101 Mich. 448. The mode of service of garnishment process upon foreign corporations is absolutely within the discretion of the legislature; and their right to do business within the state depends upon a compliance with this statute. First Nat. Bank v. Burch, 80 Mich. 245. A return of service upon a corporation as garnishee defendant is fatally defective if it does not show upon what officer of the company the writ was served. McCain v. Mandell, 187 Mich. 73; L. S. & M. S. Ry. Co. v. Hunt, 39 Mich. 469.

CITED: Hewitt v. Wagar Lumber Co., 38 Mich. 701; Hebel v. Amazon Ins. Co., 33 Mich. 400.

## CHAPTER XXIX.

### OF THE ACTION OF EJECTMENT.

#### (13168). When May be Brought.

**SECTION 1.** The action of ejectment is retained, and may be brought in the cases and in the manner heretofore accustomed, subject to the provisions hereinafter contained.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 108, being C. L. '57, (4554); C. L. '71, (6204); How. 7788; C. L. '97, (10947). Unchanged.

**AUTHORITY OF ATTORNEY IN EJECTMENT CASES:** Secs. (10962)-(10963)-(10964)-(10965)-(10966), C. L. '97, relating to compelling an attorney to prove his authority in ejectment cases have been omitted from the statute relating to ejectment.

**EJECTMENT:** Is a possessory action and does not necessarily involve the title. *Covert v. Morrison*, 49 Mich. 133; *Bertram v. Cook*, 44 Mich. 396. But not purely a possessory action; it may determine the title. *Kinney v. Harrett*, 46 Mich. 89-90; *Bringhurst v. Grand Rapids & I. Railroad Co.*, 78 Mich. 572. Ejectment and the statutory proceeding to recover possession are the only possessory remedies known in this state. *Wilkinson v. Williams*, 51 Mich. 155. It is substantially a real action and is a proceeding to try titles as well as to determine the right of possession. It is the only action for determining titles to land. *M. C. R. R. Co. v. McNaughton*, 45 Mich. 87. It is the only proper remedy where the holder of a legal title seeks to enforce it against one in possession claiming under an invalid title. *King v. Carpenter*, 37 Mich. 363. And against a party in possession claiming adversely. *Tabor v. Cook*, 15 Mich. 322; *Hoffman v. Beard*, 22 Mich. 59. As to adverse possession, see notes to *Compilers' Section* (12311). It is the proper action in which to try boundary lines. *Drake v. Happ*, 92 Mich. 580. Ejectment does not lie against a city to oust it from the use of the public street. *Graham v. Detroit*, 174 Mich. 538.

**LAW OR EQUITY:** A court of law is the appropriate tribunal for the trial of titles to land. The claimant of a legal title has a right to have the facts, upon which his claim is based, submitted to a jury, and it is only when the remedy at law is inadequate that resort can be had to equity. *Moran v. Palmer*, 13 Mich. 370; *Devaux v. Detroit*, Har. 98; *Blackwood v. Van Vleet*, 11 Mich. 255-6; *Bennett v. Nichols*, 12 Mich. 24-5; *Tabor v. Cook*, 15 Mich. 325; *Hoffman v. Beard*, 22 Mich. 63; *Tefft v. Stewart*, 31 Mich. 371-2; *Shaw v. Chambers*, 48 Mich. 358; *Mears v. Howarth*, 34 Mich. 19; *Bay City Bridge Co. v. Van Etten*, 36 Mich. 310; *Douglass v. Boardman*, 113 Mich. 618. But there may be occasion for invoking the aid of equity, if the suit at law involves but a portion of the controversy (*Eaton v. Trowbridge*, 38 Mich. 454); or if, after its determination, there may remain an apparent title of record clouding the legal title (*F. & P. M. R. Co. v. Gordon*, 41 Mich. 420);

but those are exceptional cases. *Shaw v. Chambers*, 48 Mich. 358. A court of equity is the proper forum for determining whether or not the owner of the title cut off in tax proceedings is entitled to a reconveyance from the tax title owner. *Wilson v. Sauble*, 181 Mich. 408. Ejectment involves the legal title only and not equitable interests or claims. *Ryder v. Flanders*, 30 Mich. 336; *Whiting v. Butler*, 29 Mich. 122; *Conrad v. Long*, 33 Mich. 78; *Jeffrey v. Hursh*, 42 Mich. 563; *Buell v. Irwin*, 24 Mich. 145; *Harrett v. Kinney*, 44 Mich. 457; *Van Auken v. Monroe*, 38 Mich. 725; *Hayes v. Livingston*, 34 Mich. 384; *Moran v. Moran*, 106 Mich. 12; *Michigan Land & Iron Co. v. Thoney*, 89 Mich. 231; *Paldi v. Paldi*, 95 Mich. 410; *Geiges v. Greiner*, 68 Mich. 153; *Shaw v. Hill*, 83 Mich. 327; *Yale v. Stevenson*, 58 Mich. 537. See *Nims v. Sherman*, 43 Mich. 46; *White v. Hapeman*, 43 Mich. 267. Only strictly legal rights are involved in an action of ejectment. *Povell v. Pierce*, 168 Mich. 427. *Olin v. Henderson*, 120 Mich. 149.

### (13169). Extension of Action.

SEC. 2. The action of ejectment may also be brought:

1. In the same cases in which a writ of right might formerly be brought to recover lands, tenement, or hereditaments, and by any person claiming an estate therein, in fee, or for life, either as heir, devisee or purchaser;

2. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower of any lands, tenements or hereditaments.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 108, being C. L. '57, (4555); C. L. '71, (6205); How. 7739; C. L. '97, (10948), changing in the first subdivision "may now" to "might formerly." Unchanged.

SUBDIVISION 1: As to the rights of the heir and the administrator in the real estate, see notes to Compilers' Section (13850).

SUBDIVISION 2: As to dower and its recovery, see notes to Compilers' Section (11654).

The authority for bringing an action of ejectment to recover dower rests entirely upon the statutes, in which form of action alone it is recoverable in this state. *Galbraith v. Fleming*, 60 Mich. 412; *Proctor v. Bigelow*, 38 Mich. 285. In *re McLennan's Est.*, 179 Mich. 600. The widow can bring ejectment for dower before assignment of the same, after the expiration of six months from the time her right accrues. *Rea v. Rea*, 63 Mich. 263; *Galbraith v. Fleming*, 60 Mich. 408; *Douglass v. Boardman*, 113 Mich. 618. Such action does not necessarily determine the right of possession in the sense ordinarily applicable to ejectment suits, but determines her right to dower in the whole premises, without judgment of ouster, as in other cases; and after such general judgment the circuit court must proceed to admeasure and assign her dower, the same in all respects as in probate proceedings. *Rea v. Rea*, 63 Mich. 264; *Galbraith v. Fleming*, 60 Mich. 412; *Snyder v. Snyder*, 6 Mich. 473-4. But the statutory right to recover unassigned dower is vested solely in the widow and is not available to her assignee. *Galbraith v. Fleming*, 60 Mich. 414. The widow can bring her action



against strangers as well as against her husband's heirs. *Bemis v. Conley*, 49 Mich. 393. Recovery of dower is barred by the statutory limitation upon actions of ejectment. *Proctor v. Bigelow*, 38 Mich. 282. And when a purchaser from the administrator has gone into possession under an understanding with the widow for the occupation and enjoyment of her dower interest, rendering her rent therefor, she cannot maintain ejectment against him without first terminating the tenancy. *Gustin v. Burnham*, 34 Mich. 511; *Johnston v. Loose*, 201 Mich. 261.

### (13170). Who May Recover in Ejectment.

SEC. 3. No person can recover in ejectment, unless he has at the time of commencing the action a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.

HISTORY: Re-enacts Sec. 3, R. S. '46, Ch. 108, being C. L. '57, (4556); C. L. '71, (6206); How. 7790; C. L. '97, (10949). Unchanged.

INTEREST IN PREMISES: An incorporeal easement, such as the use of a street or alley, is not such an interest in land as will support ejectment. *Grand Rapids v. Whittlesey*, 33 Mich. 109; *Bay Co. v. Bradley*, 39 Mich. 163; *Taylor v. Gladwin*, 40 Mich. 232; *Harrington v. Pt. Huron*, 86 Mich. 52. Nor will ejectment lie for lands which the owners had offered to dedicate nearly 50 years before, but had never been accepted. *Cass County Supervisors v. Banks*, 44 Mich. 467. But a lot owner, upon a public street, has a valid, subsisting interest in the land lying between his lot and the center of the street, and may maintain ejectment against one who ousts him of its use and possession. *Smeberg v. Cunningham*, 96 Mich. 385. Plaintiff showing title, running back for a long time, presumed to hold by direct chain of title from government, unless defendant claims under some one in position to disturb that presumption. *Steinhauser v. Kuhn*, 50 Mich. 367; *Drake v. Happ*, 92 Mich. 580. Ejectment by holder of tax title. *Van Auken v. Monroe*, 38 Mich. 725. By trustees of legal title to cemetery. *Buena Vista Township Board of Health v. East Saginaw*, 45 Mich. 257. By administrator, for land acquired by foreclosure of mortgage. *Kunzie v. Wixom*, 39 Mich. 384. By person holding under patent from the state, issued prematurely or on mistake of fact. *Romain v. Lewis*, 39 Mich. 233. By landlord against tenant after expiration of tenancy, on no other showing than the recognition of title which is always implied in a tenancy. *Kinney v. Harrett*, 46 Mich. 87. Further, as to the interest necessary to support ejectment. *Goodall v. Henkel*, 60 Mich. 382; *Reilly v. Blaser*, 61 Mich. 399; *Busch v. Nester*, 62 Mich. 382; *Bringhurst v. Grand Rapids & I. Railroad Co.*, 78 Mich. 570; *Shaw v. Hill*, 79 Mich. 86; 83 Mich. 322; *Michigan Land & Iron Co. v. Thoney*, 89 Mich. 226. Plaintiff must rely on the sufficiency of his own title. *Van Vleet v. Blackwood*, 39 Mich. 728; *Crooks v. Whitford*, 47 Mich. 285. Every right must rest on its own foundation and not on another's weakness. *Stockton v. Williams*, 1 Doug. 556. Plaintiff's right of action depends upon the statute of limitations in force when his right of action accrued. *Stambaugh v. Snoblin*, 32 Mich. 296. An outstanding

title, to bar a suit in ejectment must appear to be a present, subsisting and operative legal title, on which its owner could sue and recover. *Bennett v. Horr*, 47 Mich. 221. A tenant's rights rest upon corresponding rights in his landlord. *Bertram v. Cook*, 44 Mich. 396. When plaintiff claims under circuit court execution on transcript from justice court. *Monaghan v. McKimmie*, 32 Mich. 40.

A plaintiff in ejectment must rely upon the strength of his own title. *West Mich. Park Ass'n. v. Pere Marquette Railroad Co.*, 172 Mich. 179. Ejectment will not lie by a city to oust a railway company from the use of and occupancy of the public highway. *City of Detroit v. Detroit United Railway Co.*, 172 Mich. 147.

**RIGHT OF POSSESSION:** One cannot recover in ejectment, unless he had a right of possession at the time of bringing the action. *Mich. Land & Iron Co. v. Thoney*, 89 Mich. 231; *Van Vleet v. Blackwood*, 39 Mich. 728; *Smith v. Cole*, 166 Mich. 165. A mortgagee has no right to possession, until after foreclosure. See notes to Compilers' Section (13221). Guardians for nurture have no right of possession of their ward's lands and cannot bring ejectment for it. *Kinney v. Harrett*, 46 Mich. 87. See *Donihue v. Rankin*, 31 Mich. 148. A deed absolute gives the right of possession and will sustain ejectment, even though meant as a mortgage, if nothing appears to show that intent. *Jeffrey v. Hursh*, 42 Mich. 563.

The vendee under a land contract may maintain ejectment against one who has ousted him from possession of the land. *Olin v. Henderson*, 120 Mich. 155. A vendor in a land contract giving the vendee the right of possession cannot maintain ejectment until he has in some manner terminated the contract relation. *Id. Kuite v. Lage*, 152 Mich. 638; citing *Covert v. Morrison*, 49 Mich. 135. An executor may maintain ejectment. *Moody v. Macomber*, 159 Mich. 661. One entitled to the possession of land merely, may maintain ejectment. *Id.* A plea of the general issue and notice of a former suit as a bar to the action constitute a deliberate assertion of title and possession hostile to the plaintiff's title. *Carpenter v. Carpenter*, 119 Mich. 168. See also *Lamb v. Lamb*, 139 Mich. 169; *West Mich. Park Asso. v. Pere Marquette R. Co.*, 172 Mich. 179; *Olin v. Henderson*, 120 Mich. 156.

#### (13171). Who to be Defendants.

SEC. 4. If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named a defendant; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein at the commencement of the suit; and all persons claiming any title to the premises adverse to that claimed by the plaintiff, may in all cases be made defendants in such action.

**HISTORY:** Re-enacts Sec. 4, R. S. '46, Ch. 108, being C. L. '57, (4557); C. L. '71, (6207); How. 7791; C. L. '97, (10950), omitting, "in the declaration." Unchanged.

**CONSTRUED:** The "interest therein," mentioned in this section, means some legal interest, and not a mere equity. *Dawson v. Peter*, 119 Mich. 281.

**DEFENDANT:** Ejectment must be brought against the actual occupant, if any. *Lockwood v. Drake*, 1 Mich. 14; *Clark v. Hall*, 19 Mich. 374; *Crane v. Seltz*, 30 Mich. 457; *Hoyt v. Southard*, 58 Mich. 432; *Haddy v. Tobias*, 85 Mich. 327; *Farrand v. Kavanaugh*, 132 Mich. 437. And all persons claiming any title adverse to plaintiff's claim may be united as defendants. *Crane v. Seltz*, 30 Mich. 457. Ejectment against any person exercising acts of ownership, or claiming title or interest. *Harrington v. Pt. Huron*, 86 Mich. 55; *Heinmiller v. Hatheway*, 60 Mich. 395-6; *Hoyt v. Southard*, 58 Mich. 432; *Anderson v. Courtright*, 47 Mich. 161; *Whitely v. Whitely*, 110 Mich. 557. The non-joinder of one who occupies a distinct portion of the premises only, limits the recovery by excluding that portion. *Hendricks v. Rasson*, 42 Mich. 104. Ejectment for distinct parcels of land must be brought against each separate holding. *Walsh v. Varney*, 38 Mich. 73. It is competent for plaintiff to bring in a landlord and tenant as defendants; and the tenant may call upon his landlord to defend. *Powers v. Scholtens*, 70 Mich. 299. Defendant, claiming that he was put in possession by the national government, must show the government's right to be paramount to plaintiff's, in order to defeat a recovery. *Scranton v. Wheeler*, 113 Mich. 565. An action of ejectment is not barred after ten years occupancy, if it does not appear that defendant's possession was adverse to plaintiff. *Perkins v. Nugent*, 45 Mich. 156. Defendants in ejectment need not, at common law, show title from the beginning, but can base their defense upon actual possession under a prima facie valid claim of title. *Maxwell v. Paine*, 53 Mich. 32; *Hall v. Kellogg*, 16 Mich. 139; *Gamble v. Horr*, 40 Mich. 561.

**HOMESTEAD INTERESTS:** The wife is a necessary party to an action of ejectment to recover possession of premises occupied by her and her husband as a homestead. *Kalkes v. Storms*, 93 Mich. 480; citing *Hodson v. Van Fossen*, 26 Mich. 68; *Henry v. Gregory*, 29 Mich. 68; *Rowe v. Kellogg*, 54 Mich. 206; *Cleaver v. Bigelow*, 61 Mich. 47; *Haddy v. Tobias*, 85 Mich. 326. See *Sayles v. Curtis*, 45 Mich. 279; *Haviland v. Chase*, 116 Mich. 216. And this is equally necessary in a case where the plaintiff is proceeding after the foreclosure of a purchase money mortgage. *Haviland v. Chase*, 116 Mich. 216. But the wife is not a necessary party where the homestead is not concerned. *Bunce v. Bidwell*, 43 Mich. 542.

A plaintiff in ejectment cannot bring mortgagees in as parties defendant until after foreclosure and sale. *Dawson v. Peter*, 119 Mich. 281. See further as to necessary parties; *Powers v. Scholtens*, 79 Mich. 301; *Arnold v. Brechtel*, 174 Mich. 156. Under this section, where a husband and wife owned a lot as tenants by the entirety, and the husband built a fence enclosing a part of plaintiff's lot, the defendant's wife is not a necessary party, in the absence of a showing that she ever claimed the land in dispute. *Arnold v. Brechtel*, 174 Mich. 147, 20 D. L. N. 19, 140 N. W. 610. Unless in actual possession of the premises, he cannot be made a party defendant. *Dawson v. Peters*, 119 Mich. 281. New parties defendant. *Ferrand v. Kavanaugh*, 132 Mich. 436; *Whitely v. Whitely*, 110 Mich. 556; *Austin v. Crowell*, 193 Mich. 296.

**(13172). How Commenced.**

SEC. 5. The suit shall be commenced in the same manner as in personal actions except as hereinafter provided; and the names of the real claimants shall be inserted as plaintiffs, and all the former provisions of law concerning lessors of a plaintiff shall apply to such plaintiffs.

HISTORY: Re-enacts Sec. 5, R. S. '46, Ch. 108, being C. L. '57, (4558); C. L. '71, (6208); How. 7792; C. L. '97, (10951); As Am. '09, p. 20, Act 13, Eff. Sept. 1; omitting some of the phraseology relating to the commencement of suit. Modified.

**(13173). Who May Recover in Ejectment.**

SEC. 6. The use of fictitious names of plaintiffs or defendants, and of the names of any other than the real claimants and the real defendant, and the statement of any lease or demise to the plaintiff, and of an ejectment by a casual or nominal ejector, are abolished.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 108, being C. L. '57, (4559); C. L. '71, (6209); How. 7793; C. L. '97, (10952). Unchanged.

**(13174). Contents of Declaration.**

SEC. 7. It shall be sufficient for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title or right accrued, he was possessed of the premises in question, describing them as hereinafter provided, and being so possessed thereof that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state.

HISTORY: Re-enacts Sec. 7, R. S. '46, Ch. 108, being C. L. '57, (4560); C. L. '71, (6210); How. 7794; C. L. '97, (10953). Unchanged.

CONSTRUED: Averments. DeMill v. Moffatt, 49 Mich. 128. This section must be read in connection with Compilers' Section (13177). Goodall v. Henkel, 60 Mich. 384; Ford v. Bailey, 207 Mich. 80.

**(13175). Description of Premises.**

SEC. 8. In such declaration the premises claimed shall be described with such convenient certainty, by setting forth the section or part of a section, township and range, or the number of the lot, or otherwise, that from such description, possession of the premises claimed, may be delivered.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 108, being C. L. '57, (4561); C. L. '71, (6211); How. 7795; C. L. '97, (10954). Unchanged.

**DESCRIPTION:** Sufficiently certain. Seeley v. Howard, 23 Mich. 11; Lockwood v. Drake, 1 Mich. 14. Fatally defective. White v. Hapeman, 43 Mich. 267. Explanation of ambiguity in description. Purkiss v. Benson, 28 Mich. 538. Identification of lands on plat, by oral testimony. Johnstone v. Scott, 11 Mich. 232. See Reidinger v. Cleveland Iron Min. Co., 39 Mich. 30; Crooks v. Whitford, 47 Mich. 283; Dart v. Barbour, 32 Mich. 267. Plaintiff cannot recover lands not described in his declaration. Twogood v. Hoyt, 42 Mich. 609; Bringham v. Grand Rapids & I. Railroad Co., 78 Mich. 570; Ford v. Bailey, 207 Mich. 80.

#### (13176). Undivided Shares.

**SEC. 9.** If such plaintiff claims an undivided share or interest in any premises, he shall state the same particularly in such declaration.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 108, being C. L. '57, (4562); C. L. '71, (6212); How. 7796; C. L. '97, (10955). Unchanged.

**CONSTRUED:** No recovery can be had of the defendant for more than the amount of interest claimed. De Mill v. Moffatt, 49 Mich. 128. Nor for any interest acquired subsequent to defendant's alleged entry. *Id.*

See Butler v. Porter, 13 Mich. 292; Bringham v. Grand Rapids & I. Railroad Co., 78 Mich. 573; Ford v. Bailey, 207 Mich. 80.

#### (13177). Dower Interest.

**SEC. 10.** If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as widow of her husband, naming him. In every other case the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or for the life of another, or for a term of years, or otherwise, specifying such lives, or the duration of such term.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 108, being C. L. '57, (4563); C. L. '71, (6213); How. 7797; C. L. '97, (10956). Unchanged.

**CONSTRUED:** The declaration must set forth the estate claimed by plaintiff. Ludeman v. Hirth, 96 Mich. 18; Goodall v. Henkel, 60 Mich. 384; Kinney v. Harrett, 46 Mich. 90; Bringham v. Grand Rapids & I. Rd. Co., 78 Mich. 573. But plaintiff is not bound to aver the character of his title, except as to its extent. Richards v. Pierce, 44 Mich. 447. The omission to describe the title may be amended after judgment. Fisher v. Hallock, 50 Mich. 463.

If the plaintiff is a widow, seeking dower, she must set forth this claim. Olin v. Henderson, 120 Mich. 156.

#### (13178). Several Counts and Plaintiff.

**SEC. 11.** In any case other than where the action is brought

for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs, jointly in one count, and separately in others.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 108, being C. L. '57, (4564); C. L. '71, (6214); How. 7798; C. L. '97, (10957). Unchanged.

**(13179). Security for Costs.**

**SEC. 12.** All the provisions of law relating to security for costs, shall be applicable to the action of ejectment.

**HISTORY:** Re-enacts a part of and supersedes Sec. 12, R. S. '46, Ch. 108, being C. L. '57, (4565); C. L. '71, (6215); How. 7799; C. L. '97, (10958). Modified.

Security in the form of certificate of deposit. *Smith v. Kent Circuit Judge*, 139 Mich. 464.

**(13180). Service of Process.**

**SEC. 13.** If the premises are actually occupied, the process or declaration shall be served by delivering a copy thereof to the defendant named therein, who shall be in the occupation thereof, personally, or by leaving the same with some person of proper age, at the dwelling house of such defendant, if he be absent.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 108, being C. L. '57, (4566); C. L. '71, (6216); How. 7800; C. L. '97, (10959), making some changes in phraseology. Modified.

**CONSTRUED:** Service. *Lockwood v. Drake*, 1 Mich. 15; *Austin v. Crowell*, 193 Mich. 298.

**(13181). Personal Service.**

**SEC. 14.** If the defendant, or any defendant named in the declaration or process by which the suit is commenced, shall not occupy the premises claimed by plaintiff, such declaration or process shall be served upon such defendant personally, if such defendant can be found within this state, and such service may be made in any part thereof; if such declaration or process issued therein cannot be served by reason of the defendant not being found within this state, the same proceedings shall be had as in chancery cases, in the case of absent, concealed or non-resident defendants.

**HISTORY:** Re-enacts in part and supersedes Sec. 14, R. S. '46, Ch. 108, being C. L. '57, (4567); As Am. '61, p. 469, Act 222, Eff. June 15; C. L. '71, (6217); How. 7801; As Am. '85, p. 38, Act 40, Imd. Eff. Apr. 10; C. L. '97, (10960). Changed.

**SUBSTITUTED SERVICE IN EJECTMENT CASES:** If service of process in ejectment cases can not be made by reason of the defendant not being found within this state, an order for appearance may be had and published or served as in chancery cases.

**(13182). Default for Not Appearing.**

SEC. 15. Upon filing due proof of service of process, or declaration, or of the due publication of such order and compliance in all respects with the requirements of law in case of service by publication, or of the service of a copy of such order personally on such defendant within the time limited therein, if such defendant shall neglect to appear and plead within the time provided by law or rule of court, his default for not appearing and pleading may be entered as in other cases.

**HISTORY:** Re-enacts a part of and supersedes Sec. 16, R. S. '46, Ch. 108, being C. L. '57, (4569); As Am. '61, p. 470, Act 222, Eff. June 15; C. L. '71, (6218); How. 7802; C. L. '97, (10961). Changed.

**(13183). Defendant's Plea.**

SEC. 16. No demurrer, plea in abatement, or plea to the jurisdiction shall be filed, but the provisions of section five (see section four) of chapter fourteen shall be applicable in such cases. The defendant shall plead the general issue only as in personal actions, and under such plea, the defendant may give the same matter in evidence, and the same proceedings shall be had as upon a plea of not guilty in the former action of ejectment. Under such plea the defendant may give in evidence any matter, which if pleaded in the former writ of right, or action of dower, would bar the action of the plaintiff.

**HISTORY:** New section.

**GENERAL ISSUE—DEFENSES AVAILABLE:** In ejectment, under section 16, Chap. 29, Act No. 314, Pub. Acts 1975 (this section), the defense that a deed is void is available under plea of the general issue, notwithstanding Circuit Court Rule No. 23. *Kushler v. Weber*, 205 Mich. 400, 171 N. W. 365.

**(13184). Statements of Title to be Attached to Pleadings.**

SEC. 17. The plaintiff shall attach to his declaration, and the defendant to his plea, if he claims title, a statement of the title relied on, showing from and through whom such title was obtained, and the page and book where the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated and either party shall furnish the adverse party with a copy of any

unrecorded conveyance, or furnish a satisfactory reason for not doing so within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial, unless it has been sufficiently referred to in such statement, which on motion, may be made more specific, and may be amended as other proceedings.

**HISTORY:** This section merges and supersedes Sec's. '22 and 23, R. S. '46, Ch. 108, being C. L. '57, (4575)-(4576); C. L. '71, (6224)-(6225); How. 7808-9; C. L. '97, (10967)-(10968). Unchanged.

**DECLARATION AND PLEA IN EJECTMENT CASES:** It is required that the plaintiff shall attach to his declaration, and the defendant to his plea, if he claims title, a statement of the title relied on, showing from and through whom such title was obtained and the page and book where the same appears of record. If such title or any portion thereof is not in writing or does not appear of record, such fact shall be stated and either party shall furnish the adverse party with a copy of any unrecorded conveyance or furnish a particular reason for not doing so within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial unless it has been sufficiently referred to in such statement, which on motion may be made more specific, and may be amended as other proceedings.

**CONSTRUED:** A fraudulent deed may be as fully and effectually set aside in an action of ejectment as upon a bill of complaint in equity. *Cleland v. Taylor*, 3 Mich. 201. Merely equitable defenses not admissible. See notes to Compilers' Section (13168). "Law or equity." Defenses: Outstanding title. *Bennett v. Horr*, 47 Mich. 221. Underclaim of possession from national government. *Scranton v. Wheeler*, 113 Mich. 565. Limitation. *Perkins v. Nugent*, 45 Mich. 156. Homestead claim. *Amphlet v. Hibbard*, 29 Mich. 298. Tax deed. *Conn. Mut. Life Ins. Co. v. Bulte*, 45 Mich. 113; *Jeffrey v. Hursh*, 45 Mich. 61; *Hemmingway v. Drew*, 47 Mich. 554. A plea of the general issue is sufficient to admit, without notice, the defense of title by adverse possession. *Miller v. Beck*, 68 Mich. 78. But special notice, in the nature of a plea puis darrein continuance, would be necessary to admit the defense of a deed from plaintiff to defendant's wife, executed after suit begun. *Jenney v. Potts*, 41 Mich. 52. If, pending suit, plaintiff mortgages the land, there is nothing to hinder the defendant from buying it on foreclosure, and the title thus attained will enure to his benefit. *Snyder v. Hemmingway*, 47 Mich. 549.

A plea of the general issue and notice of a former suit as a bar to the action constitute an assertion of title. *Carpenter v. Carpenter*, 119 Mich. 168.

### (13185). Right to Possession Sufficient.

**SEC. 18.** It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises, at the



time of the commencement of the suit, as heir, devisee, purchaser or otherwise.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 108, being C. L. '57, (4577); C. L. '71, (6226); How. 7810; C. L. '97, (10969). Unchanged.

**CONSTRUED:** As to boundary lines between parties, see notes to Compilers' Sections (2488), (11688). Where defendants did not enter as plaintiff's tenants, they may show that his title had been divested by a stranger to the proceedings, as by a tax sale, *Lee v. Clary*, 38 Mich. 223.

**(13186). Lease, Entry and Ouster.**

**SEC. 19.** It shall not be necessary on the trial for the defendant to confess, nor the plaintiff to prove, lease, entry and ouster, or either of them, except as provided in the next section; but this section shall not be construed to impair, nor in any way to affect, any of the rules of evidence in force, in regard to the maintenance and defense of the action.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 108, being C. L. '57, (4578); C. L. '71, (6227); How. 7811; C. L. '97, (10970), omitting "now." Unchanged.

**(13187). Ouster to be Proved in Certain Cases.**

**SEC. 20.** If the action be brought by one or more tenants in common, or joint tenants, against their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove on the trial of the cause, that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 108, being C. L. '57, (4579); C. L. '71, (6228); How. 7812; C. L. '97, (10971). Unchanged.

**OUSTER:** Question for jury. *LaFountain v. Dee*, 110 Mich. 347; *Highstone v. Burdette*, 54 Mich. 332. Evidence of. *Pierson v. Conley*, 95 Mich. 621; *Fenton v. Miller*, 94 Mich. 211; *Bailey v. Bailey*, 36 Mich. 185. See note, "Estates in common," to Compilers' Section (11561). Ouster may be admitted by the pleadings. *Carpenter v. Carpenter*, 119 Mich. 167. Ejectment against his cotenant where occupancy had existed twelve years. *Voss v. Life Insurance Co.*, 119 Mich. 167.

**(13188). Verdict Upon Joint Possession.**

**SEC. 21.** If the action be brought against several defendants and a joint possession or claim of title of all be proved, the plaintiff shall be entitled to a verdict against all, whether they shall have pleaded separately or jointly.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 108, being C. L. '57, (4580); C. L. '71, (6229); How. 7813; C. L. '97, (10972).

**CONSTRUED:** Necessity of showing joint occupation in case of two defendants. *Murphy v. Campau*, 33 Mich. 71.

**(13189). Verdict Upon Several and Distinct Possessions.**

**SEC. 22.** When the action is against several defendants, if it appear on the trial that any of them, at the commencement of the suit, occupied or claimed distinct parcels in severalty, or jointly, and that other defendants possessed or claimed other parcels in severalty, or jointly, all of which titles, possessions, or claims were derived from the same source, the jury in such case shall state particularly in their verdict the description of the parcel claimed by each of said defendants, when the said verdict shall be for the plaintiff; and in case the said several titles, claims or possessions were derived from a different source, the plaintiff shall elect at the trial, and before the testimony shall be deemed closed, against which he will proceed, and a verdict shall be rendered for the defendants not proceeded against.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 108, being C. L. '57, (4581); As Am. '69, p. 144, Act 78, Eff. July 5; C. L. '71, (6230); How. 7814; C. L. '97, (10973). Unchanged.

**CONSTRUED:** *Townsend v. Kreigh*, 133 Mich. 247.

**(13190). Rendering of Verdict in Certain Cases.**

**SEC. 23.** In the following cases the verdict shall be rendered as follows:

1. If it be shown on trial that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally;

2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant;

3. If the verdict be for any plaintiffs, and there be several defendants, the verdict shall be rendered against such of them as were in the possession of the premises, or as claimed title thereto, at the commencement of the action;

4. If the verdict be for all the premises claimed, as specified in the declaration, it shall in that respect be for such premises generally;

5. If the verdict be for a part of the premises described in

such declaration, the verdict shall particularly specify such part as the same shall have been proved, with the same certainty hereinbefore required in the declaration, in the description of the premises claimed.

6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in a part of the premises claimed, it shall specify such share, and shall describe such part of the premises as hereinbefore required;

7. The verdict shall also specify the estate or right which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, or for his own life, or for the life of another, stating such lives, or whether it be a term for years, or otherwise, and specifying the duration of such term.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 108, being C. L. '57, (4582); C. L. '71, (6231); How. 7815; C. L. '97, (10974). Unchanged.

**VERDICT:** Must follow the declaration, as to the description of the premises and the extent and quality of the estate claimed. *Bringhurst v. Grand Rapids & I. Railroad Co.*, 78 Mich. 572-8. As to certain other requirements in verdict, see *Beard v. Sherrick*, 67 Mich. 324. Verdict authorized by this section *McCammon v. Detroit L. & N. Railroad Co.*, 66 Mich. 444-5. Certain finding essential. *Hamblin v. Warner*, 30 Mich. 95. Verdict directed by the court, see *Gadsley v. Monroe*, 115 Mich. 285.

**SUBDIVISION 1:** *McCammon v. Detroit L. & N. Railroad Co.*, 66 Mich. 444-5.

**SUBDIVISION 2:** Where the declaration alleges a joint title in all the plaintiffs, it cannot be sustained by proof of title of part of the premises in one only of the plaintiffs; and this statute has no application to such a case, but contemplates a case where one or more of a greater number of plaintiffs are found to have a right to the possession of the entire premises. *Lynch v. Kirby*, 36 Mich. 243.

**SUBDIVISION 5:** As to description, see note to Compilers' Section (13175). See *Ensley v. Coolbaugh*, 160 Mich. 309.

**SUBDIVISION 7:** The verdict must in all cases specify the estate or right belonging to the plaintiff. *M. C. R. Co. v. McNaughton*, 45 Mich. 91; *Kinney v. Harrett*, 46 Mich. 90; *Cleland v. Taylor*, 3 Mich. 206; *Goodall v. Henkel*, 60 Mich. 384; *Shaw v. Hill*, 79 Mich. 92. Where such finding is not necessary. *Morse v. Hewell*, 28 Mich. 490; *Schweitzer v. Bird*, 204 Mich. 333; *Ford v. Bailey*, 207 Mich. 80.

#### (13191). Expiration of Plaintiff's Title Before Trial.

**SEC. 24.** If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be rendered that he recover his damages by reason of the

withholding of the premises by the defendant, to be assessed, and that as to the premises claimed, the defendant go thereof without day.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 108, being C. L. '57, (4583); C. L. '71, (6232); How. 7816; C. L. '97, (10975). Unchanged.

**JUDGMENT:** It is the general rule that judgment, in ejectment, rests on the title held at the beginning of the suit. *Snyder v. Hemmingway*, 47 Mich. 552; *M. C. R. Co. v. McNaughton*, 45 Mich. 87; *Hemmingway v. Drew*, 47 Mich. 554; *Hurd v. Raymond*, 50 Mich. 371. And changes occurring during the progress of the suit, however important as incidents, do not determine the result. *Hurd v. Raymond*, 50 Mich. 371. But this is not universal; and among the exceptions is the express one in this section, where the right or title of the plaintiff expires during the pendency of the action and before trial. *Hurd v. Raymond*, 50 Mich. 371. But this section contemplates cases in which terms and rights expire, and not cases where the right or title is simply transferred. *M. C. R. Co. v. McNaughton*, 45 Mich. 91; *Jenney v. Potts*, 41 Mich. 52. Effect of judgment under the statute different from that at common law. *Crane v. Seitz*, 30 Mich. 459. Judgment entry of recovery of premises described in declaration formally inaccurate, but cured by statute of amendments. *Morse v. Hewett*, 28 Mich. 490-92.

#### (13192). Suit Not to Abate by Death.

**SEC. 25.** The action of ejectment shall not be abated by the death of any plaintiff, or of one of the several defendants after issue and before verdict or judgment; but the same proceedings may be had as in other actions, to substitute the names of the executors or administrators, or of those who may succeed to the title of the plaintiff so dying, in which case the issue shall be tried as between the original parties; and in case of the death of a defendant, the cause shall proceed against the other defendants.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 108, being C. L. '57, (4584); C. L. '71, (6233); How. 7817; C. L. '97, (10976). Unchanged.

**CITED:** *Fells v. Barbour*, 58 Mich. 50.

#### (13193). Form of Judgment.

**SEC. 26.** In cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover the possession of the premises according to the verdict of the jury, if there was such verdict; or if the judgment be by default, according to the description thereof in the declaration, with costs to be taxed.

**HISTORY:** Re-enacts Sec. 32, R. S. '46, Ch. 108, being C. L. '57, (4585); C. L. '71, (6234); How. 7818; C. L. '97, (10977). Unchanged.

**CONSTRUED:** *Ford v. Bailey*, 207 Mich. 80.

**(13194). Writ of Possession.**

SEC. 27. The plaintiff recovering such judgment shall be entitled to a writ of possession, which shall be substantially in the following form:

In the name of the People of the State of Michigan.

To the sheriff of the county of .....

Whereas, A. B. has lately, in our circuit court for the county of ....., by the judgment of such court, recovered against C. D. the following described premises, to-wit: (describing the premises recovered with like certainty as above provided), which said premises have been and are still unjustly withheld from the said A. B. by the said C. D., whereof he is convicted as appears to us of record, and for as much as it is adjudged in the said court that the said A. B. have execution upon said judgment against the said C. D. according to the force, form and effect of his said recovery; Therefore we command you that without delay you deliver to the said A. B. possession of the said premises so recovered, with the appurtenances, and that you certify to our said court at, etc., on, etc., in what manner you shall have executed this writ. (If there be costs to be collected the proper clause may be here inserted.)

Witness, etc.

Said writ of possession may be issued to the sheriff or other proper officer of any county in this state, in which the premises recovered are situated, in all cases where such judgment of recovery shall have been or may hereafter be rendered.

HISTORY: Re-enacts Sec. 33, R. S. '46, Ch. 108, being C. L. '57, (4586); C. L. '71, (6235); How. 7819; As Am. '97, p. 21, Act 20, Eff. Aug. 30; C. L. '97, (10978). Unchanged.

CONSTRUED: Ford v. Bailey, 207 Mich. 80.

**(13195). Collection of Costs from Plaintiff.**

SEC. 28. Upon a judgment against the plaintiff, or one or more plaintiffs, in cases where they shall be liable for costs, execution for the collection of the same shall be issued, as upon judgments in personal actions.

HISTORY: Re-enacts Sec. 34, R. S. '46, Ch. 108, being C. L. '57, (4587); C. L. '71, (6236); How. 7820; C. L. '97, (10979). Unchanged.

**(13196). Effect of Judgment.**

SEC. 29. Every judgment in the action of ejectment, rendered upon a verdict, or upon default after personal service, shall be conclusive as to the title established in such action, upon

the party against whom the same is rendered, and against all persons claiming from, through or under such party, by title accruing after the commencement of such action, unless the same shall be set aside or reversed.

**HISTORY:** Re-enacts in part and supersedes Sec. 35, R. S. '46, Ch. 108, being C. L. '57, (4588); C. L. '71, (6237); How. 7821; C. L. '97, (10980). Modified.

**CONSTRUED:** A single judgment in ejectment is not necessarily final for any purpose. *Rice v. Aud. Gen.*, 30 Mich. 12; *Keyser v. Sutherland*, 59 Mich. 465-6. Ejectment cannot be revived against the legal representatives of a deceased defendant; but the action may be carried on against surviving defendants. *Hoffman v. St. Clair Circuit Judge*, 40 Mich. 351. Death of sole defendant. *Id.* See *Hoffman v. Harrington*, 41 Mich. 223. See further as to the construction of this section. *Bringham v. Grand Rapids & I. Railroad Co.*, 78 Mich. 573; *Reilly v. Blaser*, 61 Mich. 399; *Keyser v. Sutherland*, 59 Mich. 466; *Cleland v. Taylor*, 3 Mich. 206; *Hovey v. Smith*, 22 Mich. 170.

### (13197). Granting of New Trials.

**SEC. 30.** Except as hereinafter provided, new trials may be granted in ejectment cases for the same reasons, and in the same manner as in personal actions; but no new trial shall be granted as a matter of course.

**HISTORY:** This section is new and supersedes Sec. 36, R. S. '46, Ch. 108, being C. L. '57, (4589); C. L. '71, (6238); How. 7822; C. L. '97, (10981). Unchanged.

**NEW TRIALS IN EJECTMENT CASES:** New trials in ejectment cases, as a matter of course, have been abolished and the rules applicable to new trials in other cases are now to be applicable in ejectment cases.

**NEW TRIAL:** Under C. L. '97, (10981), (see history above) the trial judge had the authority to vacate a judgment in ejectment upon proper showing and grant a new trial, and in *Clairview Park Improvement Co. of Grosse Pointe v. Hosmer*, 172 Mich. 173, the court held that the party against whom judgment was rendered, upon payment of costs, might have a new trial as of course, apparently overruling *Stahl v. Dayton*, 126 Mich. 72, in which it was held that a defendant in moving for a new trial would be required to disclose the nature of his defense in order that the judge might exercise his judgment in determining whether justice would be promoted by a new trial. As to the losing party's right to a new trial under the former statute, see also *Nowlen v. Hall*, 149 Mich. 360; *Leahy v. Wayne Circuit Judge*, 144 Mich. 306; *Boyce v. Osceola Circuit Judge*, 79 Mich. 154; *Cook v. Kent Circuit Judge*, 70 Mich. 101; *Keyser v. Sutherland*, 59 Mich. 465, 466; *Hoyt v. Southard*, 58 Mich. 434; *Van Den Brooks v. Carreon*, 48 Mich. 285; *Dennison v. Genesee Circuit Judge*, 37 Mich. 285; *People v. Wayne Circuit Judge*, 21 Mich. 372; *Blackwood v. Van Vleet*, 11 Mich. 255. The burden of proof is not changed upon a second trial because, under a judgment entered on a verdict rendered on the first

trial plaintiff has obtained restitution. Upon each new trial the case must be tried as if it had never been tried before. *Donahue v. Klassner*, 22 Mich. 254. This statute applies only where a trial has been had and not simply a non-suit. *Hoffman v. St. Clair Circuit Judge*, 37 Mich. 131. The application for a new trial must be made in the trial court. *Christopher v. Detroit L. & N. Railroad Co.*, 56 Mich. 175. The time for taking a new trial dates from the day when judgment can be entered. *People v. Ingham Circuit Judge*, 34 Mich. 63; *McBride v. Chippewa Circuit Judge*, 202 Mich. 61.

Costs in case of a new trial. *Whiteley v. Kent Circuit Judge*, 122 Mich. 617. Where the right to a writ of error is waived, it does not follow that the right to a new trial is also waived. *Clairview Park Improvement Co. of Grosse Pointe v. Hosmer Judge*, 172 Mich. 173.

### (13198). Effect of Judgment by Default.

SEC. 31. Every judgment in ejectment rendered by default when no personal service is had, or appearance entered, shall, from and after two years from the time of rendering the same, be conclusive upon the defendant, and upon all persons claiming from or through him by title accruing after the commencement of the action; but within three years after the rendering of such judgment, on the application of the defendant, his heirs, executors, administrators or assigns, the court may vacate such judgment and grant a new trial if such court shall be satisfied that justice will thereby be promoted, and the rights of the parties more satisfactorily ascertained and established.

HISTORY: Re-enacts Sec. 37, R. S. '46, Ch. 108, being C. L. '57, (4590); C. L. '71, (6239); How. 7823; C. L. '97, (10982), changing the phraseology and modifying the practice to a certain extent. Modified.

JUDGMENTS BY DEFAULT: The time within which judgments by default in ejectment cases shall become conclusive has been shortened from three to two years, and the time within which a new trial can be granted in such cases by the court has been shortened from five to three years.

CITED: (C. L. '97, 10982). *Keyser v. Sutherland*, 59 Mich. 466; *Leahy v. Wayne Circuit Judge*, 144 Mich. 306.

### (13199). Time of Disability not Included.

SEC. 32. If the defendant in an action of ejectment, at the time of docketing the judgment therein by default, be either:

1. Within the age of twenty-one years; or
  2. Insane; or
  3. Imprisoned upon conviction of a criminal offense for any term less than for life;
- the time during which such disability shall continue, shall not be deemed any portion of the said two years; but any such

person shall, on motion, be entitled to a new trial after that time, and within three years after such disability shall be removed, but not afterward.

**HISTORY:** Re-enacts in part and supersedes Sec. 39, R. S. '46, Ch. 108, being C. L. '57, (4592); C. L. '71, (6241); How. 7825; C. L. '97, (10984). Modified.

**(13200). Substitution of Heirs.**

**SEC. 33.** If the person entitled to such new trial shall die during the continuance of any disability, specified in the preceding section, his heirs, executors or administrators may be substituted in such action, and shall be entitled to such new trial at any time within three years after his death.

**HISTORY:** Re-enacts in part and supersedes Sec. 40, R. S. '46, Ch. 108, being C. L. '57, (4593); C. L. '71, (6242); How. 7826; C. L. '97, (10985). Changed.

**(13201). Possession on New Trial After Recovery.**

**SEC. 34.** If the plaintiff shall have taken possession of the premises by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided; and if the defendant recover on any new trial hereby authorized, he shall be entitled to a writ of possession in the same manner as if he were plaintiff.

**HISTORY:** Re-enacts Sec. 41, R. S. '46, Ch. 108, being C. L. '57, (4594); C. L. '71, (6243); How. 7827; C. L. '97, (10986). Unchanged.

**WRIT OF POSSESSION:** In *Dawson v. Chippewa Circuit Judge*, 127 Mich. 328, the court in construing the former act relative to ejectment, (C. L. '97, 10947-11006), held that the fact that defendant has a statutory right to a new trial, did not militate against plaintiff's right to a writ of possession. The writ of possession is issuable as of course, and may be issued in vacation as well as term time. *Dawson v. Chippewa Circuit Judge*, 127 Mich. 329.

**(13202). Evidence on New Trial.**

**SEC. 35.** Upon any new trial granted as herein provided, the defendant may show any matters in bar of a recovery, which he might show to entitle him to the possession of the premises if he were plaintiff in the action.

**HISTORY:** Re-enacts Sec. 42, R. S. '46, Ch. 108, being C. L. '57, (4595); C. L. '71, (6244); How. 7828; C. L. '97, (10987). Unchanged.

**CONSTRUED:** The statute applies only where the plaintiff has taken possession by virtue of his recovery in the former action. *Cook v. Bertram*, 37 Mich. 124.



**(13203). Damages.**

**SEC. 36.** The plaintiff recovering judgment in ejectment shall also be entitled to recover damages for rents and profits of the premises recovered; but if such action be brought for the recovery of dower, the plaintiff shall be entitled to recover such damages only in the cases, and to the extent prescribed in sections eight thousand nine hundred forty-one, eight thousand nine hundred forty-two, eight thousand nine hundred forty-three and eight thousand nine hundred forty-four of the Compiled Laws of eighteen hundred ninety-seven.

**HISTORY:** Re-enacts Sec. 43, R. S. '46, Ch. 108, being C. L. '57, (4596); C. L. '71, (6245); How. 7829; C. L. '97, (10988), changing the phraseology slightly in referring to preceding sections and eliminating "in any of the cases in which such action may be maintained."

The sections above referred to are Compilers' Sections (11673)-(11674)-(11675)-(11676). Modified.

**CONSTRUED:** Recovery of mesne profits. *Wilson v. Hoffman*, 93 Mich. 72; *Rea v. Rea*, 63 Mich. 264; *Hitchcock v. Pratt*, 51 Mich. 268; *Noble v. Fairs*, 58 Mich. 639; *Killackey v. Killackey*, 156 Mich. 136; *Id.* 166 Mich. 311; *Robinson v. Batzer*, 195 Mich. 242.

**(13204). Suggestion of Claim of Damages**

**SEC. 37.** The plaintiff seeking to recover such damages, shall, within one year after the docketing of the judgment, make and file a suggestion of such claim with the clerk of the court in which such judgment was rendered, as a continuation of the same.

**HISTORY:** Re-enacts in part and supersedes Sec. 44, R. S. '46, Ch. 108, being C. L. '57, (4597); C. L. '71, (6246); How. 7830; C. L. '97, (10989). Modified.

**CONSTRUED:** On the vacation of a judgment in ejectment in favor of the plaintiff, his suggestion of damages, made and filed under this section, dies with the judgment. *Williams v. Ottawa Circuit Judge*, 79 Mich. 549. The judgment must be the final judgment in the cause, which final judgment does not relate back to any other judgment taken in the cause. *Id.* 551. Compare *Clark v. Green Circuit Judge*, Bay County, 62 Mich. 355. The statute becomes a part of the record of the case in which it is filed. *Noble v. Fairs*, 58 Mich. 640.

**(13205). Form of Suggestion.**

**SEC. 38.** Such suggestion shall be substantially in the same form as a declaration in an action of assumpsit for use and occupation, as near as may be, and may be against the defendants liable for such rents and profits, omitting those not so liable, and a notice shall be annexed to said suggestion in

form, as near as may be, such as is required by law to be attached to a declaration in suits commenced by declaration, notifying the defendant that he is required to plead to such suggestion within fifteen days after service thereof, and a copy of such suggestion and of such notice shall be served on the defendants named therein, in the same manner as in cases of declarations, in personal actions.

**HISTORY:** Re-enacts in part and supersedes Sec. 45, R. S. '46, Ch. 108, being C. L. '57, (4598); C. L. '71, (6247); How. 7831; C. L. '97, (10990). Modified.

**CONSTRUED:** The suggestion is, in substance, a declaration in assumpsit for use and occupation. *Noble v. Fairs*, 58 Mich. 639.

#### (13206). Defendant's Pleading.

**SEC. 39.** Such defendants may plead to such suggestion, and give notice of any special matters in bar of such claim, except such as were or might have been controverted in such action of ejectment, in the same manner as in personal actions; and such defendants may show on the trial, in bar or in mitigation of the damages claimed by the plaintiff, a recovery by such defendants, or by any other person, of the same premises, or of part thereof, subsequent to the verdict in such action of ejectment.

**HISTORY:** Re-enacts Sec. 46, R. S. '46, Ch. 108, being C. L. '57, (4599); C. L. '71, (6248); How. 7832; C. L. '97, (10991). Unchanged.

#### (13207). Trial of Issues.

**SEC. 40.** If any issue of fact be joined on such suggestion, it shall be tried as in other causes, and if such issue be found for the plaintiff, the same jury shall assess his damages, to the amount of the mesne profits received by the defendant, since he entered into possession of the premises subject to the restrictions hereinafter contained.

**HISTORY:** Re-enacts Sec. 47, R. S. '46, Ch. 108, being C. L. '57, (4600); C. L. '71, (6249); How. 7833; C. L. '97, (10992). Unchanged.

**CONSTRUED:** The trial judge's finding of mesne profits is conclusive as to amount, if not excepted to, in a review on case made. *Noble v. Fairs*, 58 Mich. 637.

#### (13208). Facts to be Established by Plaintiff.

**SEC. 41.** On the trial of such issue, the plaintiff shall be required to establish, and the defendant may controvert, the time when such defendant entered into the possession of the

premises; the time during which he enjoyed the mesne profits thereof; and the value of such profits; and the record of the recovery in the action of ejectment shall not be evidence of such time.

**HISTORY:** Re-enacts Sec. 48, R. S. '46, Ch. 108, being C. L. '57, (4601); C. L. '71, (6250); How. 7834; C. L. '97, (10993). Unchanged.

**(13209). Extent of Recovery of Rents.**

**Sec. 42.** The plaintiff shall not be entitled to recover the rents and profits of the land so recovered, for any longer term than six years immediately preceding the time when such suggestion shall be served on the defendant.

**HISTORY:** Re-enacts Sec. 54, R. S. '46, Ch. 108, being C. L. '57, (4607); C. L. '71, (6256); How. 7840; C. L. '97, (10999). Unchanged.

**(13210). Set Off by Defendant.**

**Sec. 43.** On such trial, the defendant shall have the same right to set off permanent improvements made on the premises, to the amount of the plaintiff's claim as is now allowed by law; and in estimating the plaintiff's damages, the value of the use by the defendant, of any improvements made by him, or purchased by him in good faith from any person from whom he derives color of title thereto, shall not be allowed to the plaintiff.

**HISTORY:** Re-enacts Sec. 49, R. S. '46, Ch. 108, being C. L. '57, (4602); C. L. '71, (6251); How. 7835; C. L. '97, (10994). Unchanged.

**CONSTRUED:** Ejectment is the proper remedy where the improvements are only partly on the property in controversy. *Cromwell v. Hughes*, 144 Mich. 5.

**(13211). Value of Improvements.**

**Sec. 44.** Whenever in any action of ejectment the plaintiff, or any one or more of the plaintiffs, if there be more than one, shall recover, or recover any undivided interest in the premises the defendant or defendants shall be allowed compensation in proportion to such recovery for buildings and improvements on the premises recovered, erected, or made by him or them, by any person through whom he or they claim title to the extent that such buildings and improvements shall increase the present value of said premises: *Provided*, The defendant or defendants, or the person through whom he or they claim title, shall have been in the actual, peaceable occupation of

the premises recovered, for six years before the commencement of the action: Or *Provided*, The same shall have been so occupied for a less time than six years under a color of title and in good faith.

**HISTORY:** Re-enacts Sec. 50, R. S. '46, Ch. 108, being C. L. '57, (4603); As Am. '69, p. 313, Act 157, Eff. July 5; C. L. '71, (6252); As Am. '73, p. 473, Act 188, Eff. July 31; As Am. '75, p. 207, Act 180, Eff. Aug. 3; How. 7836; As Am. '85, p. 170, Act 150, Eff. Sept. 19; C. L. '97, (10995). Unchanged.

**COMPENSATION:** This section does not contemplate that the expenditure for such buildings and improvements shall be refunded to the occupant, but only that he shall be allowed such a sum as shall equal the extent that such buildings and improvements have increased the present value of the premises. *Sherman v. A. P. Cook Co.*, 98 Mich. 67. This statute applies only to the lands described in plaintiff's declaration and in the deeds, or other instruments through which defendant claims. *King v. Potter*, 18 Mich. 134. And only to cases where the plaintiff establishes a title in fee simple. *Burkle v. Ingham Circuit Judge*, 42 Mich. 513. It does not apply where the defendant is one of several tenants in common with plaintiff; if it did, he might recover from each the full value of the improvements. *Martin v. O'Conner*, 37 Mich. 439; *Sands v. Davis*, 40 Mich. 17; *Morris v. McKay*, 40 Mich. 326. An executory contract for the sale of land which does not purport to convey any legal, possessory interest in land, does not give the vendee a legal right to the possession of the land, and cannot be made the basis of claim for improvements in ejectment. *Buell v. Irwin*, 24 Mich. 145. As to the practice in prosecuting these claims, see *Rawlson v. Parsons*, 6 Mich. 401. Prior to amendment of '73. *King v. Harrington*, 18 Mich. 213; *Sands v. Davis*, 40 Mich. 14. Amendment of '75. *Martin v. O'Conner*, 37 Mich. 441-2; *Miller v. Clark*, 56 Mich. 339. This section applies only to actions of ejectment. *Lemerand v. Flint & P. M. Railway Co.*, 117 Mich. 309.

The defendant is entitled to compensation to the extent that the buildings and improvements made by him shall increase the present value of the premises. *Connecticut Mut. Ins. Co. v. Wood*, 115 Mich. 453. Because structures have been erected upon the land which are of value to it, the plaintiff cannot be charged with this cost if the actual value of the premises has not been enhanced thereby. But the defendant cannot be denied all relief on the grounds that the improvements are not adapted to the use to which the plaintiff may assert it to be his intention to devote the property upon recovering it. *Petit v. Flint & P. M. R. Co.*, 119 Mich. 494. When defendant makes improvements believing in good faith that he has perfect title to the premises he is entitled to compensation, even if he has knowledge that plaintiff claims to be the owner. *Thomas v. Wagner*, 131 Mich. 601. When compensation for improvements is sought in an action of ejectment brought by the state. *State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 580. See further as to compensation for improvements. *Cleveland v. Clark*, 123 Mich. 183; *Sleight v. Roe*, 125 Mich. 590; *Boucher v. Trembley*, 140 Mich. 357; *Putney v. Vinton*, 145 Mich. 222.

**OCCUPATION:** The occupancy contemplated by this section is such a one as, under the rules of the common law, would entitle one

to acquire a title by adverse possession. It must be actual, open and peaceable. But this does not necessarily imply that the claimants shall actually live and make their home upon the disputed property. If it were constantly worked year after year, if cropped, or if shrubs and trees were planted and cared for and such attention given as they required, or if fences were built, such an occupancy is actual, rather than constructive, and is such an occupancy as the statute contemplates. *Jones v. Merrill*, 113 Mich. 433.

**HOLDER OF TAX TITLES:** This section construed in connection with Compilers' Section (4103) relative to rights of purchaser of tax title who has been dispossessed after making improvements on the property. *Platz v. Englehart*, 138 Mich. 490; *Powell v. Pierce*, 168 Mich. 432; *Closser v. McBride*, 182 Mich. 601. Compensation for the improvement on a party line. *Closser v. McBride*, 182 Mich. 594, 148 N. W. 756. Ejectment is proper remedy to litigate improvements. *Cronwell v. Hughes*, 144 Mich. 5. Six years and good faith under color of title occupancy necessary to claim for improvements. *Boucher v. Prembley*, 140 Mich. 357. Claim for improvements on State tax lands. *Platz v. Englehardt*, 138 Mich. 490. Defendant under a void tax deed may recover for improvements. *Thomas v. Wagner*, 131 Mich. 602. Defendant without color of title cannot be allowed compensation for improvements. *State v. Lake St. C. F. & S. Club*, 127 Mich. 600. Defendant could not recover for improvements as against other remainder-men. *Sleight v. Roe*, 125 Mich. 580. How to obtain the measure of compensation. *Petit v. Flint & P. M. R. Co.*, 119 Mich. 494.

**IMPROVEMENTS:** In ejectment, evidence of occupation for six years, or for less than six years under color of title, entitling defendants to recover for improvements under this section, held, insufficient. *Kushler v. Weber*, 205 Mich. 401, 171 N. W. 365.

### (13212). Claim in Writing to Compensation.

**SEC. 45.** In all actions of ejectment, if any defendant wish to avail himself of the provisions for compensation contained in the last preceding section, he may file a claim in writing, to compensation for buildings and improvements on the premises in controversy, setting forth therein the character of the occupation, and the time thereof, and a request that the jury find whether the premises have been actually and peaceably occupied by the defendant, or the person through whom he claims title, and the time of such occupation, and determine the increased value of the premises by reason thereof, a copy of which with notice of the filing thereof, shall be served on the plaintiff or his attorney at least ten days before the first day of the term at which such cause is tried. The plaintiff may then file a request in writing, that the jury also find and determine what would have been the value of the premises at the time of the trial, if no buildings had been erected or improvements made or waste committed, a true copy of which,

with notice of filing, shall be served on the defendant or his attorney, within five days after service of said notice of claim for compensation for improvements. The jury, in all cases in which the above matters shall be submitted to them, shall, by their verdict, if they find for the plaintiff, also find and determine upon said matters.

**HISTORY:** Re-enacts Sec. 51, R. S. '46, Ch. 108, being C. L. '57, (4604); C. L. '71, (6253); As Am. '73, p. 473, Act 188, Eff. July 31; As Am. '75, p. 207, Act 180, Eff. Aug. 3; How. 7837; As Am. '85, p. 170, Act 150, Eff. Sept. 19; C. L. '97, (10996). Unchanged.

**CLAIM:** To entitle defendant to compensation for improvements he must file his claim therefor with a request for an estimation by the jury of the increased value of the premises. If he file no such claim, the plaintiff, if he succeed, will be entitled to judgment for the recovery of the property as in other cases. Where such claim and request is filed and the plaintiff files none for an estimation of the land without improvements, the jury must estimate the increased value under defendant's claim. *Rawson v. Parsons*, 6 Mich. 406. See *Putney v. Vinton*, 145 Mich. 222.

Evidence of the value of improvements is properly excluded where defendant fails to file a claim for compensation therefor. *Newaygo County Manufacturing Co. v. Echinaw*, 81 Mich. 416. When the claim must be made. *Van Den Brooks v. Correion*, 48 Mich. 283; *Baldwin v. Cullen*, 51 Mich. 35. Filing of claim nunc pro tunc. *Brooks v. Fairchild*, 36 Mich. 231; *Schweitzer v. Bird*, 204 Mich. 335.

This section applies where defendant claims ownership under a tax sale. *Platz v. Englehart*, 138 Mich. 490.

### (13213). Abandonment of Premises and Judgment for Value.

**SEC. 46.** If, after the rendition of the verdict, the plaintiff shall at the same or next subsequent term of the court make his election on record to abandon the premises to the defendant at the value estimated by the jury, or in cases where an undivided interest is recovered at a proportionate part of such value, then judgment shall be rendered against the defendant for the sum so estimated by the jury, with costs of suit; where the recovery is of an entire interest, and where recovery is had of an undivided interest, then judgment shall be rendered against the defendant for a proportionate part of the sum so estimated by the jury, with costs of suit, which judgment shall be a lien upon the premises in question, and execution may issue on such judgment and be levied upon such premises, and the same may be sold by virtue thereof, in the same manner, and with the like effect, as any other real estate of the defendant.

**HISTORY:** Re-enacts Sec. 52, R. S. '46, Ch. 108, being C. L. '57,

(4605); C. L. '71, (6254); How. 7838; As Am. '85, p. 171, Act 150, Eff. Sept. 19; C. L. '97, (10997). Unchanged.

**ELECTION:** The plaintiff is not entitled to more than one judgment or one election (*Rawson v. Parsons*, 6 Mich. 408). He must stand by the judgment he has chosen to take. *Miller v. Clark*, 60 Mich. 165; *Bertram v. Cook*, 44 Mich. 399.

**JUDGMENT FOR VALUE:** There is no actual eviction where one who recovers in ejectment elects to take the value of the land. But there is such a technical eviction as would support an action on the covenant of seizin in the deed to the defendant. *Long v. Sinclair*, 40 Mich. 571. Where a grantee's right to land is confined to the use of it for a specific purpose, he cannot, on bringing ejectment for it, elect to abandon his claim and take the value of the land. *Cass Co. Supervisors v. Banks*, 44 Mich. 467. See, further, *Guild v. Kidd*, 48 Mich. 307; *Bertram v. Cook*, 44 Mich. 396. See *Platz v. Englehart*, 138 Mich. 490.

#### (13214). Payments for Value of Improvement.

**SEC. 47.** If the plaintiff shall not elect to abandon the premises to the defendant, he shall within one year after the rendition of the judgment for the recovery of the premises, in cases of recovery of an entire interest, pay to the clerk of the court, for the use of the defendant, such sum as shall have been assessed for the buildings and improvements, with interest thereon; and in cases where a recovery of an undivided interest is had, the said plaintiff shall pay to the said clerk, for the use of the defendant, within the time aforesaid, a proportionate part of such sum as shall have been assessed for the buildings and improvements, with interest thereon; and no writ of possession shall issue on the judgment rendered on the verdict, nor any new action be sustained for the land or undivided interest in the same, as the case may be, until such sum is paid; in case of a recovery of an entire interest, and until a proportionate part of such sum is paid in case of a recovery of an undivided interest, and a default to pay to said clerk as aforesaid, shall be deemed an abandonment of all claim of title to the premises, and a bar to the recovery thereof: *Provided*, That the plaintiff's taxed costs shall be set off by the clerk against the amount of the verdict recovered by the defendant for buildings and improvements, and where the amount of such taxed costs equals or exceeds the amount of the verdict for buildings and improvements, it shall not be necessary for the plaintiff to make any payment in satisfaction of the defendant's verdict for buildings and improvements.

**HISTORY:** Re-enacts Sec. 53. R. S. '46, Ch. 108, being C. L. '57,

(4606); C. L. '71, (6255); How. 7839; As Am. '85, p. 171, Act 150, Eff. Sept. 19; C. L. '97, (10998); As Am. '01, p. 89, Act 58, Imd. Eff. Apr. 12. Unchanged.

**CONSTRUED:** The year runs from the time of entering final judgment and is suspended pending the removal of the same to the supreme court for review. *Clark v. Green*, 62 Mich. 355; *Williams v. Ottawa Circuit Judge*, 79 Mich. 551. See *Guild v. Kidd*, 48 Mich. 309. *Boyce v. Osceola Circuit Judge*, 79 Mich. 155. Unless the plaintiff within a year from the rendition of judgment pay the sum allowed defendant for improvements he will be deemed to have abandoned all claim to the land, and no writ of possession will issue till such sum is paid. *Rawson v. Parsons*, 6 Mich. 407. Compensation for improvements is not given as a personal judgment against the plaintiff, but its payment is made a condition precedent to his obtaining a writ of possession. *Lemerand v. Flint & P. M. R. Co.*, 117 Mich. 314.

**RIGHT TO ALLOWANCE:** See *Robinson v. Batzer*, 195 Mich. 242. Also note to 53 L. R. A. 337 and note to 37 L. R. A. (N. S.) 918.

#### (13215). Assessment of Damages on Default.

**SEC. 48.** If no issue of fact be joined on such suggestion, and judgment be rendered thereon against the defendant by default, or otherwise, the value of such mesne profits shall be assessed, and the plaintiff's damages ascertained in the same manner as in other cases.

**HISTORY:** Re-enacts Sec. 55, R. S. '46, Ch. 108, being C. L. '57, (4608); C. L. '71, (6357); How. 7841; C. L. '97, (11000), omitting "on demurrer." Modified.

#### (13216). Proceedings on Assessment of Damages.

**SEC. 49.** Upon such assessment, the plaintiff shall be required to establish the same matters hereinbefore required, in the case of an issue being joined, and the defendant may, in like manner, controvert the same, and make any set-off to which he shall be entitled, and the jury shall assess the damages in the same manner.

**HISTORY:** Re-enacts Sec. 56, R. S. '46, Ch. 108, being C. L. '57, (4609); C. L. '71, (6258); How. 7842; C. L. '97, (11001). Unchanged.

#### (13217). Judgment.

**SEC. 50.** Upon the return of an inquisition of damages, or upon the verdict of the jury in case of an issue being joined, the court shall render judgment as in actions of assumpsit, for use and occupation, which shall have the like effect in all respects.



**HISTORY:** Re-enacts Sec. 57, R. S. '46, Ch. 108, being C. L. '57, (4610); C. L. '71, (6259); How. 7843; C. L. '97, (11002). Unchanged.

**(13218). Recovery of Mesne Profits on Death of Plaintiff.**

SEC. 51. If the plaintiff in ejectment shall have died after issue joined, or judgment therein, his personal representatives may enter a suggestion of such death, and of the granting of letters testamentary or of administration to them, and may suggest their claim to the mesne profits of the premises recovered, in the same manner and with the like effect as the deceased might have done if still living; and the same proceedings in all respects shall be had thereon.

**HISTORY:** Re-enacts Sec. 58, R. S. '46, Ch. 108, being C. L. '57, (4611); C. L. '71, (6260); How. 7844; C. L. '97, (11003). Unchanged.

**(13219). Recovery of Dower not Previously Admeasured.**

SEC. 52. If an action be brought to recover the dower of any widow which shall not have been admeasured to her before the commencement of such action, instead of a writ of possession being issued, such plaintiff shall proceed to have her dower assigned to her in the manner following:

1. Upon the filing of the record of judgment the court, on the motion of the plaintiff, shall appoint three discreet and disinterested freeholders commissioners, for the purpose of making admeasurement of the dower of the plaintiff, out of the lands described in the record, and the commissioners so appointed shall proceed in like manner, possess the like powers, and be subject to the like obligations as commissioners appointed by the judge of probate to set off dower;

2. The commissioners shall make a report of their doings to the court, in writing, as soon as may be after their appointment, which report shall be confirmed by such court, unless good cause to the contrary be shown; and shall be entered at large in the minutes of such court;

3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the plaintiff in possession thereof.

**HISTORY:** Re-enacts Sec. 59, R. S. '46, Ch. 108, being C. L. '57, (4612); C. L. '71, (6261); How. 7845; C. L. '97, (11004). Unchanged.

**DOWER:** See notes to Compilers' Section (13169). Subd. 2. Gal-

*braith v. Fleming*, 60 Mich. 412; *Burrall v. Bender*, 61 Mich. 622; *Rea v. Rea*, 63 Mich. 263.

**ADMEASURED:** A widow, under the statute may maintain ejectment to recover her dower before it is admeasured, but this right does not extend to the assignee of her interest. *Johnston v. Loose*, 201 Mich. 261.

**(13220). Costs and Expenses of Admeasurement.**

**SEC. 53.** The costs and expenses incurred in such admeasurement, shall be subject to the same provisions as in cases of admeasurement of dower by commissioners appointed by the judge of probate.

**HISTORY:** Re-enacts Sec. 60, R. S. '46, Ch. 108, being C. L. '57, (4613); C. L. '71, (6262); How. 7846; C. L. '97, (11005). Unchanged.

**(13221). Ejectment by Mortgagee.**

**SEC. 54.** No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises, until the title thereto shall have become absolute upon a foreclosure of the mortgage.

**HISTORY:** Re-enacts Sec. 61, R. S. '46, Ch. 108, being C. L. '57, (4614); C. L. '71, (6263); How. 7847; C. L. '97, (11006). Unchanged.

**MORTGAGES:** Prior to the first enactment of this provision, in '43, it was held that the legal title to mortgaged lands was in the mortgagee and that the latter might, at any time after default, if not before, unless the mortgage provided that the mortgagor should retain possession, put the mortgagor out by ejectment. *Stevens v. Brown*, Walk. 41; *Todd v. Davis*, 32 Mich. 159; *Hoffman v. Harrington*, 33 Mich. 394; *Dougherty v. Randall*, 3 Mich. 581; *Dawson v. Peter*, 119 Mich. 281; *State Sav. Bank of Detroit v. Matthews*, 123 Mich. 59. The mortgagee had a right to take possession by way of security. *Mundy v. Monroe*, 1 Mich. 68. See, also, *Stevens v. Brown*, Walk. 41; *Schwartz v. Sears*, Walk. 170; *Hoffman v. Harrington*, 33 Mich. 392; *Dougherty v. Randall*, 3 Mich. 581; *Albright v. Cobb*, 34 Mich. 316; *Blackwood v. Van Vleet*, 11 Mich. 252; *Todd v. Davis*, 32 Mich. 160; *Van Vleet v. Blackwood*, 39 Mich. 728. But this was a mere right of entry and was barred after twenty years, under R. S. '38, p. 573. *Riopelle v. Gilman*, 23 Mich. 33; *Albright v. Cobb*, 34 Mich. 316; *Van Vleet v. Blackwood*, 39 Mich. 728; *Pierce v. Grimley*, 77 Mich. 281. The law of '43 was held unconstitutional and inoperative as to mortgages made prior thereto. *Mundy v. Monroe*, 1 Mich. 68; *Blackwood v. Van Vleet*, 11 Mich. 252; *Newton v. McKay*, 30 Mich. 380. But since the provisions of this section took effect, mortgages are securities only. *Dougherty v. Randall*, 3 Mich. 581; *Batty v. Snook*, 5 Mich. 231; *Baker v. Pierson*, 5 Mich. 456; *Caruthers v. Humphrey*, 12 Mich. 270; *Crippen v. Morrison*, 13 Mich. 23; *Van Husan v. Kanouse*, 13 Mich. 303; *Ladue v. Detroit & M. R. Co.*, 13 Mich. 380; *Newton v. Sly*, 15 Mich. 391; *Hogsett v. Ellis*, 17 Mich. 351; *Ormsby v. Barr*, 22 Mich. 84; *Gorham v. Arnold*,

22 Mich. 247; *Humphrey v. Hurd*, 29 Mich. 44; *Newton v. McKay*, 30 Mich. 380; *Wagar v. Stone*, 36 Mich. 364; *Lee v. Clark*, 38 Mich. 223; *Beecher v. Marquette Rolling Mill Co.*, 40 Mich. 307; *Hazeltine v. Granger*, 44 Mich. 503; *Reading v. Waterman*, 46 Mich. 107; *Pierce v. Grimley*, 77 Mich. 281. A mortgagee's possession not obtained by license of the mortgagor is tortious and he may be ejected. *Pierce v. Grimley*, 77 Mich. 281; *Newton v. McKay*, 30 Mich. 380; *Reading v. Waterman*, 46 Mich. 109. A mortgagee cannot, as such, bring ejectment and maintain a foreclosure bill as an auxiliary proceeding. *Livingston v. Hayes*, 43 Mich. 129. No mortgagee can transfer title to any part of the mortgaged premises, free and clear of the right to redeem. *Gorham v. Arnold*, 22 Mich. 251. Nor receive an attornment from the tenant of the mortgagor. *Hogsett v. Ellis*, 17 Mich. 363. The rents and profits of the lands do not enter into, or form any part of, the security. They belong to the mortgagor, until foreclosure, and his right thereto cannot be cut off by the appointment of a receiver in the foreclosure suit. *Wagar v. Stone*, 36 Mich. 364; *Hazeltine v. Granger*, 44 Mich. 503; *Fifth Nat. Bank v. Pierce*, 117 Mich. 384. But this rule does not apply in case of the foreclosure of a land contract. *Belding v. Meloche*, 113 Mich. 225.

Where a deed, absolute in form, is given to secure a debt, the purpose generally is, to vest in the grantee a larger power of control and disposition than he would have under an ordinary mortgage. Whether this statute applies to such a case. *Quaere*. *Wetherbee v. Green*, 22 Mich. 321. The rights of the trustee of a trust mortgage to have a receiver appointed depends upon whether a showing has been made that there is danger of ultimate loss to the bondholders by permitting the property to remain in possession of its owners until the final decree and sale. *Union Trust Co. v. Charlotte Gen. Elec. Co.* 152 Mich. 577; *Leathers v. Canfield*, 117 Mich. 284.

### (13222). Issuing Writ of Restitution.

SEC. 55. When such action of ejectment shall be removed to the supreme court by a writ of error, or otherwise, whether the judgment of the circuit court be affirmed or reversed, if a writ of restitution or possession become necessary or proper to carry into effect the judgment of the supreme court, the case shall be remanded to the circuit court where the same originated, with the order of the supreme court in the premises, and such writ of possession or restitution shall issue from such circuit court.

HISTORY: Re-enacts Sec. 2 of Act 249 of '49; As Added '63, p. 371, Act 217, Eff. June 22, being C. L. '71, (6265); How. 7849; C. L. '97, (11008). Unchanged.

### (13223). When Tenant May Take Possession.

SEC. 56. It shall be lawful for any tenant or tenants in common, who may recover any undivided interest in lands,

in an action of ejectment against a person or persons who may be in possession thereof, but who does not show in the trial of such action that he or they have any interest therein or title thereto, to take possession of the entire premises subject to all of the rights and interests of the other tenant or tenants in common therein.

**HISTORY:** Supersedes and re-enacts Sec. 1 of Act 55 of '03, p. 71, Imd. Eff. Apr. 23, though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** Plaintiff entitled to recover possession of the entire premises. *Lamb v. Lamb*, 139 Mich. 170.

(13224). **Issue of Execution.**

Sec. 57. The court before whom such action of ejectment shall be tried and such recovery had, shall order that execution be issued in favor of the plaintiff or plaintiffs in such action to put such plaintiff or plaintiffs in possession of the entire premises subject to the right or rights of the other tenant or tenants in common in said premises.

**HISTORY:** Supersedes and re-enacts Sec. 2 of Act 55 of '03, p. 71, Imd. Eff. Apr. 23, though such section is not expressly repealed by this act. Unchanged.

See case in note preceding section.

(13225). **Action after Expiration of Term of Corporation.**

Sec. 58. Notwithstanding the expiration of the term of private corporations organized for the conduct of business of any kind, under the laws of this state, any one having such an interest as would entitle him to bring ejectment therefor, in any land owned by such corporation while in existence, and not aliened or divested from it by due process of law, may bring an action of ejectment for the recovery of the same. The summons or declaration shall be against such corporation by its corporate name, and against any occupant or occupants of such lands, as defendants. Such summons or declaration shall be served on either of the persons who may have been last presiding officer, president, cashier, secretary or treasurer thereof; and in case personal service cannot be had upon any such officer for any reason, then the like proceedings by publication shall be had against such corporation as in other cases. The affidavit upon which the order of publication shall be based, shall set forth the name of such corporation while in existence, the purpose of its organization,

the statute of the state under which it was organized, and that its term of existence and the time in addition thereto during which it might by law be permitted to sue, or be sued, has expired. If there be no appearance of any person or persons entitled to appear therein, as hereinafter mentioned, within the time provided in such summons, notice endorsed upon the declaration or order of publication, the default of such defendant for want of appearance or plea, may be taken as in other cases. Within the time fixed in such summons, notice endorsed on the declaration or such order of publication, any person or persons who were stockholders of such corporation while it subsisted and who still retain their rights in the property in question, by virtue of having owned stock therein, and any creditor or creditors of such corporation, whose claims are subsisting and not barred by limitation of time, may appear and defend such action as fully as such corporation could have done while subsisting: *Provided*, That such right to appear and defend may be drawn in question by the plaintiff on the trial of the cause. All persons so appearing shall plead together and in the name of the corporation. Such publication shall be a full and complete service upon such corporation, and upon all persons natural or artificial, interested in said land, because of their having been stockholders in the corporation while subsisting, or creditors thereof. All persons so appearing and defending, or seeking to defend, shall be liable for costs in the action as fully as such corporation would be if defending.

**HISTORY:** Re-enacts a part of Sec. 1 of Act 113 of '91, being C. L. '97, (11009) in so far as such section pertains to actions of ejectment. Unchanged.

(13226). **Verdict and Judgment.**

Sec. 59. The verdict and judgment in such suit shall be against the corporation in the corporate name and shall be binding upon it and upon all persons claiming said land by virtue of their stock in or demands upon the same, and shall be conclusive against such corporation and such persons, subject only to such exceptions as are or may be provided by general statute in other cases of ejectment. Any judgment in favor of the defendant corporation shall inure to the benefit of the persons entitled to the property in dispute.

The plaintiff shall have judgment against such corporation defendant neither for money damages of any kind nor for costs of suit subject to the discretion of the court, nor shall he be entitled to file against it a suggestion of damages in continuation of such judgment.

**HISTORY:** Re-enacts in part Sec. 2 of Act 113 of '91, being C. L. '97, (11010), in so far as such section relates to ejectment. Modified.

**(13227). Filing Notice of Commencement with Register Deeds.**

**SEC. 60.** Hereafter upon the commencement of any action of ejectment, the plaintiff shall file for record in the office of the register of deeds of the county wherein the lands sought to be recovered are situated, a notice of the pending of such suit in ejectment, setting forth its title and the general effect thereof and a description of the lands to be affected thereby and the party in whose favor any final judgment in ejectment shall be rendered shall, within thirty days after the rendition thereof, file for records in said register's office a duly certified copy of said final judgment, and in case of failure so to do, the commencement of said suit or the rendition of said judgment shall not be operative as constructive notice to purchasers of said real estate of the right or title of said plaintiff or of any right or title established by said final judgment, until such notice of suit, or certified copy of judgment shall be so filed for record.

**HISTORY:** Re-enacts Sec. 1 of Act 70 of '91, being C. L. '97, (11011). Unchanged.

**(13228). Duty of Register.**

**SEC. 61.** It shall be the duty of the register to receive, file and record such notice and certified copies of judgments in a book kept for that purpose, upon paying to him the fees allowed by law for recording deeds of conveyance.

**HISTORY:** Re-enacts Sec. 2 of Act 70 of '91, being C. L. '97, (11012). Unchanged.

## CHAPTER XXX.

### PROCEEDINGS TO RECOVER THE POSSESSION OF LAND IN CERTAIN CASES.

#### Of Forcible Entries and Detainers.

##### (13229). Entry Into Possession.

SECTION 1. No person shall make any entry into lands, tenements or other possessions, but in cases where entry is given by law; and, in such cases, he shall not enter with force, but only in a peaceable manner.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 123, being C. L. '57, (4974); C. L. '71, (6695); How. 8284; C. L. '97, (11153). Unchanged.

FORCIBLE ENTRY AND DETAINER: Nothing comes within the statute which would not have been indictable force under it, and proof which would not maintain a criminal conviction is insufficient. *Marsh v. Bristol*, 65 Mich. 386; *Davis v. Ingersoll*, 2 Doug. 372. This statute was not intended to apply to a mere trespass, however wrongful; but the entry or detainer must be riotous, or personal violence must be used or in some way threatened, or the conduct of the guilty parties must be such as in some way to inspire terror or alarm in the persons evicted or kept out. The force contemplated is not merely the force used against, or upon, the property, but force used or threatened against persons. *Shaw v. Hoffman*, 25 Mich. 169. See *Harrington v. Scott*, 1 Mich. 17; *Davis v. Ingersoll*, 2 Doug. 372; *Hoffman v. Harrington*, 22 Mich. 57.

Where a landlord by notice to quit terminates a tenancy for non-payment of rent and during the tenant's absence takes possession and removes the tenant's goods from the premises his entry is lawful. *Smith v. Detroit Building & Loan Association*, 115 Mich. 340; *Cockermine v. Fisher*, 140 Mich. 96. Leaving goods on the premises cannot prevent making a peaceful entry, as force against property is no breach of the peace, and the force to make it unlawful must be against the tenant himself. *Marsh v. Bristol*, 65 Mich. 387, citing *Hoffman v. Harrington*, 22 Mich. 56. Unless the tenant is driven off either by actual force applied to him, or as the only apparent way of avoiding its use against him at the time, he cannot be regarded as forcibly expelled and there is no forcible entry. *Marsh v. Bristol*, 65 Mich. 388, reviewing several cases; *Appleton v. Buskirk*, 67 Mich. 409. Forcible detention is no proof of forcible entry. *Marsh v. Bristol*, 65 Mich. 386; *Latimer v. Woodward*, 2 Doug. 368. But if the entry be obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in such entry to have been the forcible expulsion of the party in possession, and follows it up by actual expulsion by

threats of personal violence or superior force, it will amount to a forcible entry. *Seitz v. Miles*, 16 Mich. 456. See *Hoffman v. Harrington*, 22 Mich. 56-7. But a forcible entry is not made unless the tenant is forcibly expelled, and is not complete until the expulsion. *Id.* 22 Mich. 57. The forcible expulsion is the real thing aimed at; and if a party is actually intimidated, it is not necessary for him to resist and compel an actual breach of the peace. *Id.* Every forcible entry is forbidden; but a forcible detainer after a peaceable entry is not forbidden unless the detainer is unlawful. *Id.* 54; *Marsh v. Bristol*, 65 Mich. 385; *Farmer v. Hunter*, 45 Mich. 337. While a tenant was attending the trial of summary proceedings brought by his landlord, the landlord's agent took possession of the property occupied by the tenant and the summary proceedings were then discontinued. Held: That the entry was lawful. *Miner v. Dickey*, 140 Mich. 518. Where a vendor is entitled to the possession of property occupied by a vendee who has forfeited the contract of purchase, and the vendor enters the property without force and then attempts by a display of force to remove the vendee's goods from the premises, such conduct constitutes a violation of the statute against forcible entries. *McIntyre v. Murphy*, 153 Mich. 342.

Where an employee occupies a house as incidental to the employment and as a part of his compensation for his labor, the relation of landlord and tenant does not exist. *Lane v. Au Sable Elec. Co.*, 181 Mich. 26; *Vincent v. Crane*, 134 Mich. 702. And after the termination of the employment, the employer may lawfully set the employee's goods out of the house and take possession. *Lane v. Au Sable Elec. Co.*, 181 Mich. 26. A person merely occupying desk room in a hotel is not a tenant. *Swart v. Western Union Tel. Co.*, 142 Mich. 23. What is not a "quiet and peaceable possession." *Harrington v. Scott*, 1 Mich. 17; *Newton v. Doyle*, 38 Mich. 645; Removal of tenant's property by one entitled to possession. *U. S. Mfg. Co. v. Stevens*, 52 Mich. 331. Forcible ejection of tortious intruder. *People v. Adams*, 52 Mich. 105. See further as to forcible entry. *Carpenter v. Harris*, 51 Mich. 223; *Gault v. Stormout*, 51 Mich. 637; *Byers v. Anderson*, 143 Mich. 179; *Duff v. Hall*, 158 Mich. 514.

If an entry be obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in having entered to have been the expulsion of the party in possession, and it is followed up by actual expulsion by means of personal threats or violence, or superior force, it will amount to a forcible entry. *Hogle v. Wayne Circuit Judge*, 160 Mich. 575.

The first section of this chapter provides for the recovery of land which has been entered or obtained by force, and the complaint must state, among other things, that "defendant entered the same by force, or that he unlawfully holds the same by force," and plaintiff could not maintain a proceeding thereunder when he never had possession of the property in dispute, and there was no evidence whatever of force or intimidation. *Chylowski v. Steinberg*, 193 Mich. 547; 160 N. W. 421, where landlord obtained entry by means of fraud. *Gallant v. Miles*, 200 Mich. 535.

**QUESTIONS OF TITLE:** See note "Questions of Title" to *Compilers' Section* (13240).

**UNDER FORMER LAWS:** Under the law existing before the enact-



ment of this statute, the default of a tenant in payment of rent justified the landlord in entering and using sufficient force to eject the tenant; but, in the interest of public tranquility, this statute provides against breaking the public peace and provides that a person put out by forcible entry may be restored to possession. Where there has been no forcible entry, it does not forbid retaining possession by force, unless the possession is unlawful and against the rights of the person kept out. *Marsh v. Bristol*, 65 Mich. 385.

**GENERAL PROVISIONS:** As to the hearing, recovery of double damages, appeal, removal of cause by certiorari, etc., see Compilers' Sections (13247) et seq.

### (13230). Restoration of Possession.

SEC. 2. When any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, the person entitled to the premises may be restored to the possession thereof, in the manner hereinafter provided.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 123, being C. L. '57, (4975); C. L. '71, (6696); How. 8285; C. L. '97, (11154). Unchanged.

**RESTORATION TO POSSESSION:** This section provides for a restoration in two classes of cases: (1) When the entry is by force, although entry may be given by law; and (2). When the entry is peaceable, but not given by law, and therefore prohibited, and the possession is unlawfully held by force; in other words, in the cases and under the circumstances in which an entry is inhibited by section one. The entry in both these cases must be unlawful. In the first case it is unlawful, because made by force; in the second case, because it is not given by law. *Bush v. Dunham*, 4 Mich. 343; *Seitz v. Miles*, 16 Mich. 456. The proceedings to restore possession for forcible entry or detainer are in their nature criminal and require the same kind of proof. *Harrington v. Scott*, 1 Mich. 17; *Marsh v. Bristol*, 65 Mich. 386, distinguishing *Seitz v. Miles*, 16 Mich. 456. And see *Davis v. Ingersoll*, 2 Doug. 372. Only the person entitled to the possession can be restored thereto, under this chapter. *Bush v. Dunham*, 4 Mich. 343; *Hoffman v. Harrington*, 22 Mich. 54; *McGuffe v. Carter*, 42 Mich. 497. The general rule is, that the possession of a tenant is not such a possession as entitles the landlord to bring the action for forcible entry and detainer, and that, when a tenant is disseized under circumstances which authorize the action, the tenant should institute the proceedings. *Vincent v. Brant*, 101 Mich. 62. A deed purporting to convey the premises in question to the complainant is admissible to show his right of possession. *Gale v. Eckhart*, 107 Mich. 465. This statute does not contemplate proceedings unless the demandants represent the entire interest in the lands. *Moody v. Seaman*, 46 Mich. 74. Tenants in common of the whole estate may join in the proceedings to recover possession. *Id.*

One who holds a deed to land from the state land commissioner under P. A. 1893, p. 407, No. 206, Sec. 131, as amended by P. A. '01, p. 187, No. 141, should bring ejectment against the former owner of the property who is in peaceful and rightful possession thereof, and

not forcible entry and detainer under this section or summary proceedings under Sec. 11164. *Duff v. Hall*, 158 Mich. 513, 123 N. W. 11. See *Smith v. Detroit Loan & Building Ass'n.*, 115 Mich. 350.

(13231). Complaint.

SEC. 3. The person entitled to the possession of the premises, his agent or attorney, may make complaint in writing and an oath, and deliver the same to a circuit court commissioner of the county in which the premises are situated, or to a justice of the peace of the city or township where the premises are located, *or of any adjoining or contiguous city or township*, setting forth that the person complained of, is in possession of the lands or tenements in question, describing them, and that he entered into the same with force, or that he unlawfully holds the same by force, or against the rights of the plaintiff, as the case may be: Provided, That justices of the peace shall not have jurisdiction under this chapter, when a circuit court commissioner resides in the same township or city, unless such circuit court commissioner shall be absent from the county or is interested in the case, either as principal agent or attorney.

HISTORY: Re-enacts Sec. 3 of R. S. '46, Ch. 123; As Am. '48, p. 313, Act 206, Eff. June 2, being C. L. '57, (4976); As Am. '58, p. 10, Act 4, Eff. May 6; As Am. '61, p. 466, Act 218, Eff. June 15; As Am. '67, p. 88, Act 63, Eff. June 27; C. L. '71, (6697); How. 8286; C. L. '97, (11155), changing "complainant" to "plaintiff," "act" to "chapter," and eliminating "or the recorder of the city of Detroit or a judge of a court of record," and "or city as amended by P. A. '19, Act No. 172, by adding the words in italics. Unchanged until the last amendment.

COMPLAINT: Under the Revised Statutes of '38 it was held that the complaint should contain the same substantive allegations as were requisite in an indictment thereunder and be held to the same proof as would be necessary for a conviction (*Davis v. Ingersoll*, 2 Doug. 372); that the complaint should allege all the facts necessary to show a case under the statute and give jurisdiction (*Caswell v. Ward, Royce v. Bradburn*, 2 Doug. 374, 377); that no declaration is necessary in these cases, the complaint standing in lieu thereof (*Caswell v. Ward*, 2 Doug. 374). See *Bush v. Dunham*, 4 Mich. 344; *Clark v. Gage*, 19 Mich. 512. Proper form of complaint. *Bush v. Dunham*, 4 Mich. 345. The complaint must aver that complainant is entitled to the possession of the premises. *Bush v. Dunham*, 4 Mich. 339; *Bryan v. Smith*, 10 Mich. 229; *Allen v. Carpenter*, 15 Mich. 32; *Bennett v. Robinson*, 27 Mich. 29. The general allegation in the complaint that defendant is in possession of the premises and unlawfully holds them against the rights of the plaintiff is sufficient, though possession was taken or held by force. *Gault v. Stormont*, 51 Mich. 636. The lands or tenements should be described definitely and intelligibly enough to designate and identify the premises. The degree of certainty should be measured by

the rules of pleading, rather than by those of contracts. *Clark v. Gage*, 19 Mich. 512. The time alleged is not immaterial, in the same sense as in the case of indictments, and two distinct occurrences can not properly be submitted to the jury under one complaint. *Hoffman v. Harrington*, 25 Mich. 146. The complaint may be in general form, without setting forth the particular facts making a case within the statute. *Bryan v. Smith*, 10 Mich. 234. But it must show all that is necessary to confer jurisdiction. *Id.* 10 Mich. 233; *Bush v. Dunham*, 4 Mich. 344. Sufficiency of complaint. *Kusterer v. Wise*, 59 Mich. 382; *Carpenter v. Harris*, 51 Mich. 223. The complaint must be positively sworn to, not "to the best of the knowledge, information and belief" of the affiant. *Seitz v. Miles*, 16 Mich. 456. Surplusage in the complaint. *Id.*; *Bennett v. Robinson*, 27 Mich. 26.

**JURISDICTION:** This statute is not unconstitutional in conferring jurisdiction upon circuit court commissioners. *Streeter v. Paton*, 7 Mich. 341. The jurisdiction of justices in these proceedings is derived wholly from this chapter; and, when exercising such jurisdiction, they are not bound by the provisions of the general justice's act, except so far as it has been adopted by this chapter. *Dibell v. Brinkerhoff*, 22 Mich. 371; *Fowler v. Bredin*, 98 Mich. 134. The complaint need not set up the fact that no commissioner resides in the township. If the fact be so, the justice is given jurisdiction. *Grand Rapids Nat. Bank v. Kritzer*, 116 Mich. 688. A justice of the peace has the same jurisdiction as a circuit judge in these proceedings. *Riggs v. Sterling*, 51 Mich. 157; *Chylowski v. Steinberg*, 193 Mich. 547.

#### (13232). Process Upon Complaint.

**SEC. 4.** Upon receiving such complaint, the officer to whom the same is delivered, shall issue his warrant, directed to the sheriff or any constable of the same county, commanding him to apprehend the person named in such complaint, and to bring him forthwith before such officer, to answer such complaint; or such officer may, at the option of the plaintiff, issue summons against the defendant, as hereinafter provided, in cases of tenants holding over after the expiration of their term, and the same proceedings may be thereupon had as in case of a tenant holding over after the expiration of his lease.

**HISTORY:** Re-enacts Sec. 4, R. S. '46, Ch. 123, being C. L. '57, (4977); C. L. '71, (6698); How. 8287; C. L. '97, (11156), changing "complainant" to "plaintiff." Unchanged.

**WARRANT:** The arrest of defendant in these proceedings is not approved, where some other course is allowable and where an arrest is not essential to complainant's security. *Carpenter v. Harris*, 51 Mich. 226.

#### (13233). Execution of Warrant.

**SEC. 5.** The sheriff or constable to whom any such warrant shall be delivered, shall execute the same by arresting the de-

feudant, and bringing him forthwith before the officer issuing such warrant, and shall thereupon notify the plaintiff of such arrest.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 123, being C. L. '57, (4978); C. L. '71, (6699); How. 8288; C. L. '97, (11157), changing "complainant" to "plaintiff." Unchanged.

**(13234). Pleading to Complaint.**

**SEC. 6.** Upon the defendant being brought before such officer on such warrant, he may plead not guilty to the complaint, or if he neglect or refuse to plead thereto, such officer shall enter such plea for him.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 123, being C. L. '57, (4979); C. L. '71, (6700); How. 8289; C. L. '97, (11158). Unchanged.

**CONSTRUED:** The commissioner is not obliged to wait one hour for defendant to appear. *Fowler v. Bredin*, 98 Mich. 133. As to plea of "not guilty," see notes to Compilers' Section (13244).

**(13235). Powers of Officer Issuing Warrant.**

**SEC. 7.** On such issue being joined, the officer issuing the warrant shall possess all the power necessary for the trial and determination thereof, and shall proceed to hear and determine the same; and for that purpose may issue subpoenas for witnesses, and compel their attendance in like manner as justices of the peace are authorized to do in cases within their jurisdiction.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 123, being C. L. '57, (4980); C. L. '71, (6701); How. 8290; C. L. '97, (11159). Unchanged.

**CONSTRUED:** "As justices of the peace are authorized to do." See *Dibell v. Brinkerhoff*, 22 Mich. 371; *Fowler v. Bredin*, 98 Mich. 134. Suits under the statutes of forcible entry and detainer (R. S. '38; Am. '40, p. 83) may be continued on cause shown, the power to continue, although not expressly conferred, being incident to the jurisdiction to hear and determine. *Caswell v. Ward*, 2 Doug. 374. See Compilers' Section (13247), as to adjournments.

**(13236). Trial by Jury.**

**SEC. 8.** If, before proceeding to the trial of such issue, either the plaintiff or the defendant shall request that the same be tried by a jury, such jury shall be selected and summoned, and the same proceedings shall be had in all respects as upon the trial of a cause by a jury in a justice's court, except that the sheriff, if present, may perform the same duties

in the selecting, summoning, and keeping of the jury in such case, as constables are authorized to perform in cases in justices' courts, and the venire shall be directed to the sheriff or any constable of the county.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 123, being C. L. '57, (4981); C. L. '71, (6702); How. 8291; C. L. '97, (11160), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** The jury are judges both of the law and of the facts. *Chamberlain v. Brown*, 2 Doug. 120. Question of forcible entry, for jury. *Donovan v. Chappell*, 63 Mich. 685.

**(13237). Judgment on Conviction.**

**SEC. 9.** If such defendant shall be convicted upon a trial before such officer, or by the verdict of such jury, or upon a plea of guilty to such complaint, the officer who issued the warrant shall thereupon enter a judgment that the plaintiff have restitution of the premises; and shall tax the costs and expenses for the plaintiff.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 123, being C. L. '57, (4982); C. L. '71, (6703); How. 8292; C. L. '97, (11161), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** *Bush v. Dunham*, 4 Mich. 344. Where defendant secured the judgment costs should be taxed against the complainant. *Stuart v. Corlette*, 129 Mich. 611.

**(13238). Precept and Execution.**

**SEC. 10.** The court shall thereupon issue a precept, commanding the sheriff or any constable of the county, to cause the plaintiff to be restored and put into full possession of the said premises; and shall also, in the same precept, or in a separate execution, direct the costs and expenses so taxed to be levied and collected of the defendant, in the same manner as costs are or may be collected on judgments before justices of the peace, in personal actions.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 123, being C. L. '57, (4983); C. L. '71, (6704); How. 8293; C. L. '97, (11162). Unchanged.

**CONSTRUED:** *People v. Gay*, 2 Doug. 367; *Chylowski v. Steinberg*, 193 Mich. 552.

**(13239). Judgment for Defendant.**

**SEC. 11.** If the plaintiff shall fail to prosecute his complaint, or if on such trial the defendant shall be found not guilty, judgment shall be rendered for the defendant for his

costs, which shall be taxed and collected of the plaintiff, in the same manner hereinbefore provided for the collection of costs in favor of a plaintiff recovering judgment.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 123, being C. L. '57, (4984); C. L. '71, (6705); How. 8294; C. L. '97, (11163). Unchanged.

**COSTS:** In case of a verdict adverse to plaintiff, he cannot compel the commissioner to make return to an appeal until the costs are paid. *Stuart v. Corlette*, 129 Mich. 611. The commissioner has no discretion in the matter of costs. *Id.*

Mandamus will not lie to compel commissioner to make return to an appeal from a judgment of not guilty, withheld by him because of the nonpayment of defendant's costs, though the same were taxed without notice to complainant, four days after the entry of judgment and after the taking of the appeal. *Stuart v. Corlette*, 129 Mich. 612. See *Marvin v. Hartz*, 130 Mich. 28.

#### Summary Proceedings to Recover the Possession of Land in Other Cases.

#### (13240). How Premises Recovered.

SEC. 12. The person entitled to any premises may recover possession thereof in the manner hereinafter provided, in the following cases:

1. When any person shall hold over any lands or tenements, after the time for which they are demised or let to him, or to the person under whom he holds, or contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements, or any lease or agreement under which he holds, or where rent shall have become due on any such lease or agreement, and demand of the rent or possession of the premises is waived therein, in writing, and not included in the printed form of the lease or agreement;

2. When any rent shall have become due, on any such lease or agreement, and the tenant or person in possession shall have neglected or refused for seven days after demand of the possession of the premises, unless waived as aforesaid, made in writing, to deliver up possession of the premises or pay the rent so due;

3. When any person shall continue in possession of any premises sold by virtue of any mortgage or execution, after the expiration of the time limited by law for the redemption of such premises, or when any heir or devisee shall continue in possession of any premises sold and conveyed by any executor or administrator under license from the probate court or

under authority in the will, to pay the debts of the deceased testator or intestate;

4. When any tenant at will or by sufferance shall hold over, after the determination of his estate, by a notice to quit, as provided by law.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 123, being C. L. '57, (4985); As Am. '67, p. 130, Act 94, Eff. June 27; As Am. '69, p. 197, Act 114, Eff. July 5; C. L. '71, (6706); As Am. '81, p. 235, Act 198, Eff. Sept. 10; How. 8295; C. L. '97, (11164). Unchanged.

**SUMMARY PROCEEDINGS:** As to when and in what manner the possession of property, without the consent of the occupant, can be taken without resort to the courts, see notes to Compilers' Section (13229). The subdivision of the chapter provides a mode of proceeding by the person entitled to the premises in the classes of cases in which the entry was lawful, but the right of possession under it has ceased. *Bush v. Dunham*, 4 Mich. 343. The defense of a former suit pending must be raised by a verified plea in abatement and cannot be raised by a motion to quash the proceedings. *Ryan v. Miller*, 129 Mich. 170. A lessee of land to whom the owner refuses possession cannot maintain summary proceedings. *Freeborn v. LaLonde*, 118 Mich. 662. For other cases in which proceedings cannot be maintained, see *Foss v. VanDriele*, 47 Mich. 201; *Brown v. Martin*, 49 Mich. 565; *Abel v. Hubbell*, 52 Mich. 37; *Newkirk v. Tracy*, 61 Mich. 174. Privity between the parties. *Royce v. Bradburn*, 2 Doug. 377. When there is sufficient privity. *Green v. Gill*, 47 Mich. 86; No privity between the parties in case of tenancy by sufferance. *Bennett v. Robinson*, 27 Mich. 26. What not available in defense. *Bartlett v. Bartlett*, 103 Mich. 294. See further as to summary proceedings. *Swart v. Western Union Tel. Co.*, 142 Mich. 23; *Cunningham v. Kinyon*, 156 Mich. 428; *Hilsendegen v. Clothing Co.*, 165 Mich. 255; *Patterson v. Carrel*, 171 Mich. 296.

**QUESTIONS OF TITLE:** Not triable in summary proceedings under this chapter. *Riggs v. Sterling*, 51 Mich. 158; *Vos v. Dykema*, 26 Mich. 399; *Bennett v. Robinson*, 27 Mich. 31; *Gregory v. Knight*, 50 Mich. 61; *Mulder v. Corlett*, 54 Mich. 82; *Hoffman v. Clark*, 63 Mich. 82; *Hill v. Olin*, 82 Mich. 643; *Drake v. Happ*, 92 Mich. 584; *Jenkinson v. Winans*, 109 Mich. 526; *Northern Michigan Building & Loan Asso. v. Fors*, 171 Mich. 331. When it appears that title is necessarily involved the magistrate or judge should dismiss the proceedings. *Butler v. Bertrand*, 97 Mich. 60. But this must be understood to mean a question of legal title, and it must be raised by the evidence offered. *Gage v. Sanborn*, 106 Mich. 278. The question of title can be raised under the statutory plea of not guilty. *Butler v. Bertrand*, 97 Mich. 59. The pleading of title by the defendant will not divest the court of jurisdiction. *Chapman v. Nehman*, 128 Mich. 296; *Tefft v. Tefft*, 154 Mich. 239; See *Meeska v. Miller*, 138 Mich. 88. A defendant who goes into possession as a tenant cannot dispute the landlord's title. *Meeska v. Miller*, 138 Mich. 88. A deed is admissible in evidence to show plaintiff's right of possession. *Gale v. Eckhart*, 107 Mich. 465. The defendant cannot set up an equitable title. *Cottrell v. Moran*, 138 Mich. 410. The question of fraud in the procurement of a deed cannot be raised in summary proceedings. *Gale v. Eckhart*, 107 Mich. 465. A

party holding under a tax title cannot be ousted by proceedings under this chapter. *Duff v. Hall*, 158 Mich. 513. Where defendant claims title by adverse possession. *Parker v. Case*, 155 Mich. 497.

**NOTICE TO QUIT:** See Compilers' Section (11812) and notes. A tenant at will must be served with notice to quit before summary proceedings can be properly instituted against him. *Simons v. Detroit Twist Drill Co.*, 136 Mich. 592; *Appleton v. Buskirk*, 67 Mich. 409. One holding over after the sale of his premises on execution is not entitled to notice to quit. *Lieblein v. Hansen*, 178 Mich. 13. Tenants holding over after the expiration of their term are not entitled to notice to quit before bringing summary proceedings to dispossess them. *Smith v. Smith*, 144 Mich. 139. Notice to deliver possession or pay rent takes the place of a formal demand for the payment of rent. *Cockerline v. Fisher*, 140 Mich. 99. Waiver of notice to quit. *Crane v. O'Reilly*, 8 Mich. 312; *Moody v. Seaman*, 46 Mich. 74.

**SUBDIVISION 1:** *Vincent v. Defield*, 98 Mich. 84. Upon the termination of a lease the lessor is entitled in law to the possession of the leased premises and has a right to enter peaceably into such possession and the lessee has no right to remove him by force. *Gillespie v. Beecher*, 85 Mich. 347, 354; *Franck v. Wigert*, 56 Mich. 474. And the landlord may, in the tenant's temporary absence, take peaceable possession, enter the premises and remove the tenant's furniture without injury; and should the tenant resist the landlord may make effective defense of his possession. *Smith v. Detroit L. & B. Association*, 115 Mich. 340. The party entitled to the possession of property has a right to take it in any manner not constituting a breach of the peace and it was never the design of this section to take away that right. *Pendill v. Union Mining Co.*, 64 Mich. 172.

See further as to the right of re-entry, notes to Compilers' Section (13229). Re-entry clause in lease. *Langley v. Ross*, 55 Mich. 163. As to tenancies at will, by sufferance and from year to year, see Compilers' Section (11812) and notes. As to rents, etc., see notes to Compilers' Section (11809) and the next subdivision. An agreement by a tenant to surrender at some future time the possession of lands does not, if broken, give the landlord the right to enforce the agreement by summary proceedings. There must be in addition to the agreement an actual surrender of the lands. *Fish v. Thompson*, 129 Mich. 316.

**FORFEITURE OF LEASE:** Where no provision is made in a lease for the mode of its forfeiture, or of notice of the lessor's election to forfeit it, he must proceed according to the recognized rules of the common law, as modified by this section. *Pendill v. Union Mining Co.*, 64 Mich. 178. See also *Hanaw v. Bailey*, 83 Mich. 24. The mere receipt of rent due before forfeiture, after the lease had been forfeited, will not be a waiver of forfeiture. And the mere payment of rent, or royalty, unless fully paid, would not waive the forfeiture (*Alexander v. Hodges*, 41 Mich. 691). *Pendill v. Union Mining Co.*, 64 Mich. 179. Effect of payment of rent after suit brought and pending the hearing, see *Chiere v. McDonald*, 121 Mich. 54; *Gault v. Gault*, 162 Mich. 85.

A lease upon shares is not assignable without consent of lessor, and its attempted assignment and delivery of possession thereunder works a forfeiture and the lessor may take immediate steps to regain possession. *Lewis v. Sheldon*, 103 Mich. 102, citing *Randall v. Chubb*, 46 Mich. 311.



An assignment in violation of a provision in a lease that the lessee is not to assign and that an assignment will work a forfeiture, entitled the plaintiff to possession of the land. *Marvin v. Hartz*, 130 Mich. 26.

**LAND CONTRACTS:** There are three actions open to the vendor in a land contract upon the failure of the vendee to make payments, and a service of a notice upon him declaring the contract forfeited (1) Foreclosure in equity. (2) Ejectment. (3) Proceedings under this chapter. The first two exist independent of statute, the third is purely statutory. *Lambton Loan & Investment Co. v. Adams*, 132 Mich. 353. See also *Donnelly v. Lyons*, 173 Mich. 515-20. Where a vendee has violated the terms of a land contract, notice of forfeiture on the part of the vendor is required in order to determine the contract relation. *Murphy v. McIntyre*, 152 Mich. 592. A vendee who has violated the forfeiture clause in a land contract and has been dispossessed by summary proceedings cannot redeem in equity the property recovered from him by the vendor, even though the notice to quit was insufficient, *Mills v. William Drueke Co.*, 172 Mich. 394.

**SUBDIVISION 2:** As to rents, when due, etc., see notes to Compiler's Section (11809).

Where the rent is payable monthly, but no time of payment is fixed, it is not due until the end of the month; but it is competent to make it payable in advance, as a condition precedent to the vesting of any estate in the tenant. *Hilsendegen v. Scheich*, 55 Mich. 468. The statute has given a remedy to obtain possession for non-payment of rent, independent of any conditions in the lease. *Langley v. Ross*, 55 Mich. 166. And a landlord may bring this action, although he had previously assigned the rents to accrue under the lease. *Chamberlain v. Brown*, 2 Doug. 120. Proceedings cannot be commenced before the rent actually paid has been fully earned. *Barber v. Stone*, 104 Mich. 90. The statute permits notice only when rent is due by the terms of the lease. *Barber v. Stone*, 104 Mich. 92. Oral demand of payment, followed on refusal by a written demand of possession and notice to quit, is sufficient. *Budd v. Fairs*, 53 Mich. 518, citing *Morrill v. Mackman*, 24 Mich. 279; *McSloy v. Ryan*, 27 Mich. 110; *Coan v. Mole*, 39 Mich. 454; *Moody v. Seaman*, 46 Mich. 74. Proceedings can be begun against a tenant from year to year, who fails to keep up his annual rent, if after written demand and notice, he still neglects for seven days to pay. *Budd v. Fairs*, 53 Mich. 518. The demand for payment, required by this subdivision as a condition precedent to re-entry, may be waived by the parties. *Pendill v. Union Mining Co.*, 64 Mich. 172. Service of notice to pay rent or surrender possession. *McSloy v. Ryan*, 27 Mich. 110; *Moody v. Seaman*, 46 Mich. 74.

**SUBDIVISION 3:** This provision applies only to redeemable foreclosures and it cannot cover chancery sales without enlarging it beyond its terms and interfering with the legitimate powers of courts of equity. *Dowling v. Hannant*, 78 Mich. 116-17. The purchaser of mortgaged premises on a statutory foreclosure, resorting to these proceedings, must prove the regularity of all the proceedings to foreclose. *Caswell v. Ward*, 2 Doug. 374. See *Nims v. Sherman*, 43 Mich. 45; *Brown v. Martin*, 49 Mich. 565.

The owner of real property holding over after sale of his premises on execution is not a tenant. *Lieblen v. Hansen*, 178 Mich. 13.

**SUBDIVISION 4:** As to tenancies at will and by sufferance, etc.,

**(13241). Complaint.**

Section 13. In the cases specified in the preceding section, the person or persons entitled to the possession of the premises, his or their agent or attorney, may make complaint in writing and on oath and deliver the same to a circuit court commissioner or to a justice of the peace, when he shall have jurisdiction under this chapter, setting forth that the person complained of, is in possession of the lands or tenements in question, describing them, and that such person holds the same unlawfully, and against the rights of the plaintiff: *Provided, however, That when a person seeks to recover possession of any lands or tenements from any person who shall hold same contrary to the conditions or covenants of any executory contract for the purchase thereof, the complaint and summons shall so state: Provided, however, That no proceedings shall be instituted under the provisions of this act from the fifteenth day of November to the first day of May where the premises described in the complaint are situate upon an island which is more than ten miles from the nearest portion of the mainland in the same county in which said premises may be located.*

HISTORY: Amendment by P. A. '23, Act No. 320. Approved May 25, 1923.

**(13242). Summons.**

Section 14. Upon receiving such complaint, the officer, to whom same is delivered, shall issue a summons, *except where proof is made by affidavit as hereinafter provided* directed to the sheriff or any constable of the same county, commanding him to summon the defendant, *if a resident of the county*, to be and appear before such officer, at a time and place therein to be specified, not less than three nor more than six days from the issuing thereof to answer such complaint ( \* \* \* )<sup>1</sup> *except where plaintiff shall request a summons returnable in not less than fifteen days or where complaint made that a person holds possession contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements, or where the person holding possession is a non-resident of the county, or where the premises are situate upon an island more than ten miles from the nearest portion of mainland in the same county, in which case the summons so issued shall be made returnable ( \* \* \* )<sup>2</sup> in not less than fifteen days nor more than forty days from the issuing thereof. As many original summons may be issued as the plaintiff may request. If more than one original summons is issued the same shall be marked "First Original," "Second Original," and so on respectively, and the copies of each shall be likewise so marked. A summons and an order for the appearance of any defendant or defendants may be issued simultaneously.*

HISTORY: Amendment by P. A. '23, Act No. 320. Approved May 25, 1923.

1. The words omitted are: "Unless such complaint shall be based upon a default made, or contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements."

2. The words omitted are "as aforesaid."



see notes to Compilers' Section (11812). Independent of contract stipulations the vendee in a land contract, after default and after notice of forfeiture, is a tenant at will. *Murphy v. McIntyre*, 152 Mich. 592.

Where a deed is made pursuant to a decree of the supreme court, summary proceedings cannot be brought against the grantee on the ground that he agreed prior to the appeal that if the grantor's contention as to title prevailed, he would pay for the use and occupation of the premises. *Cunningham v. Kinyon*, 156 Mich. 423, 120 N. W. 806.

See *Duff v. Hall*, 158 Mich. 514; *Miner v. Dickey*, 140 Mich. 520; *Lambton Loan & Invest Co. v. Adams*, 132 Mich. 352; *Marvin v. Hartz*, 130 Mich. 27; *Chapman v. Nehman*, 128 Mich. 296.

See *Tuller v. Mich. Cent. R. Co.*, 194 Mich. 312; 160 N. W. 587; *Hoffman v. Willits*, 194 Mich. 276.

Summary proceedings cannot be brought under this statute by a lessee against a landlord who refuses possession. *Chylowski v. Steinberg*, 193 Mich. 547; 160 N. W. 421.

#### (13241). Complaint.

SEC. 13. In the cases specified in the preceding section, the person or persons entitled to the possession of the premises, his or their agent or attorney, may make complaint in writing and on oath, and deliver the same to a circuit court commissioner, or to a justice of the peace, when he shall have jurisdiction under this chapter, setting forth that the person complained of, is in possession of the lands or tenements in question, describing them, and that such person holds the same unlawfully, and against the rights of the plaintiff.

HISTORY: Re-enacts Sec. 13 of R. S. '46, Ch. 123; As Am. '48, p. 313, Act 206, Eff. June 2, being C. L. '57, (4986); As Am. '58, p. 10, Act 49, Eff. May 6; As Am. '61, p. 466, Act 218, Eff. June 15; As Am. '67, p. 89, Act 63, Eff. June 27; C. L. '71, (6707); How. 8296; C. L. '97, (11165), making change in phraseology to conform with section 3 of this chapter. Unchanged.

COMPLAINT: See cases cited under "Complaint," in notes to Compilers' Section (13231). The complaint is not jurisdictionally defective in omitting the name of the defendant from the body of it, if there is enough in it to supply the name. *Olson v. Muskegon Circuit Judge*, 49 Mich. 85. The complaint need not set up the fact that no commissioner resides in the township, if the fact be so, the justice is given jurisdiction. *Grand Rapids Nat. Bank v. Kritzer*, 116 Mich. 688. Amendment of complaint. *Gensler v. Nicholas*, 151 Mich. 529.

CITED: *Marvin v. Hartz*, 130 Mich. 26.

#### (13242). Summons.

SEC. 14. Upon receiving such complaint, the officer to whom the same is delivered shall issue a summons directed to the sheriff, or any constable of the same county, commanding him

to summon the defendant to be and appear before such officer, at a time and place therein to be specified, not less than three nor more than six days from the issuing thereof, to answer such complaint, *unless such complaint shall be based upon a default made, or contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements, in which case the summons so issued shall be returnable as aforesaid in not less than five nor more than thirty days from the issuing thereof.*

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 123, being C. L. '57, (4987); C. L. '71, (6708); How. 8297; C. L. '97, (11166). As Am. by P. A. '19, Act No. 267, Eff. Aug. 16, 19, unchanged until the last amendment shown in italics.

**CONSTRUED:** The intervention of one day between the verification of the complaint and the issue of the summons will not invalidate. *Gruler v. McRoberts*, 48 Mich. 316. The statute requires three entire days after the day of issue and before the return day. *Salce v. Ireland*, 9 Mich. 157; *Gregor v. Olde*, 209 Mich. 49.

See also *Marvin v. Hartz*, 130 Mich. 26. In summary proceedings under Compilers' Sections (13240)-(13241)-(13242)-(13243)-(13244)-(13245)-(13246), a warrant is not authorized, but upon complaint a summons is issued. *Appleton v. Buskirk*, 67 Mich. 409. See *Chylowski v. Steinberg*, 193 Mich. 552.

#### (13243). Service.

**SEC. 15.** The officer to whom such summons shall be delivered shall serve the same at least two days before the time of appearance mentioned therein, by delivering to the defendant, if to be found within the county, a copy thereof, but if the defendant shall not be found it shall be served by leaving such copy at the usual place of abode of such defendant, in the presence of some person of suitable age, who shall be informed of its contents, *except in cases which may be brought upon a complaint based upon a default or contrary to the conditions of an executory contract for the purchase of lands or tenements, in which case the summons shall be served personally upon the defendant therein mentioned at least two days before the time of appearance mentioned therein by delivering to the defendant, if to be found within the county, a copy thereof, but if the defendant shall not be found and upon proof by affidavit by any of the following facts:*

*First, That the defendant resides out of the State;*

*Second, That the defendant is a resident of this State, and that process for his appearance has been duly issued and that the same could not be served by reason of his absence from*

**(13243b). Order of Appearance.**

*Section 15-b. Upon or at any time after the filing of the complaint the officer receiving same shall make an order for the appearance of the defendant on a date to be fixed therein, which order shall contain the names of the parties in the action, the name of the court before whom the action is pending, and a description of the property set forth in the complaint, which time of appearance shall not be less than thirty days nor more than forty days from the date of such order, upon proof by affidavit of any of the following facts:*

*First, That the defendant resides out of the State;*

*Second, That the defendant is a resident of this State, and that process for his appearance has been duly issued and that the same could not be served by reason of his absence from or concealment within this State, or by reason of his continued absence from his place of residence; or*

*Third, That it cannot be ascertained in what state or country the defendant resides.*

*If his whereabouts shall be known, a copy of such order and*

to summon the defendant to be and appear before such officer, at a time and place therein to be specified, not less than three nor more than six days from the issuing thereof, to answer such complaint, *unless such complaint shall be based upon a default made, or contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements, in which case the summons so issued shall be returnable as aforesaid in not less than five nor more than thirty days from the issuing thereof.*

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 123, being C. L. '57, (4987); C. L. '71, (6708); How. 8297; C. L. '97, (11166). As Am. by P. A. '19, Act No. 267. Eff. Aug. 16, 19, unchanged until the last amend-

**(13243a). New Summons in Continuance of Suit.**

*Section 15-a. If it appear by the return of the officer that the summons was not served in the manner above provided, the plaintiff may take out a new summons against the defendant in continuance of his suit returnable as provided in the case of the original summons, which shall be served in the same manner and within the same period as the original summons. The officer before whom complaint is filed may continue the cause from time to time.*

**HISTORY:** Section 15a is a new section added by P. A. '23, Act No. 320. Approved May 25, 1923.

delivered shall serve the same at least two days before the time  
**(13243). Service.**

**Section 15.** The officer to whom such summons shall be delivered shall serve the same, *if returnable in not more than six days, at least two days before the time of appearance mentioned therein by delivering to the defendant, if to be found within the county, a copy thereof, but if the summons shall be returnable in not less than fifteen days the summons shall be served at least ten days before the time of appearance mentioned therein by delivering to the defendant, if to be found within the State, a copy thereof, but if the defendant shall not be found, it shall be served by leaving such copy at the usual place of abode of such defendant in the presence of some person of suitable age who shall be informed of its contents (\* \* \*)<sup>3</sup> and in cases where the summons may be served outside of the county, a sheriff or constable of any county may serve same. Service upon any or all of the defendants may be made under any of the original summons, but no more costs shall be taxed in respect of the service of such writs than if but one original shall have been issued.*

**HISTORY:** Amendment by P. A. '23, Act No. 320. Approved May 25, 1923.

3. The words omitted here are the amendments of P. A. '19, Act No. 267, which have gone into Section 15b.

(13243b). Order of Appearance.

Section 15-b. Upon or at any time after the filing of the complaint the officer receiving same shall make an order for the appearance of the defendant on a date to be fixed therein, which order shall contain the names of the parties in the action, the name of the court before whom the action is pending, and a description of the property set forth in the complaint, which time of appearance shall not be less than thirty days nor more than forty days from the date of such order, upon proof by affidavit of any of the following facts:

First, That the defendant resides out of the State;

Second, That the defendant is a resident of this State, and that process for his appearance has been duly issued and that the same could not be served by reason of his absence from or concealment within this State, or by reason of his continued absence from his place of residence; or

Third, That it cannot be ascertained in what state or country the defendant resides.

If his whereabouts shall be known, a copy of such order and a copy of the complaint shall be personally served upon such defendant at least ten days before the time prescribed for the appearance of such defendant, but if defendant shall not be found it shall be served by leaving a copy of such order and a copy of the complaint at the usual place of abode of such defendant in the presence of some person of suitable age who shall be informed of its contents, and proof of such service shall be made by the affidavit of the person who shall serve the same, made before an officer authorized to take acknowledgments; such affidavit shall state the time, place and mode of giving such notice and when such affidavit shall be made outside of this State, there shall be attached thereto the certificate of the clerk of a court of record or a certificate of a proper official in said state certifying to the official character of the person taking such acknowledgment and the genuineness of his signature to the jurat of the affidavit but upon due proof by affidavit that the order could not be served as above provided, the officer before whom complaint is filed shall make another order for the appearance of such defendant in not less than thirty days nor more than forty days from the date of such order, which order may be published in the same manner as provided where the whereabouts of such defendant is unknown. If the whereabouts of such defendant is unknown, such order shall be published within seven days after it shall have been entered in some newspaper published and circulated in the county or, if none is published and circulated therein, then in such newspaper as the court may direct, once each week for three successive weeks, and such order shall contain the date, time, and place set for the hearing, the names of the parties in the action, the name of the court before whom the action is pending, together with a description of the property set forth in the complaint. It shall not be necessary in any case to make such publication when a copy of such order shall have been served personally on such absent, concealed or non-resident defendant at least ten days before the time for the appearance of such defendant.

HISTORY: Section 15b is a new section added by P. A. '23, Act No. 320, and is taken from the amendments of P. A. '21, Act No. 267. Approved May 25, 1923.





*or concealment within this State, or by reason of his continued absence from his place of residence; or*

*Third, That it cannot be ascertained in what State or country the defendant resides.*

*An order for the appearance of such defendant may be entered by the officer receiving this complaint. Such order shall be published within five days after it shall be entered in some newspaper printed in the county or in such paper as the court may direct, once in each week for three weeks in succession, and shall contain the date, time and place set for the hearing of such cause.*

HISTORY: Re-enacts Sec. 15, R. S. '46, Ch. 123, being C. L. '57, (4988); C. L. '71, (6709); As Am. '81, p. 235, Act 198, Eff. Sept. 10; How. 8298; C. L. '97, (11167); As Am. by P. A. '19, Act No. 267, Eff. Aug. 16, unchanged until the last amendment shown in italics.

CONSTRUED: There must be two entire days between the day of service and the return day. *Salee v. Ireland*, 9 Mich. 157. In computing the time for service, Sunday must be excluded. *Crozler v. Allen*, 117 Mich. 172; *Zimmerman v. May*, 208 Mich. 55.

#### (13244). Defendant's Plea.

SEC. 16. Upon the return of such summons, if the same be returned duly served, and the defendant appears, such defendant may plead not guilty to the complaint, or if he neglect or refuse to plead thereto, such officer shall enter such plea for him, and such issue shall be tried and judgment shall be rendered, and the same proceedings shall be had thereon in all respects, and the costs shall be taxed and collected in the same manner as in cases of forcible entry or detainer, and with the like effect: *Provided*, That if it is claimed either upon the trial before such officer, or upon the trial of any appeal to the circuit court, that the plaintiff is entitled to the possession of said premises, in consequence of the nonpayment of any sum of money due, either as rent or as a part or portion of the purchase money of premises, under a contract in writing for the purchase thereof, such officer, or the court, or the jury, if the case is tried by a jury, shall, in addition, ascertain and determine the amount due the said plaintiff, and such amount shall be stated in said judgment.

HISTORY: Re-enacts Sec. 16, R. S. '46, Ch. 123, being C. L. '57, (4989); As Am. '67, p. 131, Act 94, Eff. June 27; As Am. '69, p. 198, Act 114, Eff. July 5; C. L. '71, (6710); As Am. '81, p. 236, Act 198, Eff.

Sept. 10; How. 8299; C. L. '97, (11168), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** A circuit court commissioner is not obliged to wait one hour for defendant to appear. *Fowler v. Bredin*, 98 Mich. 133. No declaration necessary. See note "Complaint," to Compilers' Section (13231). As jury, see note to Compilers' Section (13236). Defense of tenant by landlord, etc. *Byrne v. Beeson*, 1 Doug. 179.

**PLEA OF NOT GUILTY:** This statute contemplates such plea only. *Hill v. Carter*, 101 Mich. 160. Such plea waives irregularities in the summons and venire. *Falkner v. Beers*, 2 Doug. 117. See note "General issue waives," to Compilers' Section (12463). Question of title can be raised under this plea. *Butler v. Bertrand*, 97 Mich. 59.

**AMOUNT DUE PLAINTIFF:** Prior to the amendment of this section in '81, (see history above) there could be no finding of the amount due upon the lease or contract by a jury in the circuit court, as the provision of the statute relative to this finding did not apply to the trial on appeal. *McSloy v. Ryan*, 27 Mich. 110. Since the amendment, however, the circuit court may determine the amount due the same as the commissioner. *Smith v. Nelson*, 165 Mich. 443. But if the defendant omit to pay the amount found due by the circuit court within five days after judgment he loses this privilege, even if such omission be accompanied by an appeal to the supreme court. *Id.* A failure to find the amount due and state the same in the judgment will not release any party to the bond given on appeal, such sum constituting no part of the judgment and not being enforceable against either principal or surety. The object of the statute is to ascertain the extent of defendant's liability and furnish record evidence of its discharge by payment, without waiting for suit to be brought on the appeal bond. *Bauer v. Wasson*, 66 Mich. 260. See also *Chlera v. McDonald*, 121 Mich. 54.

**CITED:** *Kennedy v. Ford*, 183 Mich. 486; (In dissenting opinion), *Smith v. Detroit Loan & Building Association*, 115 Mich. 345. See *B. Siegel Co. v. Codd*, Circuit Judge, 165 Mich. 443; 149 N. W. 1015; *Lambton Loan & Investment Co. v. Adams*, 132 Mich. 352.

#### (13245). Adjournment.

**SEC. 17.** If the defendant fail to appear on the return of such summons, and the same be returned duly served, the officer issuing such summons may, in his discretion, adjourn the hearing, not more than six days from the return of such summons, and on the day to which the hearing shall be adjourned, if the defendant appear, the same proceedings shall be had as if he had appeared at the return of the summons.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 123, being C. L. '57, (4990); C. L. '71, (6711); How. 8300; C. L. '97, (11169). Unchanged.

**CONSTRUED:** *Gregor v. Olde*, 209 Mich. 43.

#### (13246). Hearing.

**SEC. 18.** If the defendant fail to appear on the return of the summons, and there be no adjournment, or if the defendant

fail to appear on the day to which the hearing may be adjourned, the officer shall note such failure in the minutes of his proceedings, and proceed to hear the complaint, and to inquire into the truth thereof; and if such officer shall be satisfied that such complaint is true, and that the plaintiff is entitled to restitution of the premises, he shall render judgment accordingly, and tax the costs for the plaintiff, and issue a writ of restitution, and process for the collection of the costs, as in other cases, and with the like effect.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 123, being C. L. '57, (4991); C. L. '71, (6712); How. 8301; C. L. '97, (11170), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** Bryan v. Smith, 10 Mich. 229, 236; Dibell v. Brinkerhoff, 22 Mich. 375; Gregor v. Olde, 209 Mich. 43.

#### (13247). Adjournments.

**SEC. 19.** After an issue shall be joined upon any complaint in pursuance of the provisions of this chapter, the hearing may be adjourned from time to time, as may be necessary, upon sufficient cause being shown. (\* \* \*)

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 123, being C. L. '57, (4992); C. L. '71, (6713); How. 8302; C. L. '97, (11171), As Am. P. A. '19, Act No. 267, Eff. Aug. 16, where this section is repeated without change excepting the elimination of the time limit.

**ADJOURNMENT:** The adjournment of causes is always a matter of discretion and the discretion is not reviewable, except in case of abuse or mistake of law. McNaughton v. Everet, 116 Mich. 142; Gregor v. Olde, 209 Mich. 43.

#### (13248). When Defendant to Remain in Custody.

**SEC. 20.** If such hearing be adjourned on the application of a defendant, proceeded against by warrant for a forcible entry, or forcible detainer, and the plaintiff shall not consent thereto, such defendant shall continue, during the time of the adjournment, in the custody of the sheriff or constable, unless he shall give bond to the plaintiff, in the penal sum of fifty dollars, with sufficient surety to be approved by the officer issuing the warrant, conditioned to pay all such costs as shall be awarded against him in such cause.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 123, being C. L. '57, (4993); C. L. '71, (6714); How. 8303; C. L. '97, (11172). Unchanged.

**(13249). General Powers of Officer.**

SEC. 21. The officer before whom any proceedings shall be had for recovering the possession of lands in pursuance of this chapter, shall possess all the necessary powers for issuing subpoenas, and compelling the attendance of witnesses, and enforcing obedience to all orders and process lawfully made or issued by him.

HISTORY: Re-enacts Sec. 22, R. S. '46, Ch. 123, being C. L. '57, (4995); C. L. '71, (6715); How. 8304; C. L. '97, (11173). Unchanged.

**(13250). Penalty for Non-Appearance of Juror or Witness.**

SEC. 22. Every person summoned as a juror or subpoenaed as a witness, who shall not appear, or appearing shall refuse to serve or testify in any cause prosecuted by virtue of this chapter, shall forfeit and pay for every such refusal, unless some reasonable excuse be shown, such fine, not exceeding ten dollars, as the officer before whom the proceedings are instituted shall think proper to impose; and such officer is authorized and required to issue an execution for the collection thereof, directed to the sheriff or any constable of the county, in the same manner and with the like effect, as justices of the peace are authorized to do in cases of similar fines imposed by them.

HISTORY: Re-enacts Sec. 23, R. S. '46, Ch. 123, being C. L. '57, (4996); C. L. '71, (6716); How. 8305; C. L. '97, (11174). Unchanged.

**(13251). Recovery of Double Damages by Plaintiff.**

SEC. 23. The plaintiff obtaining restitution of any premises under the provisions of this chapter, shall be entitled to an action of trespass on the case against the defendant, and may recover double damages from the time of the forcible entry, or forcible detainer, or of the notice to quit, or demand of possession, as the case may be.

HISTORY: Re-enacts Sec. 24, R. S. '46, Ch. 123, being C. L. '57, (4997); C. L. '71, (6717); How. 8306; C. L. '97, (11175), changing "complainant" to "plaintiff," and "treble" to "double" and eliminating "of trespass, or." Modified.

CONSTRUED: Plaintiff is entitled to treble damages, when he has recovered judgment of ouster from leased premises, notwithstanding the jury finds that defendant held possession because he, in good faith, believed he had a right to do so. *Lane v. Buhl*, 103 Mich. 38. This section, authorizing the action of trespass, is penal in its nature and can have no retroactive effect. *Newkirk v. Tracey*, 61 Mich. 180.

When complainant not deprived of the remedy here given. *Hitchcock v. Pratt*, 51 Mich. 263. Treble damages; waiver of claim. *Hogsett v. Ellis*, 17 Mich. 370. What included in treble damages. *Howser v. Melcher*, 40 Mich. 185.

CITED: *McMillan v. Fletcher*, 100 Mich. 343; *Crozier v. Allen*, 117 Mich. 171; *Schellenberg v. Frank*, 139 Mich. 185; *Sink v. Oceana Circuit Judge*, 146 Mich. 122.

**(13252). Appeal to Circuit Court.**

SEC. 24. Either party conceiving himself aggrieved by the determination or judgment of the commissioner, or other officer, made or rendered under the provisions of this chapter, may appeal therefrom to the circuit court for the same county, within the same time, in the same manner, and return may be compelled, and the same proceedings shall be thereon had, as near as may be, and with the like effect, as in cases of appeals from judgments rendered before justices of the peace, and costs shall be awarded and collected in the circuit court in the same manner; and if such appeal is taken by the defendant the appeal bond shall be in a penalty to be fixed by the officer taking the same, not less than double the amount of the annual rental value of the premises in dispute, to be determined by the commissioner, and shall be executed by two or more sufficient sureties, and shall also in addition to the usual conditions of an appeal bond contain a further condition, that if the plaintiff obtain restitution of said premiums in said suit, the said defendant will forthwith pay all rent due or to become due the plaintiff for the premises described in the complaint, or the rental value thereof, up to the time said plaintiff shall obtain possession thereof, together, with costs of suit in prosecuting said complaint and obtaining restitution of said premises, and if the plaintiff obtain restitution of said premises he may, at his election, sue and recover on said bond, or bring his action against the defendant, under section twenty-three of this chapter.

HISTORY: Re-enacts Sec. 25 of R. S. '46, Ch. 123; As Am. '51, p. 79, Act 76, Eff. July 5; C. L. '57, (4998); As Am. '61, p. 466, Act 218, Eff. June 15; C. L. '71, (6718); As Am. '81, p. 236, Act 198, Eff. Sept. 10; How. 8307; C. L. '97, (11176), making a number of changes in phraseology. Modified.

CONSTITUTIONALITY: The part of this section which provides for an election of remedies is constitutional. *Schellenberg v. Frank*, 139 Mich. 185.

CONSTRUED: By the last preceding section the legislature has given the landlord a new remedy. By this section he is denied the

right to use that remedy if he sues on the appeal bond. *Schellenberg v. Frank*, 139 Mich. 185; *Brown v. Brown*, 196 Mich. 686.

**AS IN APPEALS FROM JUSTICES:** This provision does not restrict the procedure to those provisions of the justices' act in existence when the revision of '46 was adopted, but is intended to furnish a rule, to be ascertained by reference to the laws in force at the time the appeal is taken. *Cole v. Wayne Circuit Judge*, 106 Mich. 692. See *Antiau v. Nadeau*, 53 Mich. 461; *Sallee v. Ireland*, 9 Mich. 156; *Bearse v. Aldrich*, 40 Mich. 529. The time for appeals may be extended by the circuit court, on good cause shown. *Id.* 40 Mich. 529. The judgment of the circuit court can be reviewed by writ of error only. *Parker v. Copland*, 4 Mich. 528. A reversal on certiorari does not secure a new trial, but ends the proceedings; on appeal a new trial is of right. *Knapp v. Gamsby*, 47 Mich. 377. The Circuit Court has no discretionary power to allow an appeal after expiration of the time, except where application is made for a delayed appeal under Section (14408). *Feldman v. Zimmerman*, 208 Mich. 240.

**AFFIDAVIT:** An affidavit for appeal, in the common form of affidavits on appeal from justices' courts is sufficient. *Hanaw v. Bailey*, 83 Mich. 27.

**BOND:** May be approved by deputy county clerk. *Cole v. Wayne Circuit Judge*, 106 Mich. 692. Sufficiency of bond. *Hanaw v. Bailey*, 83 Mich. 24. Condition of. *Delashman v. Berry*, 21 Mich. 520.

See *Hoffman v. Fidelity & Deposit Co. of Md.*, 184 Mich. 210; *McMullan v. Fletcher*, 100 Mich. 341; *Bauer v. Wasson*, 66 Mich. 256; *Brown v. Brown*, 209 Mich. 686 (dissenting opinion).

**JURISDICTION ON APPEAL:** The jurisdiction of the circuit court on appeal is no greater than the commissioner's. *Mulder v. Corlett*, 54 Mich. 80.

**COSTS:** The discretion of the circuit court to allow costs, including certain fees, in these appeals cannot be overcome by rule of court not to allow them in certain cases. *Volgt Brewery Co. v. Wayne Circuit Judge*, 108 Mich. 356; See *Peters v. Fisher*, 50 Mich. 331.

**COMMON LAW CERTIORARI:** The remedies of appeal and certiorari to the circuit court are adequate and complete and the supreme court, while it may have the power, is clearly not bound to review a commissioner's judgment upon a common law certiorari. *Smith v. Reed*, 24 Mich. 240. See *Farrell v. Taylor*, 12 Mich. 113.

### (13253). When Writ of Restitution to Issue.

**Sec. 25.** No writ of restitution shall be issued under the provisions of this chapter, until the expiration of five days, or *in the case of a proceeding upon any executory contract for the purchase of real estate, until the expiration of thirty days* after the entry of judgment of restitution; and in case of an appeal within that time, no writ of restitution shall issue until such appeal be determined in the circuit court; and in case it is found that the plaintiff is entitled to the possession of the premises in consequence of the non-payment of a sum of money, no writ of restitution shall issue, if the defendant shall, within five days, or *within thirty days in the case of*

*a proceeding upon any executory contract for the purchase of real estate, after final judgment, pay the amount so found due, and the amount of costs awarded to the said plaintiff. Any writ of restitution and return of service thereof may be recorded in the office of register of deeds for the county in which said lands or tenements are situated, and when so recorded shall be notice to all persons of the termination of all rights of defendant in or to such lands or tenements.*

**HISTORY:** Re-enacts Sec. 26 of R. S. '46, Ch. 123; As Am. '51, p. 80, Act 76, Eff. July 5; C. L. '57, (4999); As Am. '67, p. 131, Act 94, Eff. June 27; As Am. '69, p. 198, Act 114, Eff. July 5; C. L. '71, (6719); How. 8308; C. L. '97, (11177); As Am. by P. A. '17, Act No. 243, changing "complainant" to "plaintiff" and eliminating "double" in the last clause, therefore, substantially unchanged until the last amendment shown by type in italics.

**CONSTRUED:** See notes to Compilers' Section (13244). The payment of the amount found due by the court must be within five days after judgment, otherwise this privilege is waived. *Smith v. Nelson*, 165 Mich. 439. See *McSloy v. Ryan*, 27 Mich. 110; *Christler v. Locke*, 103 Mich. 86. Construing Act No. 243, P. A. '17. *Romeo v. Lupo*, 208 Mich. 224. See also *Feldman v. Zimmerman*, 208 Mich. 240; *Romeo v. Lupo*, 208 Mich. 222.

**CITED:** *Smith v. Detroit Loan & Building Association*, 115 Mich. 345; (in dissenting opinion) *Lambton Loan & Investment Co. v. Adams*, 132 Mich. 352; *Wray-Austin Machinery Co. v. Flower*, 140 Mich. 460; *Kennedy v. Ford*, 183 Mich. 486.

#### (13254). Execution for Costs.

**SEC. 26.** If upon the trial of an appeal in the circuit court, judgment be rendered in favor of either party for costs, the circuit court may issue execution for such costs, and if the plaintiff shall recover judgment of restitution of the premises in question, or any part thereof, the circuit court may issue a writ of possession in favor of the plaintiff, in accordance with such judgment of restitution, which writ of possession may be issued to the sheriff or other proper officer of any county of this state in which the premises recovered are situated, in all such cases where such judgment shall have been or may hereafter be rendered.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 123, being C. L. '57, (5000); As Am. '63, p. 351, Act 199, Eff. June 22; C. L. '71, (6720); How. 8309; As Am. '97, p. 21, Act 19, Eff. Aug. 30; C. L. '97, (11178), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** *Christler v. Locke*, 103 Mich. 86; *Bauer v. Wasson*, 66 Mich. 259.

#### (13255). Certiorari.

**SEC. 27.** In all cases of judgment rendered in any cause



under the provisions of this chapter, either party may remove such judgment by writ of certiorari, into the circuit court for the county in which the judgment was rendered, within the same time and in the same manner, and a return may be compelled, and the same proceedings shall be thereupon had, as near as may be, as in cases of a certiorari to a justice of the peace.

**HISTORY:** Re-enacts Sec. 28 of R. S. '46, Ch. 123; As Added '69, p. 10, Act 9, Eff. July 5, being C. L. '71, (6721); How. 8310; C. L. '97, (11179), omitting the last clause in the old section. Unchanged.

**CONSTRUED:** Knapp v. Gamsby, 47 Mich. 375; Wilkinson v. Williams, 51 Mich. 155; Antiau v. Nadeau, 53 Mich. 460. See notes to Compilers' Section (13252).

**(13256). Bond to be Given Before Certiorari is Allowed.**

**SEC. 28.** After the rendition of judgment against the defendant in any suit under the provisions of this chapter, no certiorari shall be allowed, unless he shall make and execute to the plaintiff a bond, the penalty to be fixed by the officer allowing the certiorari, not less than double the amount of the annual rental value of the premises in dispute, to be determined by the commissioner, with good and sufficient sureties, who shall justify, and also be approved by said officer, conditioned that if the plaintiff obtain restitution of said premises in said suit, the said defendant will forthwith pay all the rent due, or to become due the plaintiff, or the rental value thereof up to the time said plaintiff shall obtain possession thereof, together with costs of suit in prosecuting said complaint, and obtaining restitution of said premises, which bond shall be delivered to said plaintiff, or his agent or attorney; any if the plaintiff obtain restitution of said premises, he may, at his election, sue and recover on said bond, or bring his action against the defendant, under section twenty-three of this chapter.

**HISTORY:** Re-enacts Sec. 29, of R. S. '46, Ch. 123; As Added '69, p. 10, Act 9, Eff. July 5, being C. L. '71, (6722); How. 8311; C. L. '97, (11180), changing "complainant" to "plaintiff," "twenty-four" to "twenty-three," "twice" to "double" and other immaterial changes in phraseology. Modified.

**(13257). Recovery of Part of Premises Described.**

**SEC. 29.** On the trial of any cause under the provisions of this chapter, it shall be competent for the jury or officer before

whom such trial may be had, to find the defendant guilty of forcibly or unlawfully holding over or detaining the premises described in the complaint, or any part thereof, and judgment may thereupon be rendered in accordance with such finding.

**HISTORY:** Re-enacts Sec. 1 of Act 195 of '49, being C. L. '57, (5001); C. L. '71, (6723); How. 8312; C. L. '97, (11181), making a necessary change in phraseology in referring to "this chapter." Substantially unchanged.

**CONSTRUED:** Clark v. Gage, 19 Mich. 512.

## CHAPTER XXXI.

### OF THE PARTITION OF LANDS OWNED BY SEVERAL PERSONS.

#### (13258). Who May Have Partition.

**SECTION 1.** All persons holding lands as joint tenants or tenants in common, may have partition thereof, in the manner provided in this chapter.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 109, being C. L. '57, (4616); C. L. '71, (6266); How. 7850; C. L. '97, (11013). Unchanged.

**PARTITION:** This chapter was designed to give courts of equity jurisdiction in partition cases. *Metcalf v. Miller*, 96 Mich. 461. Partition is a local proceeding, which can be enforced only in a court having jurisdiction of the territory where the land is. *Godfrey v. White*, 43 Mich. 171. In probate court the right to partition is confined to such real estate as has been assigned by that court to the heirs or devisees after payment of debts. But no such restrictive provisions are found in this statute. *Campau v. Campau*, 19 Mich. 122. See *Wallace v. Wallace*, 63 Mich. 330; *Parkinson v. Parkinson*, 139 Mich. 534. This statute having been adopted in substance from that of New York, it is presumed to have been so adopted with the construction given it by the courts of that state. *Greiner v. Klein*, 28 Mich. 12. This statute must be strictly complied with. *Simpson v. Simpson*, 59 Mich. 75.

See further as to partition of lands. *Pellow v. Arctic Iron Co.*, 164 Mich. 109; *Hooper v. DeVries*, 115 Mich. 231; *Miller v. Miller*, 100 Mich. 563; *Mee v. Benedict*, 98 Mich. 277; *Benedict v. Torrent*, 83 Mich. 181; *Butler v. Roys*, 25 Mich. 53; *Campbell v. Campbell*, 21 Mich. 438; *Hemingway v. Griswold*, 22 Mich. 77; *Hoffman v. Beard*, 22 Mich. 65; *Thayer v. Lane*, Har. 247.

**TENANTS IN COMMON: REVERSIONERS:** Not only is the possession of one the possession of all, but the tenants respectively have the present right to enter upon the whole land and upon every part of it and to occupy and enjoy the whole. It is in this sense that the term "tenants in common" is used. A reversioner has neither actual nor constructive possession, or the right to either, but has simply an estate in expectancy, the life estate intervening. The owners of the life estate, as tenants in common, may have partition; but it does not follow that either is entitled to a partition as against the reversioners. *Metcalf v. Miller*, 96 Mich. 462. The possession of a tenant in common is subject to the incidents of partition. *Tharp v. Allen*, 46 Mich. 389. A joint estate may be severed under this statute. *Midgley v. Walker*, 101 Mich. 584. But it does not prevent tenants in common, or joint tenants, from making contracts modifying or limiting their right to partition, either at the creation of the joint

estate or afterwards. *Avery v. Payne*, 12 Mich. 540; *Eberts v. Fisher*, 54 Mich. 299. See *Biddle v. Biddle* 117 Mich. 31.

**(13259). Instituting Suits.**

SEC. 2. Any one or more of the persons so holding lands, may institute a suit in the circuit court for the county in which lands lie, by a bill in equity, for a division, or partition thereof, according to the respective rights of the parties interested therein, and for the sale of such premises, if it shall appear that the partition thereof cannot be made without prejudice to the owners. In case such lands are situated in different counties, the suit may be instituted in the circuit court for anyone of the counties in which any part of such lands may be situated, and such court shall have complete jurisdiction in the premises as fully and effectually as if the whole of such lands were situated in the county in which the suit is instituted.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 109, being C. L. '57, (4617); C. L. '71, (6267); How. 7851; As Am. '85, p. 40, Act 43, Eff. Sept. 19; C. L. '97, (11014). Unchanged.

CONSTRUED: Where the lands are situate in different counties, the court may direct a sale to be made in the county where the decree is rendered. *Morris v. Wayne Circuit Judge*, 130 Mich. 336. It is an unnecessary proceeding for an administrator to go into equity to have the estate sold in order to be divided among the heirs. *Owings v. Owings*, 150 Mich. 609. Sale of the property in single or in separate parcels. *McCammon v. Davis*, 162 Mich. 436.

**(13260). Suit Maintained by Whom.**

SEC. 3. Such suit may be maintained by any person who has an estate in possession of the lands of which partition is sought, but not by one who has only an estate therein in remainder or reversion; such suit may also be maintained by any person who has an estate in possession in any ores, minerals or metals, that may exist or be hereafter discovered in such lands, and such last mentioned suit shall be brought only against such persons as may have an estate in possession in such ores, minerals or metals, and any person who owns an undivided interest, however acquired, in all of the estates in possession and in expectancy, in the land of which partition is sought, shall be deemed to have an estate therein in fee simple, absolute in possession, to the extent of the least share which he has in any of the estates, and shall be entitled to

maintain a bill for partition under the provisions of this chapter.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 109, being C. L. '57, (4618); C. L. '71, (6268); How. 7852; As Am. '89, p. 101, Act 94, Imd. Eff. May 15; C. L. '97, (11015); As Am. '09, p. 10, Act 6, Eff. Sept. 1. Unchanged.

**CONSTRUED:** Partition will not be granted to a beneficiary under a trust instrument, where the purpose of the trust would be defeated or impaired by a division of the property. *Ward v. Ward*, 163 Mich. 570.

Meaning of term "estate in possession." *Campau v. Campau*, 19 Mich. 122; *Eberts v. Fisher*, 44 Mich. 553. The complainant, to be entitled to partition should be in actual or constructive possession. *Hoffman v. Beard*, 22 Mich. 65. Purely legal titles cannot be settled in a suit for partition. *Hemingway v. Griswold*, 22 Mich. 77. Partition between heirs. *Campau v. Campau*, 19 Mich. 116. The homestead rights of the widow and minor children do not preclude partition between heirs and their assignees. *Robinson v. Baker*, 47 Mich. 619; *Patterson v. Patterson*, 49 Mich. 176.

**(13261). Bill to be Verified.**

**SEC. 4.** The bill for a partition or sale of any such lands shall be verified by oath, and shall particularly describe the premises sought to be divided, and shall set forth the rights and titles of all persons interested therein, so far as the same are known to the complainant, including the interest of any tenant for years, for life or in dower, and the persons entitled to the reversion, remainder or inheritance after the termination of any particular estate therein, and every person who, by any contingency contained in any devise, grant or otherwise, may be, or become entitled to any beneficial interest in the premises.

**HISTORY:** Re-enacts Sec. 4, R. S. '46, Ch. 109, being C. L. '57, (4619); C. L. '71, (6269); How. 7853; C. L. '97, (11016), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** Partition will be decreed according to the equitable rights of the parties. *Thayer v. Lane*, Walk. 200. On a partition it is competent for the court to adjust the equities of the parties, including rent to the excluded tenant. *Fenton v. Wendell*, 116 Mich. 45, citing *Hoffman v. Roe*, 25 Mich. 174; *Hunt v. Hunt*, 109 Mich. 399. But to enable the court to make such decree, the equitable rights of the parties should appear from the pleadings. *Thayer v. Lane*, Walk. 200. The jurisdiction of courts of chancery over proceedings in partition, at least as to non-resident defendants, being special and limited and dependent entirely upon the statute, all the jurisdictional facts must affirmatively appear on the record. *Platt v. Stewart*, 10 Mich. 260. Sufficient statement of interest of parties. *Eberts v. Fisher*, 44 Mich.

551. Reason for requiring rights and titles of parties to be set forth. *Metcalf v. Miller*, 96 Mich. 462.

Dower may be set off in a partition suit. *Wetlaufer v. Ames*, 133 Mich. 206. See also *Page v. Webster*, 8 Mich. 266; *Greiner v. Klein*, 28 Mich. 18.

**(13262). Who May be Made Parties.**

SEC. 5. Every person having any such interest as aforesaid, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made a party to such suit.

HISTORY: Re-enacts Sec. 5, R. S. '46, Ch. 109, being C. L. '57, (4620); C. L. '71, (6270); How. 7854; C. L. '97, (11017). Unchanged.

CONSTRUED: If the wife is not made a party to the proceedings with her husband, her inchoate right of dower will not be affected. *Greiner v. Klein*, 28 Mich. 12. An administrator is not a proper party complainant in a bill against an heir in possession for partition among co-heirs. *Owings v. Owings*, 150 Mich. 609. See *Pellow v. Arctic Iron Co.*, 164 Mich. 87.

**(13263). Unknown Parties or Uncertain Interests.**

SEC. 6. In case any one or more of such parties, or the share or quantity of interest of any of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the same shall be set forth in the bill.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 109, being C. L. '57, (4621); C. L. '71, (6271); How. 7855; C. L. '97, (11018), changing "complainant" to "plaintiff." Unchanged.

NOTE: Hereafter in this chapter this change will not be noted in historical notes to the sections.

**(13264). Creditors Having Lien Need Not be Made Parties.**

SEC. 7. It shall not be necessary in the first instance, to make any creditor having a lien on the premises in question, or any part thereof, by judgment, decree, mortgage, or otherwise, a party to the proceedings, nor shall the partition of the premises alter, affect or impair the lien of any such creditor, except in the cases provided for in the next section.

HISTORY: Re-enacts Sec. 7, R. S. '46; Ch. 109, being C. L. '57, (4622); C. L. '71, (6272); How. 7856; C. L. '97, (11019). Unchanged.

**(13265). Transfer of Lien.**

**SEC. 8.** When the lien is on the undivided interest or estate of any of the parties, either in a portion or the whole of the premises partitioned, such lien, if partition be made, shall thereafter be transferred, and be a charge only on the premises assigned to such party, and may be enforced against the same as though such lien had originally existed thereupon; but if the person having such lien be made a party to such suit, the court may direct the commissioners appointed to make such partition, to designate and set apart a tract or portion of the premises equal in value to the estate or interest of the party to whose portion the lien is to be transferred, in the tract upon which such lien had before existed; and on the confirmation of the report of such commissioners, such lien shall thereupon be transferred to the portion of the premises so designated by the commissioners, with the same effect as is above provided in case the person having such lien is not a party to such suit; the portion of the premises to which the lien is transferred shall be first charged with the just proportion of the costs of the proceedings in preference to said lien; if at any time prior to the confirmation of the report of the commissioners appointed to make such partition, any person had an uncertain or contingent interest in any part of the premises, which has since the filing of the bill become a certain or absolute interest, or who has acquired a title in fee to any part of said premises by virtue of any mortgage or execution sale of any interest thereon, shall apply to the court by petition setting forth his interest in the premises, the court shall thereupon direct that such person be made a party to such proceedings, and shall make such other or further orders and decrees respecting the rights of such person as shall be agreeable to equity.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 109, being C. L. '57, (4623); As Am. '67, p. 133, Act 96, Eff. June 27; C. L. '71, (6273); How. 7857; C. L. '97, (11020). Unchanged.

**CONSTRUED:** Liens on undivided interest, in case of voluntary partition. *Webb v. Rowe*, 35 Mich. 58. A mortgagee has a right to sell lands during partition proceedings, and upon failure to redeem to become a party to the proceedings. *O'Connor v. Keenan*, 132 Mich. 646. See *Weltlauffer v. Ames*, 133 Mich. 208; *Barbour v. Patterson*, 145 Mich. 468.

**(13266). Creditors with Specific Liens may be Made Parties.**

**SEC. 9.** But the plaintiffs may, at their election, make every

creditor having a specific lien on the undivided interest or estate of any of the parties, by mortgage or otherwise, a party to the proceedings; and in such case the bill shall set forth the nature of every such lien or incumbrance.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 109, being C. L. '57, (4624); C. L. '71, (6274); How. 7858; C. L. '97, (11021). Modified.

(13267). **Summons to Appear and Answer.**

SEC. 10. Upon filing a bill in the circuit court for the partition or sale of any lands pursuant to the provisions of this chapter, the defendants, or such of them as reside in this state, and can be found therein, shall be served with a summons to appear and answer the bill, and the same may be taken as confessed, according to the practice in courts of equity.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 109, being C. L. '57, (4625); C. L. '71, (6275); How. 7859; C. L. '97, (11022), changing "subpoena" to "summons." Unchanged.

(13268). **Procedure When Parties are Unknown or Non-Resident.**

SEC. 11. If any parties having an interest in such lands are unknown, or if either of the known parties reside out of this state, or cannot be found therein, the same proceedings shall be had as in other chancery cases under like circumstances. *Provided, however,* That the order of publication shall contain a sufficient description of the premises whereof partition is sought, in addition to the other matters required by law to appear in such order.

HISTORY: Supersedes Sec. 11, R. S. '46, Ch. 109, being C. L. '57, (4626); C. L. '71, (6276); How. 7860; C. L. '97, (11023). Unchanged.

(13269). **Taking Bill as Confessed.**

SEC. 12. The proof of personal service or of the publication of such order, shall authorize an order of the court for taking the bill as confessed against all such unknown parties, and persons not resident in this state, or not found therein, as shall not appear and answer by the day mentioned in the order, or on such further day as the court may appoint; and all such unknown parties as may appear, shall be entitled to be made parties to the suit, and the bill may be amended accordingly.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 109, being C. L. '57, (4627); C. L. '71, (6277); How. 7861; C. L. '97, (11024). Unchanged.



**(13270). Guardians for Minors.**

**Sec. 13.** The general guardians residing in this state, of all minors and other persons under guardianship, who should be parties to such proceedings for partition, upon giving bond as hereinafter directed, shall represent their respective wards therein, whether such wards shall reside in or out of this state, and the court shall appoint guardians for all such minors who shall be interested in the premises, as have no general guardians in this state, for the special purpose of taking charge of the interests of such minors, in relation to the proceedings; and the acts of all such guardians of minors, or others under guardianship, shall be binding on their respective wards, and shall be as valid as if done by them respectively when of full age, or under no legal incapacity.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 109, being C. L. '57, (4628); C. L. '71, (6278); How. 7862; C. L. '97, (11025). Unchanged.

**(13271). Bond of Guardian.**

**Sec. 14.** Every such guardian shall give bond to the people of this state to be filed with the clerk of the court, in such penalty, and with such surety as the court shall direct; conditioned for the faithful performance of the trust reposed in such guardian, and to render a just and true account of his guardianship in all courts and places when thereunto required, and for the observance of the orders of the courts in relation to the said trust.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 109, being C. L. '57, (4629); C. L. '71, (6279); How. 7863; C. L. '97, (11026). Unchanged.

**(13272). Clerk to be Appointed on Failure of Guardian to Give Bond.**

**Sec. 15.** When a bill shall be filed for the partition or sale any lands in pursuance of this chapter, and any of the defendants therein are minors, or other persons under guardianship, and the general guardian or person appointed guardian by the court, shall fail to give the security hereinbefore required, it shall be the duty of the court, on the application of the plaintiffs, to appoint the clerk of said court the guardian of such minors or other persons, for the purpose of such partition, and to dispense with the securities hereinbefore required.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 109, being C. L. '57, (4630); C. L. '71, (6280); How. 7864; C. L. '97, (11027). Unchanged.

**(13273). Denial of Joint Tenancy.**

SEC. 16. Any defendant may deny the joint tenancy, or tenancy in common of any co-defendant, and such issue shall be tried and disposed of as in other cases.

HISTORY: Supersedes Sec. 16, R. S. '46, Ch. 109, being C. L. '57, (4631); C. L. '71, (6281); How. 7865; C. L. '97, (11028). Modified.

**(13274). Hearing of Cause.**

SEC. 17. Upon the hearing of the cause, the court shall declare the rights, titles and interests of the parties to such proceedings, so far as the same shall have appeared, and shall determine the rights of the said parties in such lands, and shall decree that partition be made between such of them as shall have any rights therein, according to such rights.

HISTORY: Supersedes and merges Sec's. 19 and 20, R. S. '46, Ch. 109, being C. L. '57, (4634)-(4635); C. L. '71, (6284)-(6285); How. 7868-9; C. L. '97, (11031)-(11032). Unchanged.

CONSTRUED: The equitable rights of the parties will be considered in the decree. *Thayer v. Lane*, Walk. 200; *Fenton v. Wendell*, 116 Mich. 45. A decree determining the legal estate of parties in lands is final and appealable. *Shepherd v. Rice*, 38 Mich. 556. An accounting of rents and profits during the pendency of partition proceedings is proper. *Hunt v. Hunt*, 109 Mich. 399. See *Fenton v. Miller*, 116 Mich. 45; *Schultz v. Dennison*, 159 Mich. 259.

**(13275). Decree in Case of Parties not Appearing.**

SEC. 18. If upon the hearing of the cause, the part or interest of any parties who shall not have appeared and answered the bill, whether known or unknown, in and to such premises, shall not have appeared by the proofs in the cause, then the court shall decree that partition be made, so far as the rights or interests of the parties who are known, and who have appeared in the cause, have been ascertained, and the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to division between them at any future time.

HISTORY: Re-enacts Sec. 21, R. S. '46, Ch. 109, being C. L. '57, (4636); C. L. '71, (6286); How. 7870; C. L. '97, (11033). Unchanged.

**(13276). Inquiry into Situation of Premises.**

SEC. 19. Upon making a decree for partition as provided in the two last preceding sections, an order may be entered referring it to a circuit court commissioner to inquire into the

situation of the premises, and to report whether such premises, or any part of them, are so circumstanced that a partition and division thereof amongst the parties interested cannot be made without great prejudice to the owners, or the court may in its discretion hear proofs thereon.

**HISTORY:** Re-enacts Sec. 22, R. S. '46, Ch. 109, being C. L. '57, (4637); C. L. '71, (6287); How. 7871; C. L. '97, (11034), changing "master" to "circuit court commissioner" and adding the last clause in the above section. Modified.

**CITED:** Hooper v. McAllister, 115 Mich. 177.

**(13277). Commissioners to Make Partition.**

**Sec. 20.** If the court shall be satisfied that partition of the premises between the parties interested therein can be made without prejudice to the owners, such court shall, by an order to be entered in its minutes, appoint three discreet and disinterested freeholders commissioners, to make the partition so decreed, according to the respective rights and interests of the parties, as the same were ascertained and determined by such court, and in such order the court shall designate the part or shares, if any, which shall remain undivided, for the owners whose interests shall be unknown or not ascertained.

**HISTORY:** Re-enacts Sec. 23, R. S. '46, Ch. 109, being C. L. '57, (4638); C. L. '71, (6288); How. 7872; C. L. '97, (11035), eliminating, however, in the first line of the old section, "upon the coming in of the report of the master." Unchanged.

**CONSTRUED:** Simpson v. Simpson, 59 Mich. 71.

**(13278). Vacancies.**

**Sec. 21.** If the persons so appointed commissioners, or either of them, shall die, resign, or neglect to serve, the court may, from time to time, appoint others in their places.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 109, being C. L. '57, (4639); C. L. '71, (6289); How. 7873; C. L. '97, (11036). Unchanged.

**CONSTRUED:** Application of this section. Hoffman v. Beard, 22 Mich. 67; Fenton v. Mackinac Circuit Judge, 76 Mich. 409.

**(13279). Oath of Commissioners.**

**Sec. 22.** The commissioners, before proceeding to the execution of their duties, shall severally be sworn before any officer authorized to administer oaths, honestly and impartially to execute the trust reposed in them, and to make partition as directed by the court; which oath shall be filed with the clerk

of the court on or before the coming in of the report of such commissioners.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 109, being C. L. '57, (4640); C. L. '71, (6290); How. 7874; C. L. '97, (11037). Unchanged.

**(13280). Making of Partition.**

**SEC. 23.** In making partition, the commissioners shall divide the said real estate, and allot the several portions and shares thereof to the respective parties, quality and quantity relatively considered, according to the respective rights and interests of the parties so adjudged and decreed by the court, designating the several shares and portions by posts, stones, or other permanent monuments, and they may, if necessary, employ a surveyor with the necessary assistants, to aid them therein.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 109, being C. L. '57, (4641); C. L. '71, (6291); How. 7875; C. L. '97, (11038). Unchanged.

**CONSTRUED:** Notice to the defendants of the meetings of the commissioners is essential to the validity of the action. *Simpson v. Simpson*, 59 Mich. 71. Setting off of complainant's interest only, when all the others object to a partition. *Campbell v. Campbell*, 21 Mich. 438.

**(13281). Report of Commissioners.**

**SEC. 24.** The commissioners shall make an ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust, and describing the land divided, and the shares allotted to each party, with convenient certainty, and the items of their charges.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 109, being C. L. '57, (4642); C. L. '71, (6292); How. 7876; C. L. '97, (11039). Unchanged.

**CONSTRUED:** The deliberations of the commissioners should be had together and all must be present when final action is taken and the report is made and signed, although a majority can sign and acknowledge such report. *Simpson v. Simpson*, 59 Mich. 71. Requirements of report. *Tolsma v. Tolsma*, 180 Mich. 87.

**(13282). All to Meet.**

**SEC. 25.** All the commissioners must meet together in the performance of any of their duties, but the acts of a majority so meeting shall be valid.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 109, being C. L. '57, (4643); C. L. '71, (6293); How. 7877; C. L. '97, (11040), changing "met" to "meet." Unchanged.

**CONSTRUED:** *Tolsma v. Tolsma*, 180 Mich. 88.

**(13283). Expenses.**

Sec. 26. The expenses of the commissioners, including the expenses of a surveyor and his assistants, when they shall be employed, shall be ascertained and allowed by the court; and the amount thereof, together with such compensation as shall be allowed to the commissioners by the court for their services, shall be paid by the plaintiffs and shall be allowed to them as part of the costs to be taxed.

HISTORY: Re-enacts Sec. 29, R. S. '46, Ch. 109, being C. L. '57, (4644); C. L. '71, (6294); How. 7878; C. L. '97, (11041). Unchanged.

**(13284). Setting Aside Report.**

Sec. 27. On good cause shown, the court may set aside the report, and commit the case to the same, or appoint new commissioners, as often as may be necessary, who shall proceed in like manner as hereinbefore directed.

HISTORY: Re-enacts Sec. 30, R. S. '46, Ch. 109, being C. L. '57, (4645); C. L. '71, (6295); How. 7879; C. L. '97, (11042). Unchanged.

CONSTRUED: Where the inequality of the division is so great as to amount to fraud it may be set aside. *Adair v. Cummin*, 48 Mich. 375. See *Tolsma v. Tolsma*, 180 Mich. 88.

**(13285). Decree on Confirmation of Report.**

Sec. 28. Upon the confirmation of the report of any commissioners by the court, a decree shall thereupon be entered, which shall be binding and conclusive:

1. On all parties named therein, and their legal representatives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance of such premises, after the termination of any particular estate therein; or who, by any contingency contained in any will or grant, or otherwise, may be or become entitled to any beneficial interest in the premises; or who shall have any interest in any undivided share of the premises, as tenant for years, for life, or in dower;

2. On all persons interested in the premises, who were unknown at the time of the commencement of the suit, to whom notice shall thereafter have been given by personal service, or by publishing the same as hereinbefore directed; and

3. On all other persons claiming from such parties or persons, or either of them.

**HISTORY:** Re-enacts in part and supersedes Sec. 31, R. S. '46, Ch. 109, being C. L. '57, (4646); C. L. '71, (6296); How. 7880; C. L. '97, (11043), with some changes in phraseology and eliminating "by the courtesy." Modified.

**CONSTRUED:** A tenant in common, whose interest becomes severed by partition, is a "purchaser for value" of the interests of his co-tenants in the land set apart to him. *Campau v. Barnard*, 25 Mich. 381; *Tharp v. Allen*, 46 Mich. 392. The owner of each parcel holds just such a title as would have been granted by a deed signed by every party to the partition suit, and has no equity to anything else, because nothing else was purchased. *Walsh v. Varney*, 38 Mich. 76. When a party to whom a portion of an estate has been awarded by partition accepts the deed and takes the benefit of it, no other evidence that he was properly before the court, as a party to the proceedings, is necessary. *Willetts v. Mandelbaum*, 28 Mich. 521. Dower interest. *Greiner v. Klein*, 28 Mich. 19, 26.

#### (13286). Persons and Cases not Affected.

**SEC. 29.** But such decree and partition shall not affect any tenants, or persons having claims as tenants, in dower, or for life, to the whole of the premises which shall be the subject of such partition; nor shall any such decree and partition preclude any person, except such as are specified in the last preceding section, from claiming any title to the premises in question, or from controverting the title or interest of the parties, between whom such partition shall be made.

**HISTORY:** Re-enacts Sec. 32, R. S. '46, Ch. 109, being C. L. '57, (4647); C. L. '71, (6297); How. 7881; C. L. '97, (11044), omitting "by the curtesy." Unchanged.

**NOTE:** All provisions relating to tenants by the courtesy are eliminated in this chapter and will not be noted in the history of the sections hereafter.

**CONSTRUED:** Dower interest. *Greiner v. Klein*, 28 Mich. 20. Heirs of defendants, in a partition suit not revived against them, are not precluded from bringing ejectment for their undivided interests. *DeMill v. Port Huron Dry Dock Co.*, 30 Mich. 38.

#### (13287). Sale of Premises.

**SEC. 30.** If the court shall find that all the lands or tenements of which division and partition is sought, is so situated, or that any district, tract, lot or portion thereof is so situated that a partition and division thereof amongst the persons interested therein cannot be made without great prejudice to the owners, the court may thereupon make an order that the circuit court commissioner sell the premises so situated at public auction, to the highest bidder; and if the court shall find that any portion, interest or part can be divided, and

partition made thereof, and that other portions, interests or parts cannot be so divided without great prejudice to the owners thereof, the court may, by an order, appoint commissioners as hereinbefore provided, and direct said commissioners to proceed to make partition and division of such parts or interests of which division can be made, and to set apart such portion, interest or parts as cannot be divided to be sold, and the same may be sold as hereinafter provided.

**HISTORY:** Re-enacts in part and supersedes Sec. 33, R. S. '46, Ch. 109, being C. L. '57, (4648); As Am. '61, p. 84, Act 82, Eff. June 15; C. L. '71, (6298); How. 7882; C. L. '97, (11045). Changed.

**CONSTRUED:** If the land cannot be divided "without great prejudice to the owners," it may be sold; but if any portion thereof can be divided "without great prejudice," it must be partitioned and only the rest sold. *Benedict v. Torrent*, 83 Mich. 185-6; *Gilman v. Boden*, 136 Mich. 125. Where there are several distinct parcels. *Butler v. Roys*, 25 Mich. 53; *Walsh v. Varney*, 38 Mich. 76. See *Campau v. Godfrey*, '18 Mich. 27; *Morris v. Wayne Circuit Judge*, 130 Mich. 337.

#### (13288). Terms of Credit of Purchase Money.

**SEC. 31.** The court shall direct, in such order, the terms of credit which may be allowed, for any portions of the purchase money of which it shall think proper to direct the investment, and for such portions of such purchase money as are required by the provisions hereinafter contained, to be invested for the benefit of any unknown owners, any infants, any parties out of the state, or any tenants for life or in dower.

**HISTORY:** Re-enacts Sec. 34, R. S. '46, Ch. 109, being C. L. '57, (4649); C. L. '71, (6299); How. 7883; C. L. '97, (11046). Unchanged.

#### (13289). Securing of Credits.

**SEC. 32.** The portions of the purchase money for which credit shall be allowed, shall always be secured at interest, by a mortgage of the premises sold, by a bond of the purchaser, and by such other security as the court shall prescribe.

**HISTORY:** Re-enacts Sec. 35, R. S. '46, Ch. 109, being C. L. '57, (4650); C. L. '71, (6300); How. 7884; C. L. '97, (11047). Unchanged.

#### (13290). Separate Securities.

**SEC. 33.** The circuit court commissioner may take separate mortgages and other securities, for such convenient shares or portions of the purchase money, as are directed by the court to be invested, in the name of the clerk of the court in whose

office the original bill for a partition was filed, and his successors in office; and for such shares as any known owner of full age shall desire to have so invested, in the name of such owner.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 109, being C. L. '57, (4651); C. L. '71, (6301); How. 7885; C. L. '97, (11048), changing "master" to "circuit court commissioner." Unchanged.

**(13291). To Whom Securities Delivered.**

**Sec. 34.** Upon such sales being confirmed, as hereinafter mentioned, the said circuit court commissioner shall deliver such mortgages and other securities to the clerk of the court, or to the known owners whose shares were so invested.

**HISTORY:** Re-enacts Sec. 37, R. S. '46, Ch. 109, being C. L. '57, (4652); C. L. '71, (6302); How. 7886; C. L. '97, (11049), changing "master" to "circuit court commissioner." Unchanged.

**(13292). Plaintiff to Amend Bill Before Order of Sale.**

**Sec. 35.** Before making any order for the sale of the said premises where creditors or other persons, having specific liens, or purchasers at mortgage, or execution sales of interests, in any part of the premises, shall not have been made parties, the court shall direct the plaintiff to amend his bill by making parties to the proceedings every person having a specific lien on the undivided interest or estate of any of the parties by mortgage or otherwise, and also persons who have acquired an interest under mortgage or execution sales.

**HISTORY:** Re-enacts Sec. 38, R. S. '46, Ch. 109, being C. L. '57, (4653); As Am. '67, p. 134, Act 96, Eff. June 27; C. L. '71, (6303); How. 7887; C. L. '97, (11050). Unchanged.

**CONSTRUED:** Mortgages may be made parties and their interests adjusted in partition proceedings. *Wettlaufer v. Ames*, 133 Mich. 208.

**(13293). Certain Moneys to be Brought into Court.**

**Sec. 36.** If it shall appear by the proceedings on such bill, or by such report, that there are any existing incumbrances upon the estate or interest in the premises, of any party named in the proceedings in the suit, the court shall, in the order of sale, direct the circuit court commissioner to bring into court and pay to the clerk the portion of the moneys arising from the sale of the estate and interest of such party, after deducting the portion of the costs, charges and expenses to which it shall be liable.



**HISTORY:** Re-enacts Sec. 39, R. S. '46, Ch. 109, being C. L. '57, (4654); C. L. '71, (6304); How. 7888; C. L. '97, (11051), changing "master" to "circuit court commissioner." Unchanged.

**(13294). Application for Moneys Brought In.**

**SEC. 37.** Such party may apply to the court to order such moneys, or such part thereof as he shall claim, to be paid to him; which application shall be accompanied:

1. By his own affidavit, stating the true amount actually due on each incumbrance, the owner of each incumbrance, and his residence, as far as known to such party;

2. By proof by affidavit, of the due service of a notice on each owner of any incumbrance, of the intention to make such application, at least fourteen days previously. If such owner reside in this state, such notice shall be served personally, or if he be absent from his residence, by leaving a copy there, with some person of his household of proper age. If such owner reside out of this state, such notice may be served on him personally, thirty days previously, or by publishing the same in such paper as the court may direct, three weeks successively, once in each week.

**HISTORY:** Re-enacts Sec. 40, R. S. '46, Ch. 109, being C. L. '57, (4655); C. L. '71, (6305); How. 7889; C. L. '97, (11052), changing in the first subdivision "such" to "each." Unchanged.

**(13295). Hearing and Determination.**

**SEC. 38.** Upon such application and proof of notice, the court shall proceed to hear the proofs and allegations of the parties as in other cases, and determine the rights of such parties in accordance with the facts, and the costs of such trial shall be paid by such party as the court shall direct.

**HISTORY:** This section re-enacts in part and supersedes Sec. 41, R. S. '46, Ch. 109, being C. L. '57, (4656); C. L. '71, (6306); How. 7890; C. L. '97, (11053). Substantially unchanged.

**(13296). Distribution of Moneys Among Creditors.**

**SEC. 39.** When the amount of existing incumbrances shall have been ascertained, the court shall proceed to order a distribution of the monies so brought into and remaining in court, among the several creditors having such incumbrances, according to the priority thereof respectively.

**HISTORY:** Re-enacts Sec. 42, R. S. '46, Ch. 109, being C. L. '57, (4657); C. L. '71, (6307); How. 7891; C. L. '97, (11054). Unchanged.

**(13297). Clerk to Procure Discharge of Incumbrances.**

SEC. 40. The clerk of the court by whom any such incumbrance shall be paid off shall procure satisfaction thereof to be acknowledged, in the form required by law, and shall cause such incumbrance to be duly satisfied or canceled of record, and shall defray the expenses thereof out of the portion of the monies in court belonging to the party by whom such incumbrance was payable.

HISTORY: Re-enacts Sec. 43, R. S. '46, Ch. 109, being C. L. '57, (4658); C. L. '71, (6308); How. 7892; C. L. '97, (11055). Unchanged.

**(13298). Other Parties Not to be Delayed.**

SEC. 41. The proceedings to ascertain and settle the amount of incumbrances as herein provided, shall not affect any other party in such suit for partition, nor delay the paying over or investing the monies to or for the benefit of any party upon whose estate in the premises there shall not appear to be any existing incumbrances.

HISTORY: Re-enacts Sec. 44, R. S. '46, Ch. 109, being C. L. '57, (4659); C. L. '71, (6309); How. 7893; C. L. '97, (11056). Unchanged.

**(13299). Sale of Dower or Other Life Estate.**

SEC. 42. Whenever the estate of any tenant in dower, or for life, in the whole or any part or share of the premises in question, has been admitted by the parties, or ascertained by the court, to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the court shall first consider and determine, under all the circumstances of the case, whether such estate ought to be excepted from such sale, or whether the same should be sold, and in making such determination, regard shall be had to the interests of all the parties.

HISTORY: Re-enacts Sec. 45, R. S. '46, Ch. 109, being C. L. '57, (4660); C. L. '71, (6310); How. 7894; C. L. '97, (11057). Unchanged.

CONSTRUED: A partition and assignment of dower are proper incidents to a bill to determine the right of dower, and the remedy in equity is chiefly desirable as enabling the entire rights to be disposed of in one suit. *Brown v. Brownson*, 35 Mich. 419.

**(13300). Sale to Pass Interest.**

SEC. 43. If the sale of the premises, including such estate, shall be ordered, the estate and interest of every such tenant or person shall pass thereby, and the purchaser, his heirs and

assigns, shall hold such premises free and discharged from all claims by virtue of any such estate or interest, whether the same be to any undivided share of a joint tenant or tenant in common, or to the whole or any part of the premises sold.

HISTORY: Re-enacts Sec. 46, R. S. '46, Ch. 109, being C. L. '57, (4661); C. L. '71, (6311); How. 7895; C. L. '97, (11058). Unchanged.

**(13301). Payment to Owner of Estate With His Assent.**

SEC. 44. Upon such sale being made of any such interest or estate, the court shall direct the payment of such sum in gross, out of the proceeds thereof, to the person entitled to such estate in dower, or tenancy for life, as shall be deemed upon the principles of law applicable to annuities, a reasonable satisfaction for such estate or interest, and which the person so entitled shall consent to accept in lieu thereof, by an instrument under seal, duly acknowledged or proved in the manner that deeds are required to be acknowledged or proved, to entitle them to be recorded.

HISTORY: Re-enacts Sec. 47, R. S. '46, Ch. 109, being C. L. '57, (4662); C. L. '71, (6312); How. 7896; C. L. '97, (11059). Unchanged.

**(13302). Investment of Certain Sum.**

SEC. 45. In case no such consent is given at or before the coming in of the report of sale by the circuit court commissioner, then the court shall ascertain and determine what proportion of the proceeds of such sale, after deducting all expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate or interest in dower or for life, and shall order the same to be brought into court for that purpose.

HISTORY: Re-enacts Sec. 48, R. S. '46, Ch. 109, being C. L. '57, (4663); C. L. '71, (6313); How. 7897; C. L. '97, (11060), changing "master" to "circuit court commissioner." Unchanged.

CONSTRUED: Greusel v. Smith, 85 Mich. 576.

**(13303). Proportions to be Invested.**

SEC. 46. The proportions of the proceeds of such sale, to be invested, shall be ascertained and determined in the several cases, as follows:

1. If an estate in dower shall have been included in such order of sale, its proportion shall be one-third of the proceeds of the sale of the premises, or of the sale of the undivided

share in such premises, upon which such claim of dower existed;

2. If an estate for life shall be included in the order of sale, its proportion shall be the whole proceeds of the sale of the premises, or of the sale of the undivided share thereof, in which such estate shall be; and in all cases, the proportion of the expenses of the proceedings shall be deducted from the proceeds of such sale.

HISTORY: Re-enacts Sec. 49, R. S. '46, Ch. 109, being C. L. '57, (4664); C. L. '71, (6314); How. 7898; C. L. '97, (11061). Unchanged.  
CONSTRUED: Greusel v. Smith, 85 Mich. 576.

**13304). Unknown Owners.**

SEC. 47. If the persons entitled to any such estate in dower, or for life, be unknown, the court shall make an order for the protection of the rights of such persons, in the same manner, as far as may be, as if they were known and had appeared.

HISTORY: Re-enacts Sec. 50, R. S. '46, Ch. 109, being C. L. '57, (4665); C. L. '71, (6315); How. 7899; C. L. '97, (11062). Unchanged.

**13305). Notice of Sale to be Given.**

SEC. 48. The circuit court commissioner shall give notice of any sale to be made by him, for the same time, and in the same manner, as is required by law on sales of real estate by sheriffs on execution.

HISTORY: Re-enacts Sec. 52, R. S. '46, Ch. 109, being C. L. '57, (4667); C. L. '71, (6317); How. 7901; C. L. '97, (11064). Unchanged.

**(13306). Terms and Conduct of Sale.**

SEC. 49. The terms of such sale shall be made known at the time, and if the premises consist of distinct lots, tracts or parcels, they shall be sold separately.

HISTORY: Re-enacts Sec. 51, R. S. '46, Ch. 109, being C. L. '57, (4666); C. L. '71, (6316); How. 7900; C. L. '97, (11063). Unchanged.

CONSTRUED: This section does not provide where the sale shall take place. Morris v. Judge, 130 Mich. 336.

**(13307). Who Not to be Interested in Purchase.**

SEC. 50. No such circuit court commissioner, nor any person for his benefit, shall be interested in the purchase, nor directly or indirectly purchase any of the premises sold; nor shall any guardian of any infant party in such suit, purchase,

or be interested in the purchase of any lands, being the subject of such suit, except for the benefit or in behalf of such infant; and all sales contrary to the provisions of this section shall be void.

**HISTORY:** Re-enacts Sec. 53, R. S. '46, Ch. 109, being C. L. '57, (4668); C. L. '71, (6318); How. 7902; C. L. '97, (11065), changing "master" to "circuit court commissioner." Unchanged.

**GUARDIAN AND WARD:** The guardian of minor heirs purchased the dower of the widow in the lands of his wards, and it was held that while the purchase was not prohibited by the literal terms of the statute, it was prohibited by the general principles of the law of trusts. *Johnston v. Loose*, 201 Mich. 265.

#### (13308). Report of Sale.

**SEC. 51.** After completing such sale, the circuit court commissioner shall report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of such purchaser, and the price bid by him, which report shall be filed in the court.

**HISTORY:** Re-enacts Sec. 54, R. S. '46, Ch. 109, being C. L. '57, (4669); C. L. '71, (6319); How. 7903; C. L. '97, (11066), changing "master" to "circuit court commissioner." Unchanged.

**NOTE:** This change is made in all the succeeding sections and will hereafter not be noted in the history of the sections.

#### (13309). Order for Conveyance.

**SEC. 52.** If such sales be approved and confirmed by the court, an order shall be entered directing the circuit court commissioner to execute conveyances pursuant to such sales; which such circuit court commissioner shall be authorized to do upon the entry of such order.

**HISTORY:** Re-enacts Sec. 55, R. S. '46, Ch. 109, being C. L. '57, (4670); C. L. '71, (6320); How. 7904; C. L. '96, (11067). See Circuit Court Rule 52, ('16). Unchanged.

#### (13310). Record of Conveyances.

**SEC. 53.** Such conveyances so executed shall be recorded in the county where the premises are situated; and shall be a bar, both in law and equity, against all persons interested in any way, who shall have been named as parties in the said proceedings, and against all such parties as were unknown, if notice of the order to appear and answer shall have been given by such publication or service of notice as is hereinbe-

fore directed; and against all other persons claiming from such parties, or either of them.

**HISTORY:** Re-enacts Sec. 56, R. S. '46, Ch. 409, being C. L. '57, (4671); C. L. '71, (6321); How. 7905; C. L. '97, (11068). Unchanged.

**CONSTRUED:** Greiner v. Klein, 28 Mich. 20-21; Morris v. Wayne Circuit Judge, 130 Mich. 337.

**(13311). Effect on Rights of Creditors.**

**SEC. 54.** Such conveyances shall also be a bar against all persons having specific liens on any undivided share or interest therein, who shall have been made parties to the proceedings; but no creditor having any specific lien shall be affected by such sale or conveyance unless he shall have been made a party to the proceedings.

**HISTORY:** Re-enacts Sec. 57, R. S. '46, Ch. 109, being C. L. '57, (4672); C. L. '71, (6322); How. 7906; C. L. '97, (11069). Unchanged.

**CONSTRUED:** Greiner v. Klein, 28 Mich. 21.

**(13312). Costs and Expenses.**

**SEC. 55.** The costs and expenses of the proceedings shall be deducted from the proceeds of every sale made by the circuit court commissioner, and shall be by him, in the first instance, paid to the plaintiffs or their attorney.

**HISTORY:** Re-enacts Sec. 58, R. S. '46, Ch. 109, being C. L. '57, (4673); C. L. '71, (6323); How. 7907; C. L. '97, (11070), changing "complainant" to "plaintiff" and "solicitor" to "attorney." Unchanged.

**CONSTRUED:** Gruesel v. Smith, 85 Mich. 576.

**(13313). Distribution of Proceeds of Sale.**

**SEC. 56.** The proceeds of every sale, after deducting the costs, shall be divided among the parties whose rights and interests shall have been sold, in proportion to their respective rights in the premises; and the shares of such of the said parties as are of full age, shall be paid to them or their legal representatives by the circuit court commissioner, or shall be brought into court for their use.

**HISTORY:** Re-enacts Sec. 59, R. S. '46, Ch. 109, being C. L. '57, (4674); C. L. '71, (6324); How. 7908; C. L. '97, (11071). Remains substantially unchanged.

**(13314). Shares of Known Infants.**

**SEC. 57.** When any of such known parties are infants, the court may, in its discretion, direct the shares of such infant

to be paid over to the general guardian, or to be invested in permanent securities at interest, in the name and for the benefit of such infant.

**HISTORY:** Re-enacts Sec. 60, R. S. '46, Ch. 109, being C. L. '57, (4675); C. L. '71, (6325); How. 7909; C. L. '97, (11072). Remains unchanged.

**(13315). Shares of Absent and Unknown Persons.**

**SEC. 58.** Where any of the parties whose interests have been sold are absent from the state, without legal representatives in this state, or are not known or named in the proceedings, the court shall direct the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them or their legal representatives.

**HISTORY:** Re-enacts Sec. 61, R. S. '46, Ch. 109, being C. L. '57, (4676); C. L. '71, (6326); How. 7910; C. L. '97, (11073). Remains unchanged.

**(13316). Tenants in Dower or For Life.**

**SEC. 59.** Where the proceeds of a sale belonging to any tenant in dower, or for life, shall be brought into court as hereinbefore directed, the court shall direct the same to be invested in permanent securities at interest, so that such interest shall annually be paid to the parties entitled to such estate, during their lives respectively.

**HISTORY:** Re-enacts Sec. 62, R. S. '46, Ch. 109, being C. L. '57, (4677); C. L. '71, (6327); How. 7911; C. L. '97, (11074). Remains substantially unchanged.

**(13317). Security to Refund.**

**SEC. 60.** The court may, in its discretion, require all or any of the parties, before they shall receive any share of the monies arising from such sales, to give security to the satisfaction of such court, to refund the said share with interest thereon, in case it shall thereafter appear that such party was not entitled thereto.

**HISTORY:** Re-enacts Sec. 63, R. S. '46, Ch. 109, being C. L. '57, (4678); C. L. '71, (6328); How. 7912; C. L. '97, (11075). Remains unchanged.

**(13318). In Whose Name Security to be Taken.**

**SEC. 61.** When any security is directed to be taken by the

court, or any investment to be made, or any security shall be taken by a circuit court commissioner on the sale of any real estate as hereinbefore directed, except where provision shall be made for taking the same in the name of any known owner, the bonds, mortgages or other evidences thereof shall be taken in the name of the clerk of the court in whose office the original bill was filed and his successors in office, who shall hold the same by virtue of his office, and shall deliver them to his successor.

**HISTORY:** Re-enacts Sec. 64, R. S. '46, Ch. 109, being C. L. '57, (4679); C. L. '71, (6329); How. 7913; C. L. '97, (11076). Remains substantially unchanged.

**(13319). Duty of Clerk.**

**SEC. 62.** Such clerk shall receive the interest or principal of any sums as they become due, and apply or re-invest the same, according to the circumstances of the case, as the court shall direct; and shall, once in every year, render to the court an account in writing, and on oath, of all monies received by him, and of the application thereof.

**HISTORY:** Re-enacts Sec. 65, R. S. '46, Ch. 109, being C. L. '57, (4680); C. L. '71, (6330); How. 7914; C. L. '97, (11077). Remains unchanged.

**(13320). Making of Investments.**

**SEC. 63.** All investments, or re-investments, under the provisions of this chapter, shall be made on bond and mortgage upon unincumbered real estate, of at least double the value of such investment, exclusive of buildings, or in other equivalent security; and no such security, bond, mortgage or other evidence of such investment, shall be discharged, transferred or impaired, by any act of the clerk, without the order of the court entered in the minutes thereof.

**HISTORY:** Re-enacts Sec. 66, R. S. '46, Ch. 109, being C. L. '57, (4681); C. L. '71, (6331); How. 7915; C. L. '97, (11078). Remains unchanged.

**(13321). Suits on Security.**

**SEC. 64.** Any person interested in such investment, may, with the leave of the court, prosecute the same, in the name of the existing clerk, and no suit shall be abated by the death, removal from office, or resignation of the clerk to whom such



securities or evidences were executed, or of any of his successors.

**HISTORY:** Re-enacts Sec. 67, R. S. '46, Ch. 109, being C. L. '57, (4682); C. L. '71, (6332); How. 7916; C. L. '97, (11079). Remains unchanged.

(13322). **Assessment and Collection of Costs.**

**SEC. 65.** When a decree confirming the partition made by any commissioners, shall be entered as provided in this chapter, the court shall also adjudge and decree that each of the parties concerned therein, other than the plaintiffs, pay to such plaintiffs a proportion of the costs and charges of the proceedings, to be ascertained by the court, according to the respective rights of the parties, and the proportion of such costs and charges assessed upon the unknown owners, to be chargeable on the part remaining undivided; and upon such decree execution may issue as in other cases, and may be levied on the property of the parties respectively charged with such costs, and upon any share or part of the premises allotted on any such division to any owner unknown, or not named, and upon every portion remaining undivided, for the proportion adjudged to be paid by such owners, or chargeable to the part remaining undivided.

**HISTORY:** Re-enacts Sec. 68, R. S. '46, Ch. 109, being C. L. '57, (4683); C. L. '71, (6333); How. 7917; C. L. '97, (11080), changing "complainant" to "plaintiff." Unchanged.

**CONSTRUED:** A decree determining the legal estate of parties in lands is final and appealable; it is too late to examine the merits of the case on an appeal from any subsequent order made for the purpose of enforcing it. *Shepherd v. Rice*, 38 Mich. 556. Costs and charges of partition proceedings should be apportioned against the defendants in the decree. *Id.* The court has power to award the complainant a reasonable allowance for solicitor's fees above taxable costs. *Græusel v. Smith*, 85 Mich. 575; *Barbour v. Patterson*, 145 Mich. 462. An attorney is not entitled to a lien for his services on the proceeds of the sale of property under this chapter. *Conlon v. Wayne* Circuit Judge, 186 Mich. 354, 152 N. W. 960.

(13323). **Sale of Premises of Unknown Owner.**

**SEC. 66.** A sale of the premises of such owner unknown, upon such execution, shall be as valid as if such owner had been named in the proceedings, and in such execution.

**HISTORY:** Re-enacts Sec. 69, R. S. '46, Ch. 109, being C. L. '57, (4684); C. L. '71, (6334); How. 7918; C. L. '97, (11081). Remains unchanged.

**(13324). When Plaintiffs to Pay Costs.**

SEC. 67. If a bill for partition shall be dismissed, or the suit shall be discontinued, the plaintiffs shall pay costs to be collected, as in other cases.

HISTORY: Re-enacts Sec. 70, R. S. '46, Ch. 109, being C. L. '57, (4685); C. L. '71, (6335); How. 7919; C. L. '97, (11082), changing "complainant" to "plaintiff." Unchanged.

**(13325). Appeal.**

SEC. 68. Any of the parties to a suit for the partition or sale of any premises under the provisions of this chapter, and any party interested in the premises, though not named in the proceedings, may, jointly or separately, and without the consent of any co-plaintiff or co-defendant, appeal from any decree or order of the said court, upon any such proceedings, within the same time, and under the like regulations, as in other cases.

HISTORY: Re-enacts Sec. 71, R. S. '46, Ch. 109, being C. L. '57, (4686); C. L. '71, (6336); How. 7920; C. L. '97, (11083), changing "co-complainant" to "co-plaintiff." Unchanged.

See Vogt v. Cottler, 170 Mich. 124.

**(13326). Partition or Sale of Infants' Estate.**

SEC. 69. Whenever it shall appear satisfactorily to the court, by due proof, or on report of a circuit court commissioner, that any infant holds real estate in joint tenancy, or in common, or in any other manner which would authorize his being made a party to a suit in partition, and that the interest of such infant, or of any other person concerned therein, requires that partition of such estate should be made, such court may direct and authorize the general guardian of such infant to agree to a division thereof, or to a sale of such premises, or of such part thereof, as in the opinion of the court shall be incapable of partition, or as shall be most (best) for the interest of such infant to be sold.

HISTORY: Re-enacts Sec. 72, R. S. '46, Ch. 109, being C. L. '57, (4687); C. L. '71, (6337); How. 7921; C. L. '97, (11084). Unchanged.

**(13327). Report of Guardian.**

SEC. 70. Such guardian shall report to the court, on oath, the partition or sale so made by him, and if the same be approved and confirmed by the court, an order shall be entered

authorizing such guardian to execute conveyances of the right of such infant to such part of the said estate as shall have been sold, to the purchaser thereof; or to execute releases of the rights of such infant to such part of the said estate, as in the division, falls to the shares of the other joint tenants, or tenants in common.

HISTORY: Re-enacts Sec. 73, R. S. '46, Ch. 109, being C. L. '57, (4688); C. L. '71, (6338); How. 7922; C. L. '97, (11085). Unchanged.

**(13328). Effect of Deeds.**

Sec. 71. Such deeds shall be as valid and effectual to convey the share and interest of such infant, as if the same had been executed and duly acknowledged by such infant after arriving at full age; and in case of the sale of any part of such estate, the infant shall be deemed a ward of the court, and such order shall be taken as the court may direct, for securing, investing and applying the proceeds of the sale, and for requiring security from the guardian for that purpose.

HISTORY: Re-enacts Sec. 74, R. S. '46, Ch. 109, being C. L. '57, (4689); C. L. '71, (6339); How. 7923; C. L. '97, (11086). Unchanged.

**(13329). Husband May be Guardian of Infant.**

Sec. 72. Whenever such infant shall be a married woman, the court may, upon petition, appoint her husband as her guardian, and in case of the appointment of the husband, the provisions of the three last preceding sections shall apply to such husband.

HISTORY: Re-enacts Sec. 75, R. S. '46, Ch. 109, being C. L. '57, (4690); C. L. '71, (6340); How. 7924; C. L. '97, (11087). Unchanged.

**(13330). Petition by Guardian of Lunatics.**

Sec. 73. Whenever it shall appear to the court, on the application of the guardian of any idiot, lunatic, spendthrift, or person mentally incapable of managing his affairs, holding any estate in joint tenancy or in common, or in any other manner to authorize his being made a party to a suit in partition, that the interest of such idiot, lunatic, or other person aforesaid, or any of the parties interested in such estate, requires a partition thereof, it shall be referred to a circuit court commissioner to inquire into and report upon the circumstances.

**HISTORY:** Re-enacts Sec. 76, R. S. '46, Ch. 109, being C. L. '57, (4691); C. L. '71, (6341); How. 7925; C. L. '97, (11088). Unchanged.

**(13331). Court May Authorize Release.**

**Sec. 74.** Upon the coming in of the report, and a hearing and examination of the matter, the court may authorize such guardian to agree to a partition of such estate, and to execute releases of the right of such idiot, lunatic, or other person as aforesaid, in and to the shares of such estate falling to the other joint tenants, or tenants in common.

**HISTORY:** Re-enacts Sec. 77, R. S. '46, Ch. 109, being C. L. '57, (4692); C. L. '71, (6342); How. 7926; C. L. '97, (11089). Unchanged.

**(13332). Effect of Releases.**

**Sec. 75.** Such releases shall be as valid and effectual to convey the share of such idiot, lunatic, or other person as aforesaid, as if the same had been executed by them respectively, when of sound mind and understanding, and not subject to guardianship, and for a valuable consideration.

**HISTORY:** Re-enacts Sec. 78, R. S. '46, Ch. 109, being C. L. '57, (4693); C. L. '71, (6343); How. 7927; C. L. '97, (11090). Unchanged.

**(13333). Partition When State is Interested.**

**Sec. 76.** When any lands shall be held by the people of this state, and by individuals as tenants in common, proceedings for the partition thereof may be had against the people of this state in the circuit court, in the same manner as against individuals, and the like orders and decrees shall be had therein, and the proportion of the costs and expenses of such partition, adjudged to be paid by the people of this state, shall be certified by the attorney general, and paid out of the state treasury on warrant of the auditor general.

**HISTORY:** Re-enacts Sec. 79, R. S. '46, Ch. 109, being C. L. '57, (4694); C. L. '71, (6344); How. 7928; C. L. '97, (11091). Unchanged.

**(13334). Service of Summons.**

**Sec. 77.** The summons to answer, and all notices required to be served in other cases, shall be served on the attorney general, who shall appear in behalf of the state, and attend to its interests.

**HISTORY:** Re-enacts Sec. 80, R. S. '46, Ch. 109, being C. L. '57,

(4695); C. L. '71, (6345); How. 7929; C. L. '97, (11092), changing "subpoena" to "summons." Unchanged.

**(13335). Claims Barred by Statute of Limitations.**

SEC. 78. The authority given by this chapter to proceed for the partition of real estate, shall not authorize the revival or prosecution of any claim to lands which would, or otherwise might be barred by the statute of limitations, or by the acquiescence of any party having any such claim.

HISTORY: Re-enacts Sec. 81, R. S. '46, Ch. 109, being C. L. '57, (4696); C. L. '71, (6346); How. 7930; C. L. '97, (11093). Unchanged.

**(13336). Compensation for Equality of Partition.**

SEC. 79. Whenever partition shall be decreed by any circuit court, if it shall appear that it cannot be made equal between the parties, without prejudice to the rights and interests of some of them, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case.

HISTORY: Re-enacts Sec. 82, R. S. '46, Ch. 109, being C. L. '57, (4697); C. L. '71, (6347); How. 7931; C. L. '97, (11094). Unchanged.

CONSTRUED: Where the report and decree are silent as to any inequality, and the decree makes no compensation therefor, it will be presumed that none existed, and such presumption cannot be overthrown by parol evidence in a collateral proceeding. *Burger v. Beste*, 98 Mich. 157. See *Tolsma v. Tolsma*, 180 Mich. 89.

**(13337). Application to Lands Held by Trustee.**

SEC. 80. The provisions of this chapter shall be applicable to lands held by a trustee for the benefit of parties having a beneficial interest therein, and the proceedings for a partition may be instituted by the trustee, or any party interested in the lands so held, and shall be regulated by the provisions of this chapter, except as is hereinafter provided.

HISTORY: Re-enacts Sec. 83, R. S. '46, Ch. 109; As Added '63, p. 98, Act 70, Eff. June 22, being C. L. '71, (6348); How. 7932; C. L. '97, (11095), changing "act" to "chapter." Unchanged.

**(13338). Division of Lands Among Heirs.**

SEC. 81. Where the original parties in interest in said trust, or any of them, may have departed this life, leaving heirs or legatees, or others interested by title or right through them or any of them in said lands, it shall be competent for

the court, at its discretion, to divide the said land by decree, among the said heirs, legatees, or others representing the interests of the deceased therein, so as to set off the interest of all such parties together, without subdivisions among them.

**HISTORY:** Re-enacts Sec. 84, R. S. '46, Ch. 109; As Added '63, p. 98, Act 70, Eff. June 22, being C. L. '71, (6349); How. 7933; C. L. '97, (11096). Unchanged.

**(13339). Interest Set Off in Body Without Subdivision.**

**SEC. 82.** In any case where it may be deemed expedient to decree that the interest which may have belonged to any deceased party shall be set off in a body, without subdivision to those claiming under him, it shall be sufficient to provide by the decree that such parcel or interest shall be set off to the heirs, assigns, or those legally entitled under or through the party originally interested, who may have deceased, mentioning his name in the decree.

**HISTORY:** Re-enacts Sec. 85, R. S. '46, Ch. 109; As Added '63, p. 98, Act 70, Eff. June 22, being C. L. '71, (6350); How. 7934; C. L. '97, (11097). Unchanged.

**(13340). Partition Where Original Parties in Interest are Fully Known.**

**SEC. 83.** In all cases where the original parties in interest are fully known, but where, by death, legal proceedings or by other operations of law, it has become uncertain who are the present parties in interest, it shall be competent and lawful to separate the portion or interest in such lands, originally owned by said parties, in the manner provided in the foregoing sections, instead of leaving it with land undivided as belonging to unknown owners, and such divisions and decree shall operate to convey the title to those claiming under said party, according to their legal rights, whatever they may be.

**HISTORY:** Re-enacts Sec. 86, R. S. '46, Ch. 109; As Added '63, p. 99, Act 70, Eff. June 22, being C. L. '71, (6351); How. 7935; C. L. '97, (11098). Modified.

**CONSTRUCTION:** See *Chase v. Angell*, 148, 9.

**(13341). Appointment of Receiver in Certain Cases.**

**SEC. 84.** Whenever it shall appear that it would be beneficial to any part owner of the premises of which partition is sought, that the same should be leased or protected from waste, trespasses, or injury, or for any other purpose, it shall

be competent for the court to appoint a receiver thereof, with such authority as may be necessary in the premises.

**HISTORY:** Re-enacts Sec. 87, of R. S. '46, Ch. 109; As Added '71, p. 237, Act 163, Eff. July 18, being C. L. '71, (6352); How. 7936; C. L. '97, (11099). Unchanged.

**(13342). Duty of Court Under Judgment in Case of Married Women.**

**Sec. 85.** In all cases of sales under judgment or decree in partition, where it shall appear that any married woman has an inchoate right of dower in any of the lands divided or sold, or that any person has any vested or contingent future right or estate in such lands, it shall be the duty of the court under whose judgment or decree such sale is made, to ascertain and settle the proportional value of such inchoate, contingent, or vested right or estate, according to the principles of law applicable to annuities and survivorships, and to direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as shall be judged best to secure and protect the rights and interests of the parties.

**HISTORY:** Re-enacts Sec. 88, R. S. '46, Ch. 109; As Added '81, p. 278, Act 235, Eff. Sept. 10, being How. 7937; C. L. '97, (11100). Unchanged.

**CONSTRUED:** This section applies where the bill is filed to partition equitable titles as well as legal titles and to compel conveyance to carry out the decree. *Chase v. Angell*, 148 Mich. 10.

**(13343). How Married Women May Release Interest in Estate.**

**Sec. 86.** Any married woman may release such right, interest, or estate to her husband, and acknowledge the same before the commissioner making the sale, or before any officer authorized to take acknowledgments, or if executed out of this state, to be executed, acknowledged, and certified as required by the laws of this state for the execution, acknowledgment, and certification of deeds, in any other state, territory, or district of the United States, and upon such release the share of the sale arising from her contingent interest shall be paid to her.

**HISTORY:** Re-enacts Sec. 89, R. S. '46, Ch. 109; As Added '81, p. 278, Act 235, Eff. Sept. 10, being How. 7938; C. L. '97, (11101), omitting the last phrase of the old section "or to her husband for her benefit." Modified. See *Chase v. Angell*, 148 Mich. 9.

**(13344). Release a Bar.**

SEC. 87. Such release, and also the payment, investment, or otherwise securing any share of the proceeds of the sale, according to section eighty-five of this chapter, shall be a bar, both in law and equity, against any such right, estate or claim.

HISTORY: Re-enacts Sec. 90, R. S. '46, Ch. 109; As Added '81, p. 278, Act 235, Eff. Sept. 10, being How. 7939; C. L. '97, (11102), changing "Section eighty-eight of this act" to "section eighty-five of this chapter." Unchanged.

CITED: *Parkinson v. Parkinson*, 139 Mich. 534.

**Of the Division and Distribution of Property Held in Trust  
Under Certain Circumstances.**

**(13345). Division Among Cestuis Que Trust Instead of Sale.**

SEC. 88. In any estate vested in a trustee or trustees for the benefit of any person or corporation, whether by will or other grant or conveyance, where a provision is made for the sale of the trust property and distribution of the proceeds, and where no limitation is placed upon the power of alienation, nor restriction made as to the time of the division and distribution of the proceeds of the trust property, and it shall appear to be more advantageous to the persons for whose benefit the trust was created to divide and distribute the trust property among them, instead of effecting a sale thereof by the trustee, and the distribution of the proceeds, the trustee, upon authority being granted so to do by the circuit court in chancery of the county where the property, or a portion thereof, is located, may make a division and distribution of the trust estate, among the persons entitled to the proceeds of the sale thereof in the same proportion in which the proceeds of the sale is provided by the terms of the instrument or grant creating the trust to be distributed.

HISTORY: Re-enacts Sec. 1 of Act 40 of '95, being C. L. '97, (11103). Unchanged.

**(13346). Where All Parties do Not Consent.**

SEC. 89. In all cases except where all the parties to be benefited by the distribution of the proceeds of the sale of the trust estate shall give their consent in writing to the division and distribution of the trust estate as above provided, the



proceedings to obtain the authority of the court as aforesaid to divide and distribute said estate, may be instituted by the trustee or any person interested in such division and distribution, and shall conform to the provisions of the preceding sections, relating to partition of lands, and the division and distribution, if authorized by the court, shall be affected in the manner provided by said preceding sections for partitioning the undivided interests of persons in real estate generally,

**HISTORY:** Re-enacts Sec. 2 of Act 40 of '95, being C. L. '97, (11104), making the necessary changes in phraseology in referring to preceding sections. Unchanged.

**(13347). Division Where All Consent in Writing.**

**SEC. 90.** Such division or distribution of a trust estate may be made by a trustee without obtaining the authority of the court as aforesaid, when all the persons who would be entitled to share in the proceeds of the sale of such estate shall consent thereto in writing, and such trustee shall make such division and distribution when all of the parties interested as aforesaid shall so request in writing.

**HISTORY:** Re-enacts Sec. 3 of Act 40 of '95, being C. L. '97, (11105). Unchanged.

**(13348). Consent of Minor, Insane or Incompetent Person.**

**SEC. 91.** When any of the persons, entitled to share in the distribution of the proceeds of the sale of such trust estate, shall be a minor, or insane, or incompetent to give their consent, or make such request, such division and distribution shall not be made without the authority of the court as aforesaid, unless such minor, insane or incompetent person shall have a general guardian, in which event such general guardian, upon obtaining the authority of the court appointing such guardian to consent to such division and distribution, or request that the same shall be made by the trustee, shall have the same power and authority to consent to such division and distribution or make request therefor, and agree upon a method of effecting such division and distribution as a person of full age and otherwise competent to act in the premises could do. The authority of the court appointing such guardian to give such consent, or make such request, may be obtained by such guardian filing with such court a petition showing the circumstances which it is deemed, renders it to

the advantage of such minor, insane or incompetent person to have such distribution or division made.

**HISTORY:** Re-enacts Sec. 4 of Act 40 of '95, being C. L. '97, (11106). Unchanged.

## CHAPTER XXXII.

### PLATTING LANDS OF INCOMPETENT PERSONS.

#### (13349). Infant May Apply to Court of Chancery.

SECTION 1. Any infant, idiot, lunatic or other incompetent person, seized of any real estate, may apply to the circuit court in chancery for the county where the property may be situated, if the infant, idiot, lunatic or other incompetent person be not a resident of this state, and if a resident of this state, then to the circuit court in chancery of the county in which he may be a resident, for the laying out, dividing and platting into lots, streets and alleys, of such real estate in the manner hereinafter directed. If the applicant has a guardian, then the application shall be made by such guardian, and if he has no guardian or the guardian is a non-resident, application may be made by a next friend, who may be authorized to act as such by said court: *Provided*, That if the application be by an idiot, lunatic or other incompetent person, his next friend shall be appointed on the petition of the person or persons having the custody of the person of such idiot, lunatic or other incompetent; and if the application be made by an infant, the appointment of such next friend shall be made on his petition, but the court before authorizing a next friend to act for him, shall require proof that his guardian, if he have one, or his parents, or other near relatives, if he have no parents, have knowledge of the intention to make such application, and unless it shall appear that such persons have knowledge of such intention, shall direct notice of the application to be given to such guardian, parents or other relatives.

HISTORY: Re-enacts and supersedes Sec. 1 of Act 44 of '93, being C. L. '97, (11107), though such section was not expressly repealed by this act. This chapter re-enacts Ch. 305, C. L. '97. Unchanged.

#### (13350). Court to Appoint Guardian.

SEC. 2. On such application, the court shall, if necessary, appoint one or more suitable persons to be guardians of such infant, idiot, lunatic or other incompetent person, in relation to the proceedings on such application.

**HISTORY:** Re-enacts and supersedes Sec. 2 of Act 44 of '93, being C. L. '97, (11108), though such section was not expressly repealed by this act. Unchanged.

**(13351). Bond of Guardian.**

**SEC. 3.** The guardian shall give bond to such infant, idiot, lunatic, or other incompetent person, to be filed with the clerk of said court in such penalty with such sureties and in such form as the court shall direct, conditioned for the faithful performance of the trust reposed; for the paying over, investing and accounting for all moneys that shall be received by such guardian according to the order of any court having authority to give directions in the premises, and for the observance of the orders of the court in relation to the said trust.

**HISTORY:** Re-enacts and supersedes Sec. 3 of Act 44 of '93, being C. L. '97, (11109), changing "register" to "clerk," though such section was not expressly repealed by this act. Unchanged.

**(13352). Prosecution of Bond.**

**SEC. 4.** If such bond be forfeited, the court shall direct it to be prosecuted for the benefit of the party injured.

**HISTORY:** Re-enacts and supersedes Sec. 4 of Act 44 of '93, being C. L. '97, (11110), though such section was not expressly repealed by this act. Unchanged.

**(13353). Circuit Court Commissioner to Inquire.**

**SEC. 5.** Upon the filing and approval of such bond, the court may proceed in a summary manner, on oral or other testimony, or by reference to a circuit court commissioner, to inquire into the merits of such application.

**HISTORY:** Re-enacts and supersedes Sec. 5 of Act 44 of '93, being C. L. '97, (11111), though such section was not expressly repealed by this act. Unchanged.

**(13354). Dedication to Public.**

**SEC. 6.** Whenever it shall appear satisfactorily that the interest of such infant, idiot, lunatic, or other incompetent person requires, or will be substantially promoted by the laying out, dividing and platting into lots, streets and alleys of the real estate of such infant, idiot, lunatic, or other incompetent, for any reason or circumstances, the court may order such real estate to be laid out, divided and platted into lots,

(13355) PLATTING LANDS OF INCOMPETENT PERSONS CHAP. XXXII

streets and alleys, by the guardians of such infants, idiots, lunatics and other incompetent persons, and such streets and alleys to be dedicated to the public in such manner and with such restrictions as shall be deemed expedient.

**HISTORY:** Re-enacts and supersedes Sec. 6 of Act 44 of '93, being C. L. '97, (11112), though such section was not expressly repealed by this act. Unchanged.

(13355). **Guardian to Report Plat on Oath.**

**SEC. 7.** Upon a plat of such real estate being made in pursuance of such order, the same shall be reported to the court on the oath of the guardian making the same, and if it be confirmed, a plat of such real estate shall be executed under the direction of the court.

**HISTORY:** Re-enacts and supersedes Sec. 7 of Act 44 of '93, being C. L. '97, (11113), though such section was not expressly repealed by this act. Unchanged.

(13356). **Validity of Plat.**

**SEC. 8.** All plats of such real estate made in good faith by the guardian in pursuance of such order, when so confirmed, shall be as valid and effectual as if made by such infant, idiot, lunatic or other incompetent person, when of lawful age and sound mind.

**HISTORY:** Re-enacts and supersedes Sec. 8 of Act 44 of '93, being C. L. '97, (11114), though such section was not expressly repealed by this act. Unchanged.

(13357). **Ward of Court.**

**SEC. 9.** From the time of such application to the court, the infant, idiot, lunatic or other incompetent person, shall be considered as a ward of the court, in so far as relates to such real estate and the platting thereof.

**HISTORY:** Re-enacts and supersedes Sec. 9 of Act 44 of '93, being C. L. '97, (11115), though such section was not expressly repealed by this act. Unchanged.

## CHAPTER XXXIII.

### GENERAL PROVISIONS CONCERNING ACTIONS RELATING TO REAL ESTATE.

#### (13358). Reversioners Permitted to Defend.

SECTION 1. If any tenant for life, or in dower, or any tenant for years, be impleaded, and the person to whom the reversion or remainder appertains, shall come into court, before trial or judgment by default, and pray to be received to defend his right, he shall be permitted to plead to the action, upon such terms as the court may deem just.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 113, being C. L. '57, (4723); C. L. '71, (6378); How. 7966; C. L. '97, (11185), eliminating "or by the curtesy" and making other immaterial changes in phraseology. Modified.

#### (13359). Reversioner to Sue After Default of Tenant.

SEC. 2. If any tenant for life or years make default or give up any lands demanded, so that judgment be given on such default or surrender, the person to whom the reversion or remainder of such lands appertains, may, after the termination of the estate of such tenant, have an action of ejectment to recover the same lands.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 113, being C. L. '57, (4724); C. L. '71, (6379); How. 7967; C. L. '97, (11186). Unchanged.

#### (13360). Certain Recoveries Void As To Reversioners.

SEC. 3. All recoveries had by agreement of parties, or by fraud, against any tenant for life, or in dower, of any lands, tenements or hereditaments, shall be void as against all persons to whom any reversion or remainder of such lands shall appertain, and as against their heirs, unless the appearance of the person having such reversion or remainder shall have been duly entered in the court where such recovery shall be had.

HISTORY: Re-enacts Sec. 5, R. S. '46, Ch. 113, being C. L. '57, (4727); C. L. '71, (6382); How. 7970; C. L. '97, (11189), omitting "or by the curtesy." Modified.

**(13361). Feigned Recoveries.**

SEC. 4. No execution shall be avoided by means of any feigned recovery, but all persons entitled to have execution of the lands, tenements or hereditaments, shall have the like means to avoid and falsify the same recoveries as a tenant of the freeholder [freehold], who was neither party nor privy to such recovery, has by the course of the common law.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 113, being C. L. '57, (4728); C. L. '71, (6383); How. 7971; C. L. '97, (11190). Unchanged.

**(13362). Rights of Lessee for Years.**

SEC. 5. A lessee for years may falsify for his term only, recoveries, in the same manner as a tenant of the freehold, who was neither party nor privy to the recovery, may do by the course of the common law; and such lessees, and their personal representatives and assigns, notwithstanding any recoveries that may be so falsified, shall hold their terms according to their demises, as if such recovery had not been had.

HISTORY: Re-enacts Sec. 7, R. S. '46, Ch. 113, being C. L. '57, (4729); C. L. '71, (6384); How. 7972; C. L. '97, (11191). Unchanged.

**(13363). Rights of Parties Recovering.**

SEC. 6. After any recovery had, the recoverers, their heirs and assigns, shall have the like remedies against any lessees for years, their representatives and assigns, for any rents or services reserved, coming due after such recoveries, and also like actions for waste done after such recoveries, as the lessors might have had, if such recoveries had not been made.

HISTORY: Re-enacts Sec. 8, R. S. '46, Ch. 113, being C. L. '57, (4730); C. L. '71, (6385); How. 7973; C. L. '97, (11192). Unchanged.

**(13364). Joint and Several Actions by Heirs.**

SEC. 7. When any person shall die, leaving heirs, either in the same or in different degrees; and where several persons shall be, in any other way, entitled to a real estate as tenants in common, or as joint tenants, they may bring a joint action for the recovery thereof, or may bring several actions for their respective shares or interests.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 113, being C. L. '57, (4731); C. L. '71, (6386); How. 7974; C. L. '97, (11193). This section is also re-enacted by Compilers' Section (12310). Unchanged.

**(13365). Guardians for Infant Defendants.**

SEC. 8. Actions relating to real property shall not be delayed, nor shall the remedy of any plaintiff be superseded by reason of the infancy of any defendant therein; but guardians to defend the rights of infant defendants, shall be appointed as in personal actions; and in all such actions against an infant, if he do not procure the appointment of a guardian within the time required for his appearance therein, the plaintiff may proceed to have such guardian appointed as in personal actions.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 113, being C. L. '57, (4732); C. L. '71, (6387); How. 7975; C. L. '97, (11194). Unchanged.

**(13366). Order for Survey of Lands.**

SEC. 9. Whenever the court in which any action relating to real property shall be pending, shall be satisfied that any survey of any premises in the possession of either party, or of any boundary line between the lands of the parties, or between the lands of either of them and the lands of other persons, is necessary or expedient to enable either party to declare, plead or prepare for trial, or for any other proceeding in such action, it may, by rule of court, upon the application of either party, order that such party have leave to make such survey.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 113, being C. L. '57, (4733); C. L. '71, (6388); How. 7976; C. L. '97, (11195). Unchanged.

**(13367). Order.**

SEC. 10. Such order shall specify the premises or boundary line to be surveyed, by a description as definite as may be; and a copy of the same shall be served previous to such entry, on the owner or occupant of the premises upon which it may be necessary to enter, to make such survey.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 113, being C. L. '57, (4734); C. L. '71, (6389); How. 7977; C. L. '97, (11196). Unchanged.

**(13368). Authority to Enter Upon Premises and Survey.**

SEC. 11. The party obtaining such order, his necessary surveyors, assistants and agents, may enter upon any premises necessary for the purpose of making such survey, and may there make the same, after having served a copy of such rule, as hereinbefore directed; and for so doing, no person acting under such order shall be liable to any action of trespass or



other action; but every such person shall be responsible in an action on the case, for any unnecessary injury caused by him.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 113, being C. L. '57, (4736); C. L. '71, (6390); How. 7978; C. L. '97, (11197).

**(13369). Imparances Abolished.**

**Sec. 12.** No imparlance, voucher, aid-prayer or receipt, shall be allowed; but whenever any action shall be brought against any tenant, to recover the land held by him, or the possession of such land, the landlord of such tenant, and any person having any privity of estate with such tenant, or with such landlord, in the premises in question, or in any part thereof, may be made defendant with such tenant, in case he shall appear for that purpose.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 113, being C. L. '57, (4736); C. L. '71, (6391); How. 7979; C. L. '97, (11198). Unchanged.  
**CONSTRUED:** Dubay v. Kelly, 137 Mich. 345.

**(13370). Alienation by Defendants.**

**Sec. 13.** Whenever any action for the recovery of any lands or tenements, or for the recovery of the possession thereof, shall be commenced against any person in possession of the premises in question, or in the receipt of the profits thereof, such action shall not be barred or delayed by reason of any alienation or conveyance made by such person to any other, either before or after the commencement of such action.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 113, being C. L. '57, (4737); C. L. '71, (6392); How. 7980; C. L. '97, (11199). Unchanged.  
**CONSTRUED:** M. C. R. Co. v. McNaughton, 45 Mich. 91.

**(13371). Liability of Purchasers During Suit.**

**Sec. 14.** If the defendant in any action for the recovery of land, or the possession of land, shall alien the land in question, pending the suit, and shall have no property whereof the damages for the issues and profits of such land recovered against him may be levied, every person to whose hands such lands shall have come, shall be liable to an action for such damages for the time that he shall have possessed the premises.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 113, being C. L. '57, (4738); C. L. '71, (6393); How. 7981; C. L. '97, (11200). Unchanged.

**(13372). Writ of Possession May Include Execution.**

SEC. 15. Whenever a writ of possession shall be issued upon a judgment in any action relating to real property, the plaintiff may include in the same process an execution against the property of the defendant, to collect the costs or damages, which may be due, in the same cases in which he would be authorized to issue such execution separately.

HISTORY: Re-enacts Sec. 17, R. S. '46, Ch. 113, being C. L. '57, (4739); C. L. '71, (6394); How. 7982; C. L. '97, (11201). Unchanged.

CONSTRUED: The provision that one entitled to a writ of possession may include an execution against the property is permissive, and implies the right to elect to take separate writs. *Dawson v. Chipewa Circuit Judge*, 127 Mich. 329.

**(13373). Practice in Real Actions.**

SEC. 16. The practice in actions relating to real estate, shall be the same in all respects as in personal actions, except where otherwise specially provided by law; and proceedings may be stayed in the like cases, and all the provisions of law respecting pleadings, process, records and judgments, in personal actions, shall, so far as the nature of such actions will admit, apply to actions, relating to real estate.

HISTORY: Re-enacts Sec. 18, R. S. '46, Ch. 113, being C. L. '57, (4740); C. L. '71, (6395); How. 7983; C. L. '97, (11202), omitting, however, two clauses relating to rules to plead. Modified.

**(13374). Certain Process and Actions Abolished.**

SEC. 17. All writs of right, writs of dower, writs of entry, and writs of assize, all fines and common recoveries, and all other real actions known to the common law, not enumerated and retained in this title, and all writs and other process heretofore used in real actions, which are not specially retained in this title, are abolished.

HISTORY: Re-enacts Sec. 19, R. S. '46, Ch. 113, being C. L. '57, (4741); C. L. '71, (6396); How. 7984; C. L. '97, (11203). Unchanged.

**Of Trespass on Lands.****(13375). Judgment for Single Damages Only.**

SEC. 18. If, upon the trial of any action for trespass on lands, it shall appear that the trespass was casual and involuntary, or that the defendant had probable cause to be

lieve that the land on which such trespass was committed was his own; or that such wood, trees, or timber were taken for the purpose of making or repairing any public road or bridge; judgment shall be given to recover only the single damage assessed.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 111, being C. L. '57, (4716); C. L. '71, (6371); How. 7958; C. L. '97, (11205), with a necessary change in phraseology in the second clause. Section 1 of Chapter 111, R. S. '46, was not repealed and is omitted from this act. See Compilers' Section (14632). Unchanged.

**CONSTRUED:** See notes to Compilers' Section (14632). The burden is on plaintiff to show that the cutting was without leave of the owner. *Padman v. Rhodes*, 126 Mich. 435. The burden of proof to show that the trespass was casual and involuntary is upon the defendant. *Michigan Land & Iron Co. v. Deer Lake Co.*, 60 Mich. 143; *Hart v. Doyle*, 128 Mich. 262; *Connor v. McRae*, 193 Mich. 696.

**TREBLE DAMAGES:** Treble damages cannot be assessed where the trespass consists in tearing down a line fence, which defendant honestly believed was placed on his own land. *Kilgamon v. Jenkinson*, 57 Mich. 325. Nor when defendant entered upon the land of plaintiff and cut timber, thinking that a letter sent by him, accepting an offer of plaintiff to sell the land, had reached plaintiff. *Wallace v. Finch*, 24 Mich. 255. See also *Miller v. Wellman*, 75 Mich. 353. See further as to treble damages, *Ward v. Rupp*, 79 Mich. 469; *Lane v. Ruhl*, 103 Mich. 40; *Longyear v. Gregory*, 110 Mich. 277; *Oconto Co. v. Lundquist*, 119 Mich. 264; *Hart v. Doyle*, 128 Mich. 257; *Bockes v. A. McAfee & Son Co.*, 165 Mich. 7.

**MEASURE OF DAMAGES:** *Gates v. Comstock*, 113 Mich. 127.

### •(13376). Recovery of Treble Damages.

**Sec. 19.** If any person shall be ejected or put out of any lands or tenements in a forcible and unlawful manner, or being put out, be afterwards held and kept out by force, he shall be entitled to maintain an action therefor, and shall recover therein three times the amount of damages assessed by the jury or a justice of the peace in the cases provided by law.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 111, being C. L. '57, (4717); C. L. '71, (6372); How. 7957; C. L. '97, (11206), changing "an action of trespass" to "an action therefor," and making other immaterial changes in phraseology. Modified.

**CONSTRUED:** This section authorizes a judgment for three times the amount of the damage, with interest, as found by the jury. *Gates v. Comstock*, 113 Mich. 127. Treble damages are not allowed for injury to household goods or for the value of tools left on the premises or for loss of profits or as a punishment. *Carman v. Scott*, 172 Mich. 44. See further as to treble damages, *Pelton v. O'Keefe*, 144 Mich.

CHAP. XXXIII WASTE AFTER COMMENCEMENT OF ACTION (13377)

425; *Wilson v. McCrillies*, 50 Mich. 347; *Mattice v. Brinkman*, 74 Mich. 708.

CITED: *Cockerline v. Fisher*, 140 Mich. 98; *McIntyre v. Murphy*, 153 Mich. 344.

(13377). Waste After Commencement of Action.

SEC. 20. After the commencement of any action on the case for waste, or any action for the recovery of land, or of the possession of land, the defendant shall not make any waste of the land in demand, or premises in question, during the pendency of the suit; and if such defendant shall commit any waste thereon, or shall threaten or make preparations to commit waste thereon, the court in which such suit is pending, or any circuit judge, or circuit court commissioner, either in term or vacation, shall have power, on the application of the plaintiff, to make an order restraining the defendant from the commission of any waste, or further waste thereon. Any person who shall violate the terms of any such order, shall be deemed guilty of contempt of the court in which such action is pending, and shall be punishable as in other cases of contempt.

HISTORY: Re-enacts Sec. 7, R. S. '46, Ch. 110, being C. L. '57, (4704), As Am. '58, p. 8, Act 4, Eff. May 6; C. L. '71, (6359); How. 7946; C. L. '97, (11122), adding the last sentence as in the above section. Modified.

CONSTRUED: An order to stay waste is discretionary and will not be compelled by mandamus. *Parks v. Marquette Circuit Judge*, 38 Mich. 244. After reversing the judgment of the court below, the supreme court has no jurisdiction of a case for any purpose and will not grant an order to stay waste. *Crane v. Reeder*, 23 Mich. 92.

## CHAPTER XXXIV.

### PROCEEDINGS AT LAW IN THE NATURE OF A JUDGMENT CREDITOR'S BILL.

#### (13378). Discovery of Property on Oath.

**SECTION 1.** When an execution against the property of a judgment debtor, issued to the sheriff of the county in which he resides, or, if he reside out of the state, to the sheriff of the county in which the judgment was recorded, or a transcript thereof filed, shall be returned unsatisfied in whole or in part, the judgment creditor may obtain an order from the judge of the court in which the judgment was obtained, or from the judge of the circuit court for the county in which the defendant resides, or from the circuit court commissioner of any such county, or of the county in which a transcript may have been filed as aforesaid, requiring the judgment debtor to appear and make discovery on oath, concerning his property or any debts due or to become due to him, before such judge or commissioner, at a time and place specified in the order.

**HISTORY:** Re-enacts Sec. 1 of Act 184 of '51, being C. L. '57, (4804); C. L. '71, (6513); As Am. '75, p. 226, Act 193, Eff. Aug. 3; How. 8107; C. L. '97, (10837).

**NOTE:** For a review of the history of this chapter, see *Reed v. Baker*, 42 Mich. 274.

**CONSTITUTIONALITY:** The validity of this act was sustained in *Lee v. Kalamazoo Circuit Judge*, 101 Mich. 406; *Berles v. Comstock*, 104 Mich. 130; *Mulhern v. Kent Circuit Judge*, 111 Mich. 535.

**CONSTRUED:** This chapter applies to decrees in equity as well as to judgments at law. *Clement, Bane & Co. v. Oceana Circuit Judge*, 119 Mich. 605. See further as to construction of this chapter, *Reed v. Baker*, 42 Mich. 274; *Shepard v. Kent Circuit Judge*, 109 Mich. 130; *Grand Rapids Savings Bank v. Widdicomb*, 114 Mich. 639; *Rathbone v. Maltz*, 155 Mich. 306.

**JUDGMENT CREDITOR'S BILL:** See Compilers' Section (12302), subd. 6, and notes to said subdivision.

One in custody under a *capias ad respondendum*, against whom no body execution has issued, and the statutory time for its issuance has not expired, may be made to appear and disclose under oath as to his credits under the law. *La Branch v. Herbst*, 192 Mich. 129; 158 N. W. 211; 23 D. L. N. 427.

**(13379). Witnesses.**

**SEC. 2.** Witnesses may be required to appear and testify in any proceeding under this chapter, in the same manner as upon the trial of an issue in the circuit court. And upon an affidavit, showing to the satisfaction of such judge or commissioner, that any person has property of the judgment debtor, or is indebted to him, the judge or commissioner may issue an order requiring such person to appear at a specified time and place, and be examined on oath concerning the same. Such judge shall take written notes of the substance of all the material facts stated by any party or witness on such examination.

**HISTORY:** Re-enacts Sec. 2 of Act 184 of '51, being C. L. '57, (4805); C. L. '71, (6514); How. 8108; C. L. '97, (10838), changing "act" to "chapter."

**(13380). Before Whom Party or Witness to Appear.**

**SEC. 3.** If the party or witness reside in the county where the order is made, he shall be required to attend before the judge of the circuit court, or before the commissioner for such county; if in any other county, before a referee, as provided in section seven of this chapter. In the latter case the examination shall be taken in writing, and certified to the court or judge.

**HISTORY:** Re-enacts Sec. 3 of Act 184 of '51, being C. L. '57, (4806); C. L. '71, (6515); As Am. '75, p. 226, Act 193, Eff. Aug. 3; How. 8109; C. L. '97, (10839), changing "act" to "chapter." Unchanged.

**(13381). Order to Apply Property on Execution.**

**SEC. 4.** The judge may order any property of the judgment debtor not exempt from execution, in the hands of either himself or any other person, or any property, debt or demand due or to become due to the judgment debtor, and not exempt as aforesaid, to be applied on execution towards the satisfaction of the judgment, or he may order any such property to be made liable to, and sold on any execution issued or to be issued on the judgment.

**HISTORY:** Re-enacts Sec. 4 of Act 184 of '51, being C. L. '57, (4807); C. L. '71, (6516); How. 8110; C. L. '97, (10840). Unchanged.

**(13382). Receiver.**

**SEC. 5.** The judge may also by an order appoint a receiver

of the property of the judgment debtor, with the like powers and authority as receivers heretofore appointed by courts of equity in this state. The judge or commissioner may also by an order forbid a transfer of the property of the judgment debtor and any interference therewith, and such order shall have the like effect as an injunction from a court of equity.

**HISTORY:** Re-enacts Sec. 5 of Act 184 of '51, being C. L. '57, (4808); C. L. '71, (6517); As Am. '75, p. 226, Act 193, Eff. Aug. 3; How. 8111; C. L. '97, (10841). Unchanged.

**CONSTRUED:** Lee v. Kalamazoo Circuit Judge, 101 Mich. 407; Prescott v. Pfeiffer, 57 Mich. 22; McBryan v. Universal Elevator Co., 130 Mich. 114.

**(13383). Recovery of Interest in Property Adverse to Judgment Debtor.**

**SEC. 6.** If it appear that the person or persons so brought before the judge or commissioner by the aforesaid judgment creditor, claims an interest in the property of the judgment debtor, adverse to him, such interest shall be recovered only in an action by the receiver; but the judge or commissioner may, by an order, forbid a transfer or other disposition of such interest till a sufficient opportunity be given to the receiver to commence the action; but such receiver shall bring no action unless at the request of the judgment creditor, and at his expense in case of failure, and he may require such reasonable security against all costs as he may think proper, before commencing such action.

**HISTORY:** Re-enacts Sec. 6 of Act 184 of '51, being C. L. '57, (4809); C. L. '71, (6518); As Am. '75, p. 226, Act 193, Eff. Aug. 3; How. 8112; C. L. '97, (10842). Unchanged.

**CONSTRUED:** This statute contemplates the appointment of a receiver who may sue directly the persons supposed to be covering property for a judgment creditor. Stoeckle v. Ehlers, 37 Mich. 263.

See note to preceding section.

**(13384). Appointment of Referees to Take Proofs.**

**SEC. 7.** The judge may in any case order a reference to a referee agreed upon or appointed under this section, provided to take and report the evidence; or if agreed upon, to report the fact as found by such referee. If the parties or their attorneys agree upon such referee, the court shall appoint the person so agreed upon; if they do not agree, the judge shall appoint some competent and disinterested person as such referee.

**HISTORY:** Re-enacts Sec. 7 of Act 184 of '51, being C. L. '57, (4810); C. L. '71, (6519); How. 8113; C. L. '97, (10843). Unchanged.  
**CITED:** Mulhern v. Kent Circuit Judge, 111 Mich. 536.

**(13385). Fees Allowed to Creditor.**

**Sec. 8.** The judge may allow to the judgment creditor, or to any party examined, whether a party to the action or not, witness fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

**HISTORY:** Re-enacts Sec. 8 of Act 184 of '51, being C. L. '57, (4811); C. L. '71, (6520); As Am. '75, p. 226, Act 193, Eff. Aug. 3; How. 8114; C. C. '97, (10844). Unchanged.

See Mulhern v. Kent Circuit Judge, 111 Mich. 528, 536.

**(13386). Penalty for Disobedience of Order.**

**Sec. 9.** If any party or witness shall disobey any order of the judge or commissioner, made in pursuance of this chapter, and duly served, such party or witness may be punished by the judge, as for a contempt, in the same manner as the circuit court may punish for contempt.

**HISTORY:** Re-enacts Sec. 9 of Act 184 of '51, being C. L. '57, (4812); C. L. '71, (6521); As Am. '75, p. 226, Act 193, Eff. Aug. 3; How. 8115; C. L. '97, (10845), changing "act" to "chapter." Unchanged.

**CONSTRUED:** Under this section the circuit court can punish for contempt a debtor who refuses to appear before the circuit court commissioner and make disclosure. Shepard v. Kent Circuit Judge, 109 Mich. 606; Mulhern v. Kent Circuit Judge, 111 Mich. 528.

**(13387). Record of Proceedings.**

**Sec. 10.** Any of the proceedings authorized by this chapter to be had before the judge, may be had before him in court, at any session of the circuit court, or at chambers; and when had before such judge at chambers, all orders made by him, and the papers on which the same were founded, shall, within five days after such order, be delivered by such judge, together with the evidence taken by him, or any referee, to the clerk of the circuit court for his county, and shall be by him filed and preserved in his office, which shall constitute the record of the proceedings, and copies thereof, certified by such clerk, shall be conclusive evidence of the order and proceedings therein stated.

**HISTORY:** Re-enacts Sec. 10 of Act 184 of '51, being C. L. '57, (4813); C. L. '71, (6522); How. 8116; C. L. '97, (10846), changing "act" to "chapter." Unchanged.



See *Mulhern v. Kent Circuit Judge*, 111 Mich. 528, 536, and *Shepard v. Kent Circuit Judge*, 109 Mich. 606, 607.

**(13388). Final Order to Have Force of Decree.**

**SEC. 11.** Any final order made in pursuance of the provisions of this chapter, shall have the like validity and force as the decree of a court of equity, under the laws and the practice of such courts at the time such order is made; and any such order in respect to real estate, or a certified copy thereof, may, if not appealed from, be recorded in the office of the register of deeds of the county in which such real estate is situated.

**HISTORY:** Re-enacts Sec. 11 of Act 184 of '51, being C. L. '57, (4814); C. L. '71, (6523); How. 8117; C. L. '97, (10847), making some changes in phraseology. Modified.

**(13389). Appeal.**

**SEC. 12.** Any final order made under any of the provisions of this chapter, may be appealed from, to the supreme court, within twenty days after the same is made, by complying with the following provisions: The party appealing shall make an affidavit setting forth the particular matters complained of in the proceedings or order, and shall deliver the same to the clerk of the court in which the papers are filed. To render an appeal effectual for any purpose, the following provisions must be complied with: If the judgment creditor appeal, he must, within said twenty days, enter into a written undertaking, with sureties, who shall justify before the clerk, unless their sufficiency be admitted by the opposite party, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred dollars; or that sum may be deposited with the clerk with whom the order is entered. Such undertaking or deposit may be waived by the written consent of the opposite party. If the appeal be taken by any other party than the judgment creditor, and if the order appealed from be for the payment of money or the delivery of property, a written undertaking must be executed by the appellant, or some person on his behalf, with two sureties, who shall justify as aforesaid, unless their responsibility be admitted as aforesaid, to at least double the amount of the money or property ordered to be paid or delivered, to the effect that if the order appealed from, or any part thereof, be affirmed, the appellant

will pay the amount directed to be paid or deliver the property in as good condition as the same is at the time of the appeal, as shall be determined on appeal, and all damages and costs which shall be awarded against the appellants. If the order appealed from direct the assignment or delivery of papers or documents by the appellant, the papers ordered to be assigned or delivered, must be delivered to the clerk with whom such proceedings are filed, or placed in the hands of such officer or receiver, as the judge having made the order shall direct, to abide the event of the appeal, and subject to the order of the supreme court. If the order appealed from direct the sale of the real estate of the appellants or the delivery of possession by them, a written undertaking must be entered into by him, with two sureties, satisfactory to the judge making the order, and filed with such clerk, to the effect that during the possession of such property by him, or any person holding under him, he will not commit or suffer any waste thereon, and that, if the order be affirmed, he will pay the value of the use of such property from the time of the appeal until the delivery of possession thereof.

**HISTORY:** Re-enacts Sec. 12 of Act 184 of '51, being C. L. '57, (4815); C. L. '71, (6524); How. 8118; C. L. '97, (10848), making the necessary changes in phraseology in referring to other sections. Unchanged.

**(13390). Notice of Appeal.**

**SEC. 13.** When all acts, matters and things required by the last preceding section shall have been done by the appellant, notice that such appeal has been taken shall be given in writing to the opposite party or his attorney, if either is to be found in the county; if not, such notice may be left with such clerk, and upon proof to such clerk that such notice has been given as aforesaid, such clerk shall, within ten days, attach together all the orders in the proceedings appealed from, and all the affidavits upon which any of them are founded, in the order of their dates, and shall attach thereto all the testimony and examinations of parties and witnesses, which shall have been filed with him in relation thereto, and shall certify them under the seal of the circuit court, and cause the same to be delivered to the clerk of the supreme court to be filed, and thereupon the supreme court shall be possessed of the cause.

**HISTORY:** Re-enacts Sec. 13 of Act 184 of '51, being C. L. '57, (4816); C. L. '71, (6525); How. 8119; C. L. '97, (10849). Unchanged.

**(13391). Reversal, Affirmance or Modification of Order.**

SEC. 14. On such appeal the supreme court may reverse, affirm or modify any such order appealed from, in any particular complained of in the affidavit upon which the appeal is founded. It may for that purpose, look into all the proceedings, and the facts as stated in the evidence returned on the appeal; and it may order a re-hearing of the whole matter, or any part thereof, before the judge making the order, or it may make such final order in the premises and award such costs as justice may require; and such last named order shall have all the force and effect of a final decree in a court of equity, according to the laws existing at the time such order is made; and may be recorded in the same manner, and enforced under such general or special rules as said court may adopt.

HISTORY: Re-enacts Sec. 14 of Act 184 of '51, being C. L. '57, (4817); C. L. '71, (6526); How. 8120; C. L. '97, (10850), changing "they" (referring to the supreme court) to "it," and "of the passage of this act" to "such order is made." Modified.

**(13392). Payment to Officer Holding Execution.**

SEC. 15. After the issuing of execution by any court against or for the taking of any property, any person indebted to the judgment debtor may pay to the officer having the execution the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the receipt of the officer having such execution shall be a sufficient discharge therefor.

HISTORY: Re-enacts Sec. 15 of Act 184 of '51, being C. L. '57, (4818); C. L. '71, (6527); How. 8121; C. L. '97, (10851). Unchanged.

## CHAPTER XXXV.

### COLLECTION OF PENALTIES, FINES AND FORFEITED RECOGNIZANCES.

#### (13393). Penalties Recoverable by Action.

SECTION 1. In all cases not otherwise specially provided for by law, where a pecuniary penalty or forfeiture shall be incurred by any person, and the act or omission for which the same is imposed, shall not be also a misdemeanor, such penalty or forfeiture may be recovered in an action of assumpsit; and if it be a forfeiture of any property, it may be sued for and recovered in an action of trespass on the case.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 128, being C. L. '57, (5111); C. L. '71, (6841); How. 8428; C. L. '97, (9797), eliminating "in an action of debt," and changing "action of trover or other appropriate action" to "action of trespass on the case." Modified.

PENALTY: When a penal statute is repealed, without a reservation or saving clause in favor of penalties that have accrued under it, such penalties cannot afterwards be recovered. *Engle v. Shurts*, 1 Mich. 150; *Tivey v. People*, 8 Mich. 128; *Breitung v. Lindauer*, 37 Mich. 230. See *Webber v. Howe*, 36 Mich. 155.

ASSUMPSIT: For penalties and forfeitures. *Wood v. Ayers*, 39 Mich. 349; *Gravel Road Co. v. Paas*, 95 Mich. 381.

Joinder of parties defendant. *People v. Dennis*, 4 Mich. 609.

CITED: *Yerkes v. Smith*, 157 Mich. 558; *People v. Dixon*, 188 Mich. 307; 154 N. W. 1; 22 D. L. N. 830.

#### (13394). Action.

SEC. 2. Every such action shall be brought in the name of the people of the state of Michigan, and shall be conducted and prosecuted in the same manner as personal actions, and shall be subject to all the provisions of law concerning personal actions, not repugnant to the provisions of this chapter.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 128, being C. L. '57, (5112); C. L. '71, (6842); How. 8429; C. L. '97, (9798). Unchanged.

#### (13395). Violation of Ordinance.

SEC. 3. Whenever a pecuniary penalty or forfeiture shall be incurred for the violation of any ordinance of any city or village, and no provision shall be made for the imprisonment

of the offender upon conviction therefor, such penalty or forfeiture may be recovered in an action of *assumpsit*; and if it be a forfeiture of any property, it may be sued for and recovered in an action of trespass on the case, or other appropriate action. Whenever a corporation shall incur a penalty or forfeiture for the violation of any ordinance, the same shall be sued for in one of the actions aforesaid.

**HISTORY:** Supersedes and re-enacts in substance Sec. 2 of Ch. X. of Act 215 of '95, being C. L. '97, (3090), though such section is not expressly repealed by this act. Modified.

**CONSTRUED:** City of Owosso v. Mich. Central Railroad, 183 Mich. 693.

#### (13396). How Action Brought.

**SEC. 4.** Such action shall be brought in the name of the city or village. The form, time of return and service thereof, the pleadings and all the proceedings in the cause shall, except as otherwise provided herein, conform to and be the same as nearly as may be, as in like actions provided by law for the recovery of penalties for violations of the laws of the state. Upon the rendition of judgment against the defendant, execution shall issue forthwith, and except when against a corporation, shall require, if sufficient goods and chattels cannot be found to satisfy the same, that the defendant be committed to prison, there to remain for a period not exceeding ninety days, unless such execution be sooner paid, or he be discharged by due course of law; but imprisonment without payment shall not operate as a satisfaction of the judgment, nor shall costs be allowed to the defendant in any such action.

**HISTORY:** Supersedes and re-enacts in substance Sec. 3 of Ch. X of Act 215 of '95, being C. L. '97, (3091), though such section is not expressly repealed by this act. Modified.

#### (13397). Jurisdiction of Justices.

**SEC. 5.** Justices of the peace shall have jurisdiction of all actions for the recovery of penalties or forfeitures, where the amount of the penalty or forfeiture shall not exceed one hundred dollars.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 128, being C. L. '57, (5113); C. L. '71, (6843); How. 8430; C. L. '97, (9799). Unchanged.

**CONSTRUED:** In what court question of jurisdiction of justice of the peace should be raised. See Ramsby v. Bigler, 129 Mich. 571. A justice of the peace has jurisdiction to try actions for damages resulting from obstructions to highways. LaBarre v. Bent, 154 Mich.

523, citing *Knorr v. Macomb Circuit Judge*, 78 Mich. 170. See also *Pardee v. Smith*, 27 Mich. 40-1; *People v. Hart*, 1 Mich. 468.

**(13398). Declaration in Assumpsit.**

SEC. 6. Whenever an action of assumpsit shall be brought for the recovery of any penalty or forfeiture imposed by any statute, it shall be sufficient, without setting forth the special matter, to allege in the declaration, that the defendant, being indebted to the plaintiffs in the amount of such penalty or forfeiture, according to the provisions of the statute by which such penalty or forfeiture is imposed, referring to such statute, undertook and promised to pay the same.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 128, being C. L. '57, (5116); C. L. '71, (6846); How. 8433; C. L. '97, (9802), omitting "as prescribed in the last section." Unchanged.

CITED: *People v. Brady*, 90 Mich. 462.

**(13399). Declaration in Trespass on the Case.**

SEC. 7. If an action of trespass on the case be brought to recover any goods or other things forfeited by the provisions of any statute, the declaration may allege that such goods or other things were forfeited according to the provisions of such statute, referring to the same as prescribed in the foregoing section, without setting forth the special matter.

HISTORY: Re-enacts Sec. 7, R. S. '46, Ch. 128, being C. L. '57, (5117); C. L. '71, (6847); How. 8434; C. L. '97, (9803), omitting "and that the defendant converted the same to his own use." Modified.

**(13400). Plea and Evidence.**

SEC. 8. To every declaration for a penalty or forfeiture, the defendant may plead the general issue, which shall be in the same form as in personal actions; and may give in evidence under such plea any special matter in bar of action, or in discharge of the defendant therefrom, in the same manner, and with the like effect as if a special notice thereof had been given.

HISTORY: Re-enacts Sec. 8, R. S. '46, Ch. 128, being C. L. '57, (5118); C. L. '71, (6848); How. 8435; C. L. '97, (9804). Unchanged.

CONSTRUED: This section does not affect the special proceedings provided by Compilers' Sections (14232)-(14233)-(14234), when title to lands come in question. *Baars v. Grand Rapids*, 129 Mich. 572.

When the defendant relies upon the title to land as a defense, see *id.* This is a general act, and does not affect the special proceedings provided for where title to land comes in question. *Ramsby v. Bigler*, 129 Mich. 570, 572.

**(13401). Action Where Amount is not Specified.**

SEC. 9. When a penalty or forfeiture is imposed by law for any act or omission, not exceeding any specified sum, an action may be brought for the highest sum so specified; and the jury, or justice before whom the trial shall be had, shall award the sum so specified to the plaintiff, or such part thereof, within the limitation prescribed by law, as shall be deemed proportionate to the offense.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 128, being C. L. '57, (5119); C. L. '71, (6849); How. 8436; C. L. '97, (9805). Unchanged.

CITED: *Pettinger v. People*, 20 Mich. 33; *City of Owosso v. Mich. Cent. R. Co.*, 183 Mich. 693. See also *Pardee v. Smith*, 27 Mich. 42.

**(13402). When May be Recovered by Indictment.**

SEC. 10. In all cases where the penalty or forfeiture shall be one hundred dollars or more, such penalty or forfeiture may be recovered by indictment in the proper court of the county.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 128, being C. L. '57, (5120); C. L. '71, (6850); How. 8437; C. L. '97, (9806). Unchanged.

CONSTRUED: *People v. Hart*, 1<sup>st</sup> Mich. 468; *Pettinger v. People*, 20 Mich. 337; *Pardee v. Smith*, 27 Mich. 42.

**(13403). When Act or Omission Deemed Misdemeanor.**

SEC. 11. When any act or omission is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty, or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 128, being C. L. '57, (5121); C. L. '71, (6851); How. 8438; C. L. '97, (9807). Unchanged.

CONSTRUED: *People v. Bartow*, 27 Mich. 69; *People v. Abbott*, 116 Mich. 264. See also *Compilers' Sections* (14998)-(15321)-(15622).

**(13404). Duty of Supervisor to Prosecute.**

SEC. 12. It shall be the duty of every supervisor whenever he shall know, or have good reason to believe that any penalty or forfeiture has been incurred within his township, which shall be recoverable by action before a justice of the peace, according to the foregoing provisions of this chapter, forthwith to commence and prosecute a suit, in the name of the people of this state, for the recovery thereof.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 128, being C. L. '57,

(5122); C. L. '71, (6852); How. 8439); C. L. '97, (9808). Unchanged.  
CITED: People v. Navarre, 22 Mich. 4; People v. Brady, 90 Mich. 462.

**(13405). Duty of Other Township Officers.**

SEC. 13. It shall be the duty of every other township officer, who shall know, or have good reason to believe that any penalty or forfeiture has been incurred within his township, forthwith to give notice thereof to the supervisor.

HISTORY: Re-enacts Sec. 13, R. S. '46, Ch. 128, being C. L. '57, (5123); C. L. '71, (6583); How. 8440. C. L. '97, (9809). Unchanged.

**(13406). When Supervisor to Notify Prosecuting Attorney.**

SEC. 14. Whenever any supervisor shall know or have good reason to believe that any penalty or forfeiture has been incurred within his township, which cannot be recovered before a justice of the peace, it shall be his duty forthwith to give notice thereof to the prosecuting attorney of his county.

HISTORY: Re-enacts Sec. 14, R. S. '46, Ch. 128, being C. L. '57, (5124); C. L. '71, (6854); How. 8441; C. L. '97, (9810). Unchanged.  
CITED: People v. Brady, 90 Mich. 462.

**(13407). Duty of Prosecuting Attorney.**

SEC. 15. In cases mentioned in the last preceding section, and in all other cases where the prosecuting attorney shall know or have good reason to believe that a penalty or forfeiture has been incurred within his county, it shall be the duty of such prosecuting attorney, without delay, to prosecute for such penalty or forfeiture; and in all cases where any suit shall be instituted by the supervisor as provided in this chapter, it shall be the duty of such prosecuting attorney, if requested by such supervisor, to attend to and conduct such suit on behalf of the plaintiffs.

HISTORY: Re-enacts Sec. 15, R. S. '46, Ch. 128, being C. L. '57, (5125); C. L. '71, (6855); How. 8442; C. L. '97, (9811). Unchanged.  
CITED: People v. Brady, 90 Mich. 462.

**(13408). Moneys to be Paid to County Treasurer.**

SEC. 16. All sums of money collected on account of any penalty or forfeiture, in pursuance of the foregoing provisions of this chapter, shall be paid by the officer collecting or receiving the same, to the treasurer of the county within which



such penalty or forfeiture was incurred, within twenty days after the collection or receipt thereof.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 128, being C. L. '57, (5126); C. L. '71, (6856); How. 8443; C. L. '97, (9812). Unchanged.  
**CONSTRUED:** People v. Wayne Co. Treasurer, 8 Mich. 393-4.

**(13409). Compelling of Payment.**

**SEC. 17.** If any sheriff, justice of the peace, or other officer shall neglect to pay over any moneys collected or received by him on account of any penalty or forfeiture within the time limited in the preceding section, the county treasurer shall proceed by attachment in the circuit court for the county, to collect the moneys so required to be paid over to him, in the same manner, and with like effect, as in case of an attachment against the sheriff for neglecting to return an execution in a civil suit.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 128, being C. L. '57, (5127); C. L. '71, (6857); How. 8444; C. L. '97, (9813). Unchanged.  
**CONSTRUED:** People v. Wayne Co. Treasurer, 8 Mich. 394.

**(13410). Order that Defaulting Juror Show Cause.**

**SEC. 18.** When any grand or petit juror shall have been legally summoned to attend any court, and such juror shall not attend pursuant to such summons, the court shall cause an order to be entered in its minutes, that such defaulting juror show cause, on some day to be specified in such order, why a fine should not be imposed on him for such default.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 128, being C. L. '57, (5128); C. L. '71, (6858); How. 8445; C. L. '97, (9814), inserting, however, "legally" before "summoned," and eliminating "by leaving a written notice at his residence," and "In the same term, or on the first day of the then next term of said court." Modified.

**(13411). Certified Copy of Order Given to Sheriff.**

**SEC. 19.** The clerk of the court by which such order shall be made shall immediately deliver to the sheriff of the county a certified copy of every such order.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 128, being C. L. '57, (5129); C. L. '71, (6859); How. 8446; C. L. '97, (9815). Unchanged.

**(13412). Service and Return of Order.**

**SEC. 20.** Such sheriff shall serve such order on the defaulting juror named therein, personally, by showing such certified

copy, and delivering to him a copy thereof; and shall return such order and his proceedings thereon to the court, at or before the time when such juror shall be required to show cause.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 128, being C. L. '57, (5130); C. L. '71, (6860); How. 8447; C. L. '97, (9816). Unchanged.

**(13413). Proceedings on Return.**

**SEC. 21.** If the sheriff shall return such order personally served, and if no satisfactory cause be shown, the court shall proceed to impose such fine as shall be proper; and if the same be returned not personally served, the court shall make a further order, that such defaulting juror show cause, at the then next term, why such fine should not be imposed; and the same proceedings shall be had upon such order, as herein provided in respect to the first order, and such orders shall be entered from time to time until the same be personally served, or the juror appear.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 128, being C. L. '57, (5131); C. L. '71, (6861); How. 8448; C. L. '97, (9817), inserting the second clause as it appears above. Modified.

**(13414). When Proceedings to Cease.**

**SEC. 22.** But if it appear from the return of the sheriff, or from any other evidence, that such juror is dead, or insane, or has permanently removed from the state; or if any satisfactory excuse shall be rendered by any person in behalf of such juror, for his default, the court may abstain from any further proceedings in relation to such default.

**HISTORY:** Re-enacts Sec. 22, R. S. '46, Ch. 128, being C. L. '57, (5132); C. L. '71, (6862); How. 8449; C. L. '97, (9818). Unchanged.

**(13415). Order for Fine to be Delivered to Prosecuting Attorney.**

**SEC. 23.** When a fine shall be imposed by any court of law upon any grand or petit juror, or upon any constable, for non-attendance, or for any other cause, or upon any officer of such court, or upon any other person, without being accompanied by an order for the immediate commitment of the person so fined, until such fine be paid, it shall be the duty of the clerk of such court immediately to deliver a copy of the order imposing such fine, to the prosecuting attorney of the county in which such court shall be held.

**HISTORY:** Re-enacts Sec. 23, R. S. '46, Ch. 128, being C. L. '57, (5133); C. L. '71, (6863); How. 8450; C. L. '97, (9819). Unchanged.

**(13416). Prosecuting Attorney to Issue Process to Collect.**

**SEC. 24.** The prosecuting attorney shall, immediately after the adjournment of such court, issue process under the seal of the circuit court for the county, to the sheriff thereof, commanding him to collect of the several persons named in the schedule annexed to such process, the several sums affixed to their names respectively, in such schedule, and to pay over the same to the treasurer of his county.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 128, being C. L. '57, (6134); C. L. '71, (6864); How. 8451; C. L. '97, (9820). Unchanged.

**CONSTRUED:** *People v. Wayne Co. Treasurer*, 8 Mich. 394.

**(13417). Schedule to be Annexed.**

**SEC. 25.** To such process shall be annexed a schedule, containing in separate columns:

1. The names of the persons fined;
2. Their respective places of residence;
3. The amount of the fine imposed on each;
4. The cause of such fine being imposed;

which schedule shall be certified by the prosecuting attorney to contain a true abstract of the orders imposing such fines, delivered to him by the clerk.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 128, being C. L. '57, (5135); C. L. '71, (6865); How. 8452; C. L. '97, (9821). Unchanged.

**CONSTRUED:** *People v. Wayne Co. Treasurer*, 8 Mich. 394.

**(13418). Execution of Process.**

**SEC. 26.** The sheriff to whom such process shall be directed and delivered, shall proceed to collect the amount of such fines respectively, of the several persons named in such schedule, by a levy and sale of the personal property of such persons, in the manner provided by law in the service of executions against property in civil cases, and shall be entitled to collect the same fees; and in case sufficient personal property cannot be found to raise such amount, such sheriff shall take the body of the person named in such schedule and detain him in custody, until he shall satisfy such sum, in the same manner as on executions against the body in civil cases, and shall be entitled for his services to the like fees.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 128, being C. L. '57, (5136); C. L. '71, (6866); How. 8453; C. L. '97, (9822). Unchanged.  
**CONSTRUED:** People v. Wayne Co. Treasurer, 8 Mich. 394.

**(13419). Execution Thereon.**

**SEC. 27.** Every sheriff to whom any such process shall be delivered, shall return the same at the then next term of the circuit court for his county, after such delivery, with his proceedings thereon; and such return may be compelled by such circuit court, in the same manner as civil process.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 128, being C. L. '57, (5137); C. L. '71, (6867); How. 8454; C. L. '97, (9823). Unchanged.

**(13420). New Process.**

**SEC. 28.** If it shall appear by any such return that any fine has not been collected, the prosecuting attorney shall issue new process, similar in all respects to the first process herein directed; and such process shall be issued from time to time, until such fines shall be collected, and the same proceedings shall be had thereon, in all respects as herein provided.

**HISTORY:** Re-enacts Sec. 28, R. S. '46, Ch. 128, being C. L. '57, (5138); C. L. '71, (6868); How. 8455; C. L. '97, (9824). Unchanged.

**(13421). Whom to Include in Process.**

**SEC. 29.** But whenever a prosecuting attorney shall issue any process for the collection of any fine, he shall include in the schedule annexed to such process, the names of all persons upon whom any fine shall at that time have been imposed, and the process against whom has been returned unsatisfied, or against whom no process shall have been issued for the collection of such fine.

**HISTORY:** Re-enacts Sec. 29, R. S. '46, Ch. 128, being C. L. '57, (5139); C. L. '71 (6869); How. 8456; C. L. '97, (9825). Unchanged.

**(13422). Actions on Recognizances.**

**SEC. 30.** Whenever any recognizance to the people of this state shall have become forfeited, the prosecuting attorney of the county in which such recognizance was taken, shall prosecute the same by action of assumpsit; and the pleadings and proceedings therein shall be the same in all respects as in personal actions for the recovery of any debt; and upon a breach of the condition of the recognizance being found or confessed,

or upon a judgment by default being entered against the defendant, the judgment shall be absolute for the amount of the penalty of the recognizance.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 128, being C. L. '57, (5140); C. L. '71, (6870); How. 8457; C. L. '97, (9826), omitting "of debt or." Modified.

**CONSTRUED:** The object of this provision for enforcing the penalty of a criminal recognizance by action of debt or assumpsit was, perhaps, to substitute the more familiar forms of action for the proceeding by *scire facias*, though an action of debt might have been brought without any such statutory provisions. *Lang v. People*, 14 Mich. 445. The sum recovered is a penal forfeiture and may be remitted like a fine. *Courtright v. Att'y Gen.*, 43 Mich. 414. See *People v. Dennis*, 4 Mich. 615; *People v. Hanaw*, 106 Mich. 421; *Townsend v. People*, 14 Mich. 388.

**(13423). Execution Thereon.**

**SEC. 31.** Executions shall be awarded and executed upon such judgments in the same manner as upon judgments in personal actions, and with the like effect in all respects.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 128, being C. L. '57, (5141); C. L. '71, (6871); How. 8458; C. L. '97, (9827). Unchanged.

**(13424). Estreating Recognizances.**

**SEC. 32.** Whenever any recognizance is directed by law to be estreated, such estreat shall be made by the entry of an order, directing the same to be prosecuted, and the same shall be prosecuted as herein directed.

**HISTORY:** Re-enacts Sec. 35, R. S. '46, Ch. 128, being C. L. '57, (5142); C. L. '71, (6872); How. 8459; C. L. '97, (9828). Unchanged.

**CONSTRUED:** *Townsend v. People*, 14 Mich. 388; *Lang v. People*, 14 Mich. 439.

**(13425). Account by Prosecuting Attorney.**

**SEC. 33.** The prosecuting attorney of each county shall, at the first term of the circuit court held in his county, after the first day of January in each year, render to such circuit court, on oath, an account in writing, of all moneys collected or received by him on account of any recognizances, fines, penalties or forfeitures, during the year then next preceding, and of all such matters relating to any proceedings for the recovery of any fines, penalties or forfeitures, as such court may require.

**HISTORY:** Re-enacts Sec. 34, R. S. '46, Ch. 128, being C. L. '57, (5144); C. L. '71, (6874); How. 8461; C. L. '97, (9830). Unchanged.

**(13426). Remission of Fines and Recognizances.**

SEC. 34. Upon the application of any person who shall have been fined by any court of law sitting in any county of this state, or of any person whose recognizance shall have become forfeited, or of his surety, the circuit court for the county in which such court was held, or in which such recognizance was taken, may, upon good cause shown, remit any such fine, or any such forfeiture of recognizance, or any part of such fine, or of the penalty of such recognizance, upon such terms as to such court shall appear just and equitable; and if any such fine shall have been paid, the officer in whose hands it may be, shall pay the same, or such part as shall have been remitted, according to such order.

HISTORY: Re-enacts Sec. 35, R. S. '46, Ch. 128, being C. L. '57, (5145); C. L. '71, (6875); How. 8462; C. L. '97, (9831). Unchanged.

CONSTRUED: *Courtright v. Atty. Gen.*, 43 Mich. 414.

**(13427). Restriction of Power to Remit.**

SEC. 35. But the last section shall not authorize such court to remit any fine imposed by any court upon a conviction for any criminal offense, nor any fine imposed by any court upon any officer thereof, or any party therein, or upon any other person for an actual contempt of such court, or for disobedience of its orders or process; nor to remit or discharge any recognizance taken in one county for the appearance of any person in another; but the power of remitting or discharging such recognizance shall be exercised exclusively by the circuit court for the county in which such person is bound to appear.

HISTORY: Re-enacts Sec. 36, R. S. '46, Ch. 128, being C. L. '57, (5146); C. L. '71, (6876); How. 8463; C. L. '97, (9832). Unchanged.

**(13428). Notice of Application.**

SEC. 36. No such application shall be heard until reasonable notice shall have been given to the prosecuting attorney, and until he shall have had an opportunity to examine the matter and prepare to resist such application.

HISTORY: Re-enacts Sec. 37, R. S. '46, Ch. 128, being C. L. '57, (5147); C. L. '71, (6877); How. 8464; C. L. '97, (9833). Unchanged.

**(13429). Costs to be Paid.**

SEC. 37. Nor shall such application in any case be granted,

without payment of the costs and expenses incurred in the proceedings for the collection, either of such fine, or the penalty of such recognizance.

HISTORY: Re-enacts Sec. 38, R. S. '46, Ch. 128, being C. L. '57, (5148); C. L. '71, (6878); How. 8465; C. L. '97, (9834). Unchanged.

**(13430). Remission of Fines Imposed by Justices.**

SEC. 38. When any person shall have been fined by any justice of the peace, upon a conviction for any offense, and shall have been committed to jail, there to remain until such fine shall be paid, the circuit court for the county may remit such fine or any part thereof, and may discharge such person from his imprisonment; and shall exercise such power in the manner and subject to the provisions herein contained, in relation to fines and penalties of recognizances.

HISTORY: Re-enacts Sec. 39, R. S. '46, Ch. 128, being C. L. '57, (5149); C. L. '71, (6879); How. 8466; C. L. '97, (9835). Unchanged.

**(13431). Money Received to be Paid to County Treasurer.**

SEC. 39. All officers or other persons, who shall collect or receive any moneys, on account of any recognizance, fine, penalty or forfeiture, shall pay over the same to the county treasurer, within twenty days after the receipt thereof, and in case of failure so to do, the county treasurer shall collect the same by attachment in the proper court, in the manner hereinbefore provided.

HISTORY: Re-enacts Sec. 40, R. S. '46, Ch. 128, being C. L. '57, (5150); C. L. '71, (6880); How. 8467; C. L. '97, (9836), inserting before "fine" "recognizance," and eliminating the fifth clause in the old section and "circuit or county." Modified.

CONSTRUED: *People v. Wayne Co. Treas.*, 8 Mich. 394; *Kent County v. Krakowski*, 207 Mich. 636.

**(13432). County Treasurer to Keep Account.**

SEC. 40. Every county treasurer shall keep an accurate account of all moneys paid to him on account of fines, penalties, and forfeitures, and shall credit all fines for the violation of the penal laws to the library fund, and all other fines, penalties and forfeitures to the general fund; and he shall account therefor to the board of supervisors at each annual meeting of such board. And in case of the sale of any real estate upon an execution upon judgment rendered for the breach of any recognizance in any criminal case it shall be

the duty of the county treasurer, in case there are no bidders to the full amount of any such judgment or the value of the property advertised, to bid off the same; and in case the same shall not be redeemed within the time allowed by law for the redemption thereof, to sell the same for the best price he can obtain therefor, and place the money received in the general fund.

**HISTORY:** Re-enacts in part Sec. 41, R. S. '46, Ch. 128, being C. L. '57, (5151); C. L. '71, (6881); As Am. '75, p. 153, Act 121, Imd. Eff. Apr. 24; How. 8468; C. L. '97, (9837); modified so as to harmonize it with C. L. '97, (4762); as amended by P. A. 1909, No. 32. Until amended, this section required the apportionment not only of fines, but also of penalties and forfeitures. The provisions for their apportionment having been repealed they should not be credited to the library fund.

**CONSTITUTIONALITY:** See Const. XI, 14 and notes to Const. of '50, XIII, 12.

**OTHER STATUTES:** See Compilers' Section (5750).

**CONSTRUED:** Kent County v. Krakowski, 207 Mich. 636.

**(13433). Penalty for Not Paying Over Moneys.**

**SEC. 41.** Any officer who shall collect or receive any moneys on account of any fine, penalty, forfeiture or recognizance, and shall neglect or refuse to pay over the same according to law, or shall appropriate or dispose of the same to his own use, or in any manner not authorized by law, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, in the discretion of the court.

**HISTORY:** Re-enacts Sec. 43, R. S. 46, Ch. 128, being C. L. '57, (5153); C. L. '71, (6883); How. 8470; C. L. '97, (9839). Unchanged.

**CONSTRUED:** Kent County v. Krakowski, 207 Mich. 636.

**(13434). Execution Not to Issue in Case of Alternative Sentence.**

**SEC. 42.** Execution may issue for the collection of fines and costs imposed for misdemeanors, or offenses punishable by fine or imprisonment, or fine and imprisonment, in all cases where no alternative sentence or judgment of imprisonment shall have been rendered.

**HISTORY:** Re-enacts Sec. 1 of Act 198 of '67, being C. L. '71, (6887); How. 8471; C. L. '97, (9840). Unchanged.



**(13435). Issue and Return.**

**SEC. 43.** Such execution shall be issued in the same form, and served and returned in the same manner, and have the same force and effect as executions now authorized to be issued, served and returned in civil actions commenced by warrant: *Provided*, That no person shall be imprisoned under and by virtue of such execution for a greater period than ninety days.

**HISTORY:** Re-enacts Sec. 2 of Act 198 of '67, being C. L. '71, (6888); How. 8472; C. L. '97, (9841). Unchanged.

**(13436). Execution on Forfeited Recognizance.**

**SEC. 44.** Whenever any recognizance to the people of this state shall have become forfeited, and a judgment entered thereon, execution shall be awarded and executed upon such judgment in the same manner as upon judgments in personal actions, and with like effect: *Provided*, That if any real estate be sold by virtue of an execution awarded on such judgment, it may be redeemed as in other cases.

**HISTORY:** Re-enacts Sec. 1 of Act 153 of '73, being How. 8473; C. L. '97, (9842), except that the phraseology of the proviso is changed so that the redemption is now made as in other cases. Modified.

**RECOGNIZANCE:** See act 106 of '61 relative to the collection of recognizances, C. L. '71, (6884)-(6885)-(6886), amended by act 31 of 1867, and repealed by act 16 of '73. The court was equally divided as to its constitutionality, in *Lang v. People*, 14 Mich. 439.

## CHAPTER XXXVI.

### WRITS OF MANDAMUS AND PROHIBITION.

#### (13437). Returns to be Made to Writ or Order.

SECTION 1. Whenever any alternative writ of mandamus, or order to show cause, shall be issued out of the supreme court, or by any circuit court of this state, the person, body, tribunal or officer to whom the same shall be directed and delivered shall make returns to said writ or order to show cause, and for a neglect to do so shall be proceeded against as for a contempt. And whenever on application to the supreme court for a mandamus against any circuit judge for the purpose of reviewing any order, decree or decision made by such judge, in any matter or proceeding pending before him, in court, at chambers or otherwise, an order is made requiring such judge to show cause why the prayer contained in such application should not be granted, his return shall be settled by causing a copy of his proposed return to such order to show cause, or to said writ, together with a notice when and where the same will be presented for settlement, to be served on the applicant or his attorney at least four days prior to the time of such settlement, which time shall be at least three days before the time designated, to show cause or the time of the return of such writ. Amendments to such showing, or return, may be proposed by the applicant or his attorney and all disputes respecting the same shall be determined by such judge according to the facts on such settlement.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 137, being C. L. '57, (5318); As Am. '71, p. 245, Act 159, Eff. July 18; C. L. '71, (7104); How. 8663; As Am. '97, p. 312, Act 236, Eff. Aug. 30; C. L. '97, (9969), making certain changes in the first sentence of such section so as to include order to show cause. Modified.

CONSTITUTIONALITY: See Const. Art. VII, Sections 4 and 10. The jurisdiction of the supreme court in mandamus cases is not statutory, but plenary. *Tawas & Bay City R. R. Co. v. Iosco Circuit Judge*, 44 Mich. 483; *Hosler v. Higgins Twp. Board*, 45 Mich. 342-3. As to the jurisdiction of the circuit courts, see *McBride v. Grand Rapids*, 32 Mich. 360-7. The circuit court has jurisdiction by mandamus over the probate court. *Mitchell v. Bay Judge*, 155 Mich. 550.

OTHER STATUTES: Mandamus to enforce compliance with the orders of the Michigan Railroad Commission, see Compilers' Section (8155).

**MANDAMUS:** It is a prerogative writ designed to afford a summary and specific remedy when the party applying for it would otherwise be subjected to serious injustice. *Tawas & Bay City R. R. Co. v. Iosco Circuit Judge*, 44 Mich. 483. It is from its very nature a remedy that cannot be hampered by any narrow or technical grounds. *Id.* It is not a writ of right. *Mabley v. Superior Court Judge*, 41 Mich. 38; *Durand v. Saginaw Circuit Judge*, 76 Mich. 629. And it is not usually allowed to parties who have been culpably dilatory or otherwise at fault; nor will it be used on technical grounds to deprive a suitor of his day in court. *Id.* It is a discretionary writ. *Hale v. Risley*, 69 Mich. 598; *Cheboygan Supervisors v. Mentor Twp.*, 94 Mich. 388.

Mandamus is not a matter of right but of discretion. Before it shall issue it should be made to appear that justice requires its issuance. *MacKinnon v. Auditor Gen.*, 130 Mich. 552; *O'Brien v. Wayne Circuit Judge*, 131 Mich. 67; *Wooster v. Calhoun Circuit Judge*, 150 Mich. 459; *Palmer-Stevenson Construction Co. v. Withey*, 176 Mich. 326. Mandamus distinguished from injunction. *Atty. Gen. v. Common Council*, 164 Mich. 371. Mandamus to review discretion of court, see *Lyle v. Cass Circuit Judge*, 157 Mich. 33; *McMillan v. Wayne Circuit Judge*, 155 Mich. 651; *Roberge v. DeLisle*, 158 Mich. 17; *Pettinger v. Montmorency Circuit Judge*, 164 Mich. 463. It may be withheld for reasons of public policy. The naked right to the writ is not sufficient to warrant its issuance. *N. Y. Mortgage Co. v. Sec. of State*, 150 Mich. 204; *Cook v. Board of Elec. Commissioners*, 172 Mich. 437. One guilty of laches and delay will be denied mandamus. *Yeomans v. Supervisors*, 174 Mich. 456; *Besser v. Alpena Circuit Judge*, 155 Mich. 633. It will not issue to decide doubtful questions. *Atty. Gen. v. Board of Agriculture*, 152 Mich. 692. And will not issue where its effects will be of no avail. *Fuchs v. Grass Lake*, 166 Mich. 576. Will not issue except to enforce a clear legal right and in furtherance of justice. *Electric Park Amusement Co. v. Wayne Circuit Judge*, 155 Mich. 640. Is not allowed to accomplish an illegal purpose. *N. Y. Mortgage Co. v. Sec. of State*, 150 Mich. 204; *Cook v. Election Commissioners*, 172 Mich. 437. The writ is not designed as a remedy for the collection of debts. *Waterman, Etc. Co. v. School District No. 4, Cato Twp.*, 183 Mich. 168. And it will be allowed only in furtherance of justice upon a proper case presented; and those who invoke its aid must come into court with clean hands. *Cheboygan County Supervisors v. Mentor Twp.*, 94 Mich. 388. But in a case where the duty of a public officer is absolute and specific, mandamus is no more a matter of discretion than any other remedy. Courts cannot refuse to enforce absolute rights. *Aud. Gen. v. Treasurer*, 73 Mich. 32. The writ of mandamus neither creates nor confers authority upon the officer to whom it is directed. It merely directs the exercise of existing powers. It should be directed to those who are to execute it, or whose duty it is to do the thing required. It must also clearly appear that the person to whom it is directed has the absolute power to execute it; otherwise it will not be issued. *Turnbull v. Giddings*, 95 Mich. 317; *Benton Harbor v. St. Ry. Co.*, 102 Mich. 391. See also *Corby v. Durfee*, 96 Mich. 11. Where a mandamus issues to direct the action of a legal tribunal, proceeding in the course of justice, it is an exercise of supervisory judicial control and is in the nature of appellate action. In other cases it is generally, if not always, an exer-

cise of original jurisdiction. *People v. Bacon*, 18 Mich. 253. As further illustrating the nature and application of this remedy, compare the following cases where the writ has been granted or denied:

GRANTED: *Port Huron & G. Ry. Co. v. St. Clair Circuit Judge*, 31 Mich. 456; *People v. Probate Judge*, 39 Mich. 302; *Gibbs v. Judge*, 53 Mich. 496; *Smith v. Supervisors*, 56 Mich. 217; *Culver v. Superior Court Judge*, 57 Mich. 25; *Murphy v. Reeder Twp.*, 57 Mich. 419; *York v. Ingham Circuit Judge*, 57 Mich. 421; *Potter v. Homer*, 59 Mich. 8; *Amperse v. Kalamazoo*, 59 Mich. 78; *People v. Swift*, 59 Mich. 529; *Molles v. Watson*, 60 Mich. 415; *Low v. Mills*, 61 Mich. 35; *Hawkins v. Fuller*, 62 Mich. 531; *Scott v. Chambers*, 62 Mich. 532; *Lindsay v. Wayne Circuit Judges*, 63 Mich. 735; *Miner v. Vedder*, 66 Mich. 101; *Aud. Gen. v. Supervisors*, 73 Mich. 182; *Jamnet v. Supervisors*, 77 Mich. 245; *Detroit v. Wayne Circuit Judge*, 79 Mich. 384; *Fruitport Twp. v. Muskegon Circuit Judge*, 90 Mich. 20; *Schwartz v. Barry*, 90 Mich. 267; *Detroit v. Ry. Co.*, 90 Mich. 646; *Giddings v. Blacker*, 93 Mich. 1; *May v. Canvassers*, 94 Mich. 505; *Seabury v. Wayne Co. Auditors*, 96 Mich. 46; *Gildersleeve v. Kent Circuit Judge*, 97 Mich. 606; *Speed v. Detroit Com. Coun.*, 97 Mich. 198; *Adams v. Wayne Circuit Judge*, 98 Mich. 51; *Fuller v. Att'y Gen.*, 98 Mich. 96; *Rosenthal v. Muskegon Circuit Judge*, 98 Mich. 208; *Peck v. Kent Circuit Judge*, 98 Mich. 639; *Haines v. Supervisors*, 99 Mich. 32; *Hitchcock v. Probate Judge*, 99 Mich. 128; *Backus v. Co. Treasurer*, 99 Mich. 218; *Caswell v. Marsac*, 99 Mich. 417; *Iron Works v. Judge*, 100 Mich. 124; *Ralph v. Shiawassee Circuit Judge*, 100 Mich. 164; *Buettner v. Wayne Circuit Judge*, 100 Mich. 179; *E. Jordan Lumb. Co. v. E. Jordan*, 100 Mich. 201; *McGuire v. Saginaw Circuit Judge*, 101 Mich. 275; *Com. Coun. v. Lighting Commission*, 101 Mich. 362; *Lee v. Kalamazoo Circuit Judge*, 101 Mich. 406; *Grand Rapids v. Burlingame*, 102 Mich. 321; *Aud. Gen. v. Supervisors*, 106 Mich. 662. Consult also cases in note, "Where it lies."

DENIED: *People v. Supervisors*, 33 Mich. 497; *Vincent v. Supervisors*, 52 Mich. 340; *Wilkie v. Ingham Circuit Judge*, 52 Mich. 641; *Marquette, etc., R. R. Co. v. Probate Judge*, 53 Mich. 217; *Frank v. Wayne Circuit Judge*, 54 Mich. 241; *Parker v. Portland*, 54 Mich. 308; *Noble v. Paris Twp.*, 56 Mich. 219; *Murphy v. Reeder Twp.*, 56 Mich. 505; *Farnsworth v. Supervisors*, 56 Mich. 640; *Portsmouth Twp. v. Bay City*, 57 Mich. 420; *Post v. Sparta*, 58 Mich. 212; *Cronin v. Supervisors*, 58 Mich. 448; *Atchison, etc., R. R. Co. v. Jennison*, 60 Mich. 232; *D., L. & N. R. R. Co. v. Newton*, 61 Mich. 33; *Merrill v. County Treasurer*, 61 Mich. 95; *Hickey v. Supervisors*, 62 Mich. 94; *Aud. Gen. v. Supervisors*, 62 Mich. 579; *Post vt. Sparta*, 63 Mich. 323; *Wolfson v. Rubicon Twp. Board*, 63 Mich. 49; *Post v. Sparta*, 64 Mich. 597; *McHenry v. Chippewa Twp. Board*, 65 Mich. 9; *Riverside School Dist. v. Riverside Twp.*, 67 Mich. 404; *Talbot v. Bay City*, 71 Mich. 118; *Delta Lumb. Co. v. Auditors and Supervisors of Wayne*, 71 Mich. 572; *Travis v. Skinner*, 72 Mich. 152; *Palmer v. Hartford*, 73 Mich. 96; *Avery v. Krakow Twp.*, 73 Mich. 622; *Walsh v. Wayne Circuit Judge*, 76 Mich. 470; *Mills v. Wayne Circuit Judge*, 77 Mich. 210; *Com'r of Highways v. Supervisor*, 77 Mich. 228; *Burt v. Wayne Circuit Judge*, 82 Mich. 251; *Electric Ry. Co. v. Grand Rapids Com. Coun.*, 84 Mich. 257; *Smith v. Wayne Circuit Judge*, 84 Mich. 564; *French v. Common Council*, 85 Mich. 135; *Campau v. Board of Pub. Works*, 86 Mich. 372;

Bassett v. Probate Judge, 87 Mich. 167; Lamoreaux v. Att'y Gen., 89 Mich. 147; Wilhelm v. Fagan, 90 Mich. 6; Hiawatha Twp. v. Schoolcraft Circuit Judge, 90 Mich. 270; Paving Co. v. Com. Council, 91 Mich. 262; Maurer v. CHff, 94 Mich. 194; Grand Rapids Guard v. Bulkley, 97 Mich. 610; Roskopp v. Macomb Circuit Judge, 97 Mich. 628; Gypsum Plaster & Stucco Co. v. Kent Circuit Judge, 97 Mich. 631; Moyle v. Houghton Circuit Judge, 97 Mich. 636; Petrie v. Judge, 98 Mich. 130; Supervisors v. Warren, 98 Mich. 144; Citizens' Sav. Bank v. Ingham Circuit Judge, 98 Mich. 173; Dempsey v. North Mich. Conference, 98 Mich. 444; Happy Home Club v. Supervisors, 99 Mich. 117; Hake v. Kent Circuit Judge, 99 Mich. 216; Giddings v. Wells, 99 Mich. 221; Big Rapids v. Supervisors, 99 Mich. 351; Manly v. Probate Judge, 99 Mich. 441; Waterworks Co. v. Ironwood, 99 Mich. 455; Springer v. Wayne Co. Auditors and People v. Hanifan, 99 Mich. 513, 516; Nat'l Bank v. Judge, 100 Mich. 67; Bacon v. Probate Judge, 100 Mich. 183; Norris v. Judge, 100 Mich. 256; McCrea v. Judge, 100 Mich. 375; Baldwin v. Judge, 101 Mich. 119; Johnson v. Canvassers, 101 Mich. 187; Wingert v. Judge, 101 Mich. 395; Baldwin v. Judge, 101 Mich. 432; Burton v. Reynolds, 102 Mich. 55. Consult, also, cases cited in note, "Does not lie."

**OTHER REMEDIES AVAILABLE:** Where the law affords another adequate remedy, mandamus will not issue. Dages v. Sanilac Circuit Judge, 122 Mich. 490; Cattermole v. Ionia Circuit Judge, 136 Mich. 276; Coffin v. Board of Education, 144 Mich. 342; Barber Asphalt Paving Co. v. Highland Park, 156 Mich. 178. Will not issue where there is a remedy by writ of error. Mich. Mut. Fire Ins. Co. v. Wayne Circuit Judge, 112 Mich. 270; Small v. Judge, 150 Mich. 6; Luther v. Judge, 151 Mich. 71; Meyering v. Wayne Circuit Judge, 164 Mich. 604; Mikkola v. Houghton Circuit Judge, 165 Mich. 583. Writ will not lie to review interlocutory orders where the remedy by writ of error is adequate. Mut. Fire Ins. Co. v. Wayne Circuit Judge, 112 Mich. 270; St. Clair Tunnel Co. v. St. Clair Circuit Judge, 114 Mich. 418; Reed v. St. Clair Circuit Judge, 122 Mich. 153; Dages v. Sanilac Circuit Judge, 122 Mich. 490; City of Detroit v. Judge, 125 Mich. 634; Poupard v. Judge, 129 Mich. 662; Steel v. Judge, 133 Mich. 695; Cattermole v. Judge, 136 Mich. 274; Skutt v. Judge, 136 Mich. 477; Hopper v. Probate Judge, 137 Mich. 124; Valley City Desk Co. v. Judge, 139 Mich. 194; Roberts v. Judge, 140 Mich. 115; Jones v. Judge, 141 Mich. 408; Sharp v. Judge, 144 Mich. 328; Cosgrove v. Judge, 144 Mich. 682; City of Flint v. Judge, 146 Mich. 439; Reynolds v. Judge, 148 Mich. 470; Geddis v. Judge, 151 Mich. 122; Olds Motor Works v. Judge, 164 Mich. 470; Craig v. Judge, 171 Mich. 34; In re Apsey's Estate, 173 Mich. 427; Hopper v. Judge, 175 Mich. 598; See also Coalsworth v. Judge, 177 Mich. 566. Equity proceedings cannot be reviewed by mandamus where an appeal can be taken. Mardin v. Judge, 118 Mich. 353; Hitchcock v. Judge, 144 Mich. 362; Wooster v. Judge, 150 Mich. 459; Tarsney v. Judge, 152 Mich. 641; Price v. Judge, 159 Mich. 614; Horning v. Judge, 161 Mich. 413; Kellogg v. Judge, 167 Mich. 95; Mann v. Judge, 169 Mich. 419; Zemon v. Judge, 171 Mich. 589. Questions arising during the course of a proceeding will not be reviewed by mandamus. Walsh v. Judge, 107 Mich. 26. Mandamus will not lie when there is a remedy by certiorari. Hartz v. Judge, 164 Mich. 233. Will not issue to decide matters pending in a suit in court. Smith v. Aud. Gen.,

151 Mich. 622; *Lillie v. Aud. Gen.*, 173 Mich. 538. Mandamus will lie when the delays of an appeal or writ of error would work harm. *Siegel v. Judge*, 155 Mich. 462; *Elec. Commissioners v. Judge*, 172 Mich. 430; *Baltic Mining Co. v. Judge*, 177 Mich. 634. Not the proper remedy to try title to public office. *Lachance v. Board of Canvassers*, 157 Mich. 679; *Miner v. Beurman*, 165 Mich. 672. Will not lie to compel a judge to vacate an order dismissing a writ of certiorari on the merits. *Hartz v. Judge*, 164 Mich. 35. Nor to review a ruling of the circuit court upon an application to dissolve a writ of attachment. *S. K. Martin Lumber Co. v. Judge*, 116 Mich. 354. Nor to compel the dismissal of garnishment proceedings. *Freud v. Judge*, 125 Mich. 670. Not the proper remedy to dismiss quo warranto proceedings. *Peninsular Club of G. R. v. Judge*, 150 Mich. 614. Mandamus will not lie to vacate an order sustaining a demurrer to a plea in abatement. *Grand Rapids & Indiana R. Co. v. Judge*, 133 Mich. 122, overruling *Carpenter v. Judge*, 122 Mich. 323. To vacate an order of discovery, see *Smith v. Judge*, 158 Mich. 588. To vacate an order of the probate court sustaining a demurrer, *Mitchell v. Judge*, 155 Mich. 550. To set aside a default judgment. *Campbell v. Judge*, 111 Mich. 248. To compel judge to enter judgment on demurrer. *Fisher v. Judge*, 128 Mich. 543. To vacate an order dismissing an action at law, *Gibbs v. Judge*, 123 Mich. 615. As remedy to review an order of the circuit court awarding custody *pendente lite* of property. *Detroit & Mackinac R. Co. v. Judge*, 152 Mich. 202. Will lie to order the issuance of an execution. *Gaskill v. Judge*, 159 Mich. 472. Also to vacate an order awarding costs. *Townsend v. Judge*, 157 Mich. 231. To dismiss suit for want of proper service. *Hoffman v. Judge*, 113 Mich. 109. To compel appointment of administrator. *McMeekin v. Judge*, 150 Mich. 354. To compel court to adjudge a party in contempt. *Mast v. Judge*, 154 Mich. 485. Is the proper remedy to review the refusal of the circuit court to grant an appeal from justices' court after five days have elapsed from the date of judgment. *Huddleston v. Charles Amos & Co.*, 180 Mich. 268. To vacate an order striking out portions of an answer in condemnation proceedings. *McDonald v. Judge*, 159 Mich. 367.

**INJUNCTION:** The discretion of a circuit judge in granting an injunction will not be interfered with by mandamus except in case of a very plain abuse of discretion. *Stenglein v. Judge*, 128 Mich. 440; *Chatfield v. Judge*, 140 Mich. 640; *Blain v. Judge*, 145 Mich. 66; *Siegel v. Judge*, 155 Mich. 462; *Grand Rapids R. Co. v. Judge*, 156 Mich. 419; *McQuater v. Judge*, 158 Mich. 46; *Murphy v. Judge*, 159 Mich. 392. While ordinarily the supreme court will not review injunction proceedings by mandamus, when the return shows the question to be one of law merely, it will consider the case. *Titus v. Judge*, 168 Mich. 510. Mandamus to vacate order denying injunction, *Mahon v. Judge*, 154 Mich. 497; *Allen v. Judge*, 159 Mich. 612; To dissolve injunction, *Village of Wolverine v. Judge*, 162 Mich. 713.

**TO COMPEL CHANGE OF VENUE:** The denial of a motion for change of venue on the ground of local prejudice will not be reviewed. *Lyle v. Judge*, 157 Mich. 33; *Grand Rapids & Indiana R. Co. v. Judge*, 159 Mich. 210. Apparently overruling *Preston Nat. Bank v. Judge*, 142 Mich. 272. Will lie to set aside change of venue ordered, before issue joined. *Bresnahan v. Judge*, 154 Mich. 491.

**PARTY IN DEFAULT:** Mandamus will lie to vacate an order set-

ting aside a default when the order was not made within six months, pursuant to circuit court rule 32, Section 4, '16, former Rule 12, sub. (b). After such default is entered. *Petley v. Judge*, 124 Mich. 14; *Carpenter v. Judge*, 126 Mich. 8; *Beinsteadt v. Judge*, 142 Mich. 633; *Caille Bros. Co. v. Judge*, 155 Mich. 480. And under chancery practice the same law applies. *St. Louis Hoop & Stave Co. v. Judge*, 155 Mich. 311; See also *Turner v. Judge*, 123 Mich. 617; *Boynton v. Judge*, 163 Mich. 500; *Gorman v. Judge*, 140 Mich. 230.

**JURISDICTIONAL QUESTIONS:** Mandamus will lie to compel a judge to determine the issue raised by a plea to the jurisdiction where a plea of the general issue pursuant to the rules of court is interposed at the same time. *National Fraternity v. Judge*, 127 Mich. 187. Not the proper remedy to review questions of the jurisdiction of the court. *Mikkola v. Judge*, 165 Mich. 583. Will not issue to dismiss a suit in equity for lack of jurisdiction. *Warren v. Judge*, 160 Mich. 572. Where a final order is made refusing jurisdiction, mandamus is the appropriate remedy. *Huddleston v. Chas. Amos & Co.*, 180 Mich. 268. For the construction of Circuit Court Rule 50, '16, Former Rule 46, giving circuit courts jurisdiction in mandamus proceedings, see *Hitchcock v. Judge*, 99 Mich. 128; *Loranger v. Judge*, 97 Mich. 615, and cases cited in note.

**IN CRIMINAL PROCEEDINGS:** Mandamus cannot be used to compel a circuit judge to quash an indictment. *Maynard v. Judge*, 124 Mich. 465. Nor to review motion to dismiss in a criminal proceeding. *Hosford v. Judge*, 129 Mich. 302. Will lie to set aside an order quashing an information. *Hoffman v. Judge*, 150 Mich. 59. Will lie to compel a circuit judge to strike from the files an unauthorized presentment of a grand jury. *Bennett v. Judge*, 183 Mich. 200. Will be used to vacate an order discharging a prisoner from custody. *Paul v. Judge*, 169 Mich. 452. To compel justice of the peace to issue criminal warrant. *Allport v. Murphy*, 153 Mich. 486. Will lie to compel court to order the issuance of subpoenas in criminal cases. *Chase v. Judge*, 154 Mich. 271.

**TO REVIEW PROCEEDINGS BY CAPIAS:** Mandamus will lie for denying a motion to quash a capias ad respondendum illegally issued. *Church v. Judge*, 129 Mich. 126; *Gardiner v. Judge*, 155 Mich. 414; *Rice v. Judge*, 176 Mich. 323; *Pratt v. Judge*, 177 Mich. 558; *Tidey v. Judge*, 179 Mich. 580. Also for refusal to grant a supersedeas releasing a prisoner held illegally under a ca. sa. *Lapham v. Judge*, 170 Mich. 569. Mandamus does not run to vacate an order discharging a defendant taken upon a capias. *Kingsley v. Judge*, 171 Mich. 305; *Cattermole v. Judge*, 136 Mich. 274.

**JUDGMENTS AND DECREES:** Mandamus will lie to compel a circuit judge to decide a suit in chancery. *Ambos v. Judge*, 123 Mich. 618. But not to compel him to enter a specific decree. *Id.* Nor to vacate a decree. *Wood v. Judge*, 150 Mich. 71; See also *Schmid v. Judge*, 144 Mich. 680; *Stevens v. Judge*, 150 Mich. 71. Will lie to vacate an order staying proceedings on a judgment. *Markham v. Judge*, 121 Mich. 573. Cannot be resorted to, to set aside a judgment. *McMillan v. Judge*, 155 Mich. 651.

**PROCEEDINGS ON APPEAL:** Mandamus is the proper remedy to review the action of the lower court in settling a bill of exceptions. *McIntire v. Carr*, 168 Mich. 463; *Morgan v. Judge*, 150 Mich. 64; *Car-*

rier v. Judge, 155 Mich. 344; Harper v. Judge, 155 Mich. 543; Besser v. Judge, 155 Mich. 631; U. S. Graphite Co. v. Judge, 158 Mich. 598; Pettinger v. Judge, 164 Mich. 463; Southwick v. Judge, 173 Mich. 472. To vacate an order denying an extension of time to perfect an appeal. Roberge v. DeLisle, 158 Mich. 17. Will issue to review circuit courts refusal to stay execution pending an appeal. Luther v. Judge, 151 Mich. 71; Hogle v. Judge, 160 Mich. 573.

**CORPORATIONS:** Mandamus will lie to compel secretary of foreign corporation to deliver company's papers to successor. Coldwater Copper Mining Co. v. Gillis, 170 Mich. 129. Mandamus by a subordinate lodge against supreme lodge to vacate order revoking relator's charter. Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696. Cannot be used to compel a private corporation to perform its obligations resting in contract. Booker v. Medical College, 156 Mich. 95. Mandamus by a foreign corporation to compel secretary of state to issue a certificate of authority. N. Y. Mortgage Co. v. Secretary of State, 150 Mich. 204; Am. Telephone & Telegraph Co. v. Sec. of State, 159 Mich. 195.

**FRANCHISES:** May be used against public service corporations to enforce the terms of a franchise. City of Lansing v. Railway Co., 109 Mich. 123; West Bloomfield Twp. v. Railway, 146 Mich. 198; Ross Twp. v. Railway Co., 165 Mich. 28; Chicago, etc. R. Co. v. Judge, 156 Mich. 573.

**PUBLIC OFFICERS AND PUBLIC BODIES:** Mandamus is the proper remedy to require the secretary of state to reject nominating petitions. Oren v. Sec. of State, 171 Mich. 590. Will lie to compel State Veterinary Board to issue certificates of registration. Jennings v. State Veterinary Bd., 156 Mich. 417. Is proper remedy to compel Board of Supervisors to submit question of local option to the electors. Rutledge v. Supervisors, 160 Mich. 22; Flanders v. Supervisors, 160 Mich. 27; Crawford v. Supervisors, 160 Mich. 31; Lewis v. Supervisors, 164 Mich. 595. And qualified electors who sign petition may start mandamus as relators. Flanders v. Supervisors, 160 Mich. 27. To compel proper authorities to accept liquor bond. Hicks v. Village of Perry, 151 Mich. 89; Bauer v. Twp. Board of Denmark, 157 Mich. 395; Knabush v. Britton Common Council, 158 Mich. 578; Cox v. Common Council, 152 Mich. 631. When mandamus may be used to restrain official action. Atty. Gen. v. Common Council, 164 Mich. 371. Mandamus will lie to compel a public officer to enforce the liquor laws. Gowan v. Smith, 157 Mich. 44. And application can be made by a private person where he shows a special, private interest in the enforcement of the law. Id. The attendance of members of a common council cannot be enforced by mandamus. Wilson v. Cleveland, 157 Mich. 510. Will not lie to enforce the private contracts of municipalities. Waterman-Waterbury Co. v. School District No. 2 of Wyoming, 183 Mich. 168. To compel a police official to enforce the laws. Yerkes v. Smith, 157 Mich. 557. To permit the location of certain swamp lands. Olds v. State Land Commissioner, 134 Mich. 443; Id. 150 Mich. 135. See also Bauer v. State Board of Agriculture, 164 Mich. 415; Ritz v. Canvassers, 172 Mich. 424; Board of Election Commissioners v. Judge, 172 Mich. 430; Cook v. Com'rs., 172 Mich. 437; Atty. Gen. v. Supervisors, 178 Mich. 514.

**PAYMENT OF MONEY: BY PUBLIC OFFICERS:** Will lie to compel a public treasurer to pay over money. Montpelier Sav. Bank v.



Quinn, 149 Mich. 701; Ullman v. Sandell, 158 Mich. 497; City of Sault Ste. Marie v. Hotten, 171 Mich. 265. To enforce the payment of a salary by a municipal corporation. Granger v. French, 152 Mich. 356. To proper public officer to sign warrant for the payment of money, see Garner v. Doremus, 154 Mich. 323; Niles Bryant School of Piano Tuning v. Bailey, 161 Mich. 193; Edwards v. Auditor Gen., 161 Mich. 639. Will lie to require a city council to appropriate the necessary expenses for a charter commission. Atty. Gen. v. Mayor, etc., of Adrian, 164 Mich. 143. To compel county auditors to audit and pay a warrant on the county road fund. Wayne Co. Road Com'rs. v. Auditors, 148 Mich. 255. Will issue to compel city council to allow a certain pay roll. Wyandotte Police Com'rs v. Council, 154 Mich. 495.

**WHERE IT LIES:** It lies only in cases where the relator can show a clear legal right and that he has no other adequate remedy. People v. Judge, 1 Doug. 319; People v. Macomb Supervisors, 3 Mich. 475; People v. Judge, 19 Mich. 299; People v. State Ins. Co., 19 Mich. 396; La Grange Twp. v. State Treasurer, 24 Mich. 476; McCarthy v. Judge, 36 Mich. 276; Pack v. Supervisors, 36 Mich. 379. It is the inadequacy, and not the mere absence of, all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of this writ. La Grange Twp. v. State Treasurer, 24 Mich. 477. The existence of a remedy of another nature, which is not adequate furnishes no reason for refusing it, if the necessity of justice requires it. Tawas & Bay City R. R. Co. v. Judge, 44 Mich. 483. It will issue to compel the performance of a ministerial duty, not dependent upon the exercise of judicial discretion. People v. Adam, 3 Mich. 428; People v. Detroit Com. Council, 28 Mich. 228; Dayton Twp. v. Rounds, 27 Mich. 82. But only a clear legal duty can be so enforced. People v. Woodhull Twp. Board, 14 Mich. 28; Butler v. Supervisors, 26 Mich. 22. And a private person can resort to this remedy only when he has some particular interest or right, independent of what he has in common with the public. People v. Prison Inspectors, 4 Mich. 187; People v. Regents, 4 Mich. 98; People v. Green, 29 Mich. 121; People v. Supervisors, 38 Mich. 421; Ayres v. State Auditors, 42 Mich. 422; Smith v. Saginaw, 81 Mich. 123; Pistorius v. Stempel, 81 Mich. 133; Thomas v. Hamilton, 101 Mich. 387. It lies only to enforce strict legal rights. Houghton Co. v. Aud. Gen., 36 Mich. 271; People v. Judge, 1 Doug. 319; People v. Judge, 19 Mich. 296; E. Sag. Water Com'rs v. Com. Council, 33 Mich. 164. Where there is a specific right mandamus lies to enforce it. Isle Royale, etc., Corporation v. Osmun, 76 Mich. 165. Where nothing remains but the enforcement of a legal duty mandamus is the proper remedy. Webster v. Newell, 66 Mich. 508; Phillips v. Sch. Dist., 79 Mich. 173. It may be allowed to set an inferior tribunal in motion. People v. Judge, 1 Mich. 359; Wiley v. Judge, 29 Mich. 494; O'Brien v. Tallman, 36 Mich. 13; Lord v. Judge, 56 Mich. 236; Brown v. Judge, 75 Mich. 274; Coot v. Willett, 93 Mich. 304. It lies in the following cases: To command public officers to produce and give up papers in their custody. La Grange Twp. v. St. Treasurer, 24 Mich. 478. To compel the state board of canvassers to convene and recanvass the votes cast, where a palpable mistake was made by its predecessors. Rich v. Canvassers, 100 Mich. 453. To compel the payment by a municipal corporation of an official salary, the amount of which is fixed. Speed v. Com. Coun., 100 Mich. 92;

McBride v. Grand Rapids, 47 Mich. 236. To compel a circuit judge to consider a coroner's account for fees and expenses of an inquest upon the dead body of a stranger. Locke v. Speed, 62 Mich. 408. To compel a county treasurer to permit inspection of liquor bonds on file in his office. Brown v. Co. Treasurer, 54 Mich. 132. It has been held to lie in the following cases: Ramsey v. Everett Town Clerk, 52 Mich. 344; Hudson Com Coun. v. Whitney, 53 Mich. 158; Court-right v. Twp. Clerk, 54 Mich. 182; Mitchell v. Judge, 53 Mich. 541; Churchill v. Judge, 56 Mich. 536; Hart v. Judge, 56 Mich. 592; Pt. Huron Board of Ed. v. Treasurer, 57 Mich. 46; Johnson v. Dick, 69 Mich. 108; Van Vranken v. Judge, 85 Mich. 140; Roemer v. Canvassers, 90 Mich. 27; Ayers v. Gartner, 90 Mich. 380; Ketcham v. Wagner, 90 Mich. 271; Packard v. Canvassers, 94 Mich. 450; Belknap v. Canvassers, 94 Mich. 516; Meurer v. Musicians' Association, 95 Mich. 451; Courtright v. Com. Council, 96 Mich. 291; Rankins v. Judge, 97 Mich. 623; Backus v. Carleton, 97 Mich. 624; People's M. B. Society of Elkhart, Ind. v. Judge, 97 Mich. 627; Rogers Union Sch. Dist. v. Parris, 97 Mich. 593; Combs v. Judge, 99 Mich. 234; Hayden v. Hefferan, 99 Mich. 262; Com. Coun. of Grand Rapids v. Bd. Pub. Works, 99 Mich. 392; Allison v. Judge, 104 Mich. 141; Chapin v. Judge, 104 Mich. 232; Rouse, Hazard & Co. v. Judge, 104 Mich. 234; Rich v. Chamberlain, 104 Mich. 436; Todd v. Bd. Elec. Com'rs., 104 Mich. 474; Anderson v. Judge, 105 Mich. 89; Fowler v. Judge, 105 Mich. 90; Wood v. Judge, 105 Mich. 378; White v. Supervisors, 105 Mich. 608; Brown v. Mining Co., 105 Mich. 653; Supervisors v. Judges, 106 Mich. 166.

**DOES NOT LIE:** Generally when the party has another and an adequate remedy. People v. Judge, 1 Mich. 359; People v. Judges, 1 Doug. 305; People v. Judge, 19 Mich. 296; Wiley v. Judge, 29 Mich. 487; Eyke v. Lange, 90 Mich. 592; 104 Mich. 26; Corby v. Durfee, 96 Mich. 12; Gibson v. Judge, 97 Mich. 620; Chandler v. Judge, 97 Mich. 621; Coffin v. Detroit Bd. Ed., 114 Mich. 342. It will not issue when it is not essential. Tawas and Bay City R. R. Co. v. Judge, 44 Mich. 483. Nor to enforce any doubtful claim. Pack v. Supervisors, 36 Mich. 380. Nor to aid in the enforcement of an illegal claim. Board of Ed. v. Detroit, 80 Mich. 548; Cheboygan County Supervisors v. Mentor Twp., 94 Mich. 388. Nor where it is apparent that it is applied for to gratify the spite of a private individual, nor where the realtor has instigated, authorized or approved of the act complained of. Hale v. Risley, 69 Mich. 598.

Nor to review or control discretionary or judicial action. People v. Judge, 1 Mich. 359; People v. Adam, 3 Mich. 428; People v. Probate Judge, 16 Mich. 204; People v. Judge, 17 Mich. 67; People v. Judge, 20 Mich. 220; Mixer v. Manistee County Supervisors, 26 Mich. 422; Wiley v. Judge, 29 Mich. 495; People v. Judge, 30 Mich. 99; People v. Supervisors, 31 Mich. 116; Harbaugh v. Judge, 32 Mich. 259; People v. Aud. Gen., 36 Mich. 271; People v. Judge, 36 Mich. 500; People v. Judge, 37 Mich. 131; Stinton v. Judge, 37 Mich. 286; Mabley v. Judge, 32 Mich. 190; O'Brien v. Tallman, 36 Mich. 13; Olson v. Judge, 49 Mich. 85; Delhi Sch. Dist. v. Judge, 49 Mich. 432; Scott v. Judges, 58 Mich. 311; People v. Judge, 38 Mich. 244; Ambler v. Aud. Gen., 38 Mich. 746; People v. Judge, 39 Mich. 21; People v. Judge 39 Mich. 123; People v. Judge, 39 Mich. 375; Chicago & N. E. R. R. Co. v. Judge, 40 Mich. 168; People v. Judge, 40 Mich. 169; Stork v. Judge,

41 Mich. 5; Mabley v. Judge, 41 Mich. 38; Gunzberg v. Judge, 42 Mich. 591; Cicotte v. Wayne Co., 59 Mich. 509; Logan v. Smith, 66 Mich. 676; Chesebro v. Judge, 70 Mich. 650; Tug & Wreck Co. v. Judge, 75 Mich. 371; Third Nat'l Bank v. Reilly, 81 Mich. 438; Hull v. Reilly, 87 Mich. 497; Chicago & G. T. Ry. Co. v. Genesee Circuit Judge, 89 Mich. 549; Ellis v. Judge, 90 Mich. 272; Sanborn v. Mitchell, 94 Mich. 519; Felcher v. Judge, 97 Mich. 633; Chiera v. Judge, 97 Mich. 638; Detroit & Birmingham Plank Rd. Co. v. Judge, 98 Mich. 141; Taylor v. Judge, 100 Mich. 181; Pinkerton v. Staningor, 101 Mich. 273; Haney v. Judge, 101 Mich. 392. But if discretion is abused the remedy is by mandamus. Gray v. Barton, 62 Mich. 195; Vincent v. Bowes, 78 Mich. 315; Detroit v. Judge, 79 Mich. 387. And mandamus lies to review the action of a circuit judge in granting a preliminary injunction and in refusing to dissolve the same, where the question in dispute is merely one of law. Insurance Co. v. Judge, 100 Mich. 606. It will also lie to review the decision of the trial judge in contempt proceedings, where the question which the judge determines is whether there is jurisdiction to proceed to try the question of fact. Montgomery v. Judge, 100 Mich. 439. Where the case contemplates continuous action, this remedy is an unfit one; the very thing to be done must be pointed out. Diamond Match Co. v. Powers, 51 Mich. 147. The right to an office will not be settled by mandamus. Tallmadge Twp. Sch. Dist. v. Root, 61 Mich. 373; Moiles v. Watson, 60 Mich. 415; Frey v. Michie, 68 Mich. 327; Pariseau v. Board of Education, 96 Mich. 306-7. But where a person in office de jure et de facto is interfered with by one whose lack of title is plain under adjudicated cases in our own courts, it is not only proper, but best, to settle the question by mandamus. Lawrence v. Hanley, 84 Mich. 399. Whether land is a public highway by user or not will not be decided in mandamus proceedings. Tenant v. Crocker, 85 Mich. 328. It does not lie to compel a druggist, at the instance of a private person, to allow the examination of the record of sales of liquor by such druggist. The general rule is that mandamus will not run against a private individual. Thomas v. Hamilton, 101 Mich. 387. No mandamus can issue to a state officer to compel him to perform any but some unquestionable and legally defined duty. Bresler v. Butler, 60 Mich. 40. In the following cases it has been held that mandamus does not lie. Leavitt v. Judge, 52 Mich. 595; Byles v. Golden Twp., 52 Mich. 612; Loomis v. Rogers Twp., 53 Mich. 135; Castor v. Judge, 54 Mich. 318; Pt. Huron Board of Ed. v. Treasurer, 57 Mich. 46; Burt v. Grand Lodge of Masons, 66 Mich. 85; Supervisors v. Aud. Gen., 69 Mich. 1; Ware v. Judge, 75 Mich. 488; Osborne v. Lindow, 78 Mich. 606; Wiley v. Judge, 86 Mich. 381; McLaughlin v. Burroughs, 90 Mich. 311; Eyke v. Lange, 90 Mich. 592; 104 Mich. 26; Aitcheson v. Huebner, 90 Mich. 643; Mason v. Gladstone, 93 Mich. 232; Cumming Twp. v. Ogemaw Co., 93 Mich. 314; Newton v. Canvassers, 94 Mich. 455; Railway Co. v. Judge, 95 Mich. 318; Blackmore v. Probate Judge, 95 Mich. 446; White v. Highway Commissioner, 95 Mich. 288; Pulling v. Durfee, 97 Mich. 605; O'Brien v. Chambers, 97 Mich. 607; Thomas v. Judges, 97 Mich. 608; Fishel v. Judge, 97 Mich. 609; Hicks v. Wayne Co. Auditors, 97 Mich. 611; John Hancock Mut. Life Ins. Co. v. Probate Judge, 97 Mich. 613; Hitchcock v. Judge, 97 Mich. 614; Tinker v. Board of Pub. Works, 97 Mich. 616; Elder v. Garner, 97 Mich. 617; Muskegon Boom. Co. v. Judge, 97

Mich. 622; Love v. Judge, 97 Mich. 625; Underwood v. Judge, 97 Mich. 626; Wayne Co., Sav. Bank v. Supervisor, 97 Mich. 630; Crittenden v. Judge, 97 Mich. 637; Flynn v. Aud. Gen., 99 Mich. 96; Storme v. Judge, 99 Mich. 144; Swarthout v. Judge, 99 Mich. 347; Benton Harbor v. St. Ry. Co., 102 Mich. 386; Berles v. Comstock, 104 Mich. 129; Willson v. Judge, 104 Mich. 155; Black v. Judge, 104 Mich. 286; Alpena County Supervisors v. Simmons, 104 Mich. 305; Tucker v. Com. Council, 104 Mich. 621; Mason v. Railway Co., 104 Mich. 631; Moline Plow Co. v. St. Treasurer, 105 Mich. 57; Hulbert v. Henry, 105 Mich. 211; Stone v. Judge, 105 Mich. 234; Savidge v. Judge, 105 Mich. 257; Gypsum Plaster & Stucco Co. v. Kent Circuit Judge, 105 Mich. 497; Pratt v. Montcalm Circuit Judge, 105 Mich. 499; Sherwood v. Ionia Circuit Judge, 105 Mich. 540; Insurance Co. v. Judge, 105 Mich. 566; Seibly v. Ingham Circuit Judge, 105 Mich. 584; Jones v. Shiawassee Circuit Judge, 105 Mich. 664; Stern v. Wayne Circuit Judge, 105 Mich. 685; Walsh v. St. Clair Circuit Judge, 107 Mich. 26; Goodson v. Detroit Bd. Health, 114 Mich. 345; S. K. Martin Lumber Co. v. Menominee Circuit Judge, 116 Mich. 354; Railway Co. v. Judge, 116 Mich. 399; McKillop v. Supervisors, 116 Mich. 614; Keeler v. Deo, 117 Mich. 1.

**QUESTIONS OF PRACTICE:** Who may be relators. Sweet v. Smith, 153 Mich. 674; Board of Supervisors of Gratiot Co. v. Mdnson, 157 Mich. 505; Yerkes v. Smith, 157 Mich. 558; Flanders v. Supervisors, 160 Mich. 27. Who may be respondents. Atty. Gen. v. Board of Agriculture, 152 Mich. 689; Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696; Village of Wolverine v. Cheboygan Circuit Judge, 162 Mich. 713. An application to vacate an order must precede the filing of a petition for mandamus for that purpose. Freud v. Wayne Circuit Judge, 131 Mich. 606; Blain v. Chippewa Circuit Judge, 145 Mich. 63. And is necessary in criminal proceedings as well as in a civil suit. Bennett v. Kalamazoo Circuit Judge, 181 Mich. 700. But when the party seeking the order applies for mandamus refusal to grant the order is sufficient without a second application. Lapham v. Oakland Circuit Judge, 170 Mich. 564. When the averments in the petition are taken as true. Jones v. Detroit Bd. of Ed., 88 Mich. 371; Grand Rapids v. Burlingame, 102 Mich. 321; Clark v. Kent Circuit Judge, 125 Mich. 449. When the answer must be taken as true. Aud. Gen. v. Supervisors, 84 Mich. 125; Hosier v. Board, 45 Mich. 340; Pack v. Presque Isle Co., 36 Mich. 380; Grondin v. Logan, 88 Mich. 247; Tyler v. Supervisors, 93 Mich. 448; Merrill v. Co. Treasurer, 61 Mich. 95; Hickey v. Supervisors, 62 Mich. 100; Post v. Twp. Board, 63 Mich. 324; Murphy v. Town Treasurer, 56 Mich. 505; Double v. McQueen, 96 Mich. 44; Benton Harbor v. St. Ry. Co., 102 Mich. 386; Atty. Gen. v. Board of Agriculture, 152 Mich. 689; Allport v. Murphy, 153 Mich. 486. Unless an issue of fact is joined the return must be taken as true. Lake v. Houghton Circuit Judge, 172 Mich. 660.

See Keeler v. Deo, 117 Mich. 1, citing numerous cases to the effect that, when the hearing is upon the petition and answer, the latter must be taken as true. It is necessary in an application for mandamus to point out the very thing to be done. Diamond Match Co. v. Powers, 51 Mich. 147. Where the determination of the issues presented in a mandamus case involved, an investigation of long accounts, a reference was ordered to the circuit court to have the account stated and the facts settled. Haines v. Supervisors, 87 Mich.

237. An order and finding of facts in the circuit court is conclusive in the supreme court. *Henderson v. Election Com'rs.*, 160 Mich. 37. Improper averments in the answer should be taken advantage of on the hearing. *Erickson v. Alpena Circuit Judge*, 138 Mich. 103.

The supreme court, under its plenary jurisdiction, will grant relief where a case is made out in part, even if it fails in other respects. *Hosier v. Higgins Twp. Board*, 45 Mich. 342. The validity and good faith of a mortgage decided on mandamus proceedings is res judicata. *Weed v. Mirick*, 62 Mich. 419. Costs are not allowed on issuing a mandamus, if no intentional wrong on respondent's part is charged or appears. *Mitchell v. Huron Circuit Judge*, 53 Mich. 541. Obedience to the writ of mandamus is enforced by process for contempt. *Diamond Match Co. v. Powers*, 51 Mich. 147. In this state an order to show cause why a peremptory mandamus should not issue has uniformly been substituted for an alternate mandamus. *People v. La Grange Twp. Bd.*, 2 Mich. 191. The alternative mandamus is answered by a return, which is in the nature and performs the office of a plea; while the order to show cause, like all other orders, of a similar character, is answered by affidavits. *Id.*

An order in mandamus proceedings that contains matter not properly within the order may be severed from the remaining portions of the order that are legal and does not require reversal of the entire proceeding. *Coldwater Copper Mining Co. v. Gillis*, 170 Mich. 129. As to practice, see also *Chicago, etc. R. Co. v. Judge*, 156 Mich. 573. The proper proceeding to review mandamus is certiorari. *Chicago, etc. R. Co. v. St. Clair Circuit Judge*, 156 Mich. 573; *Board of Supervisors v. Ver Kenke*, 128 Mich. 202; *Allport v. Murphy*, 153 Mich. 486. See *McBride v. Grand Rapids*, 32 Mich. 359, and writ of error was used. As to C. L. '97, (9969); *supra*, see *Detroit & Mackinaw Ry. Co. v. Alpena Circuit Judge*, 152 Mich. 20; *Rachow v. Charlevoix Circuit Judge*, 209 Mich. 157.

**DEMURRER:** The practice of demurring to a petition for mandamus is not proper, the petition should be answered. *Schouwink v. Ferguson*, 191 Mich. 287.

#### (13438). When Motion to Vacate Order Not Necessary.

**SEC. 2.** In all cases where any order or determination of any court or judge shall be reviewable in mandamus proceedings, if such order or determination was made after hearing counsel in opposition thereto, it shall not be necessary to make a motion for the vacation of such order or determination before instituting mandamus proceedings to review the same.

**HISTORY:** New section.

**MANDAMUS:** Provision has been made that it shall not be necessary to make a motion for the vacation of any order or determination of any court or judge before beginning mandamus proceedings, if such order or determination was made after hearing counsel in opposition thereto.

**VACATION OF ORDER:** Under the provisions of the Judicature Act as now existing, a motion to the trial judge to vacate the order is not necessary. *Haire v. Charlevoix Circuit Judge*, 201 Mich. 230.

**(13439). Mandamus Against State Officer.**

SEC. 3. No circuit court shall have jurisdiction to issue a writ of mandamus against any state officer.

HISTORY: New section.

**MANDAMUS AGAINST STATE OFFICERS:** No circuit court shall have jurisdiction to issue a writ of mandamus against any state officer.

**(13440). Plea to Return.**

SEC. 4. Whenever a return shall be made to any such writ, the person prosecuting the same may plead to all, or any of the material facts contained in said return; and such issue of fact thus joined, shall be determined as in other cases: *Provided*, That all material facts stated in said return, that are not specifically denied by plea, shall be taken as admitted to be true. In case no plea is filed to such return, the cause shall stand for hearing upon the petition and return. Such issue of fact shall be tried in the county within which the material facts are alleged to have taken place.

HISTORY: Re-enacts in part and supersedes Sec. 2 and 3, R. S. '46, Ch. 137, being C. L. '57, (5319)-(5320); C. L. '71, (7105)-(7106); How. 8664-5; C. L. '97, (9970)-(9971). Modified.

**MANDAMUS AND FACTS IN THE RETURN:** All material facts stated in the return in mandamus cases not specifically denied by plea shall be taken as admitted to be true.

**CONSTRUED:** Roscommon Twp. v. Midland County Supervisors, 49 Mich. 457; Detroit & M. Ry. Co. v. Judge, 152 Mich. 202.

**PLEADING:** All material facts stated in a return in a mandamus proceeding, which are not specifically denied by the plea shall be taken as admitted to be true. Haire v. Charlevoix Circuit Judge, 201 Mich. 230; Yerkes v. Antrim Circuit Judge, 200 Mich. 445; Thiedemann v. Mich. State Board Dental Exam., 204 Mich. 156; Mich. R. R. Com. v. Detroit & Mackinac R. R. 192 Mich. 433; Thiedemann v. Bd. Dental Examiners, 208 Mich. 552.

**(13441). Damages and Costs.**

SEC. 5. In case a verdict shall be found for the persons suing out such writ, he shall recover damages and costs in like manner as he might have done in an action on the case for a false return, and a peremptory mandamus shall be granted to him without delay.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 137, being C. L. 57, (5321); C. L. '71, (7107); How. 8666; C. L. '97, (9972); eliminating "or if judgment be given for him upon demurrer, or by default," and changing action on the case as aforesaid," to "action on the case for a false return." Modified.

(13442) WRITS OF MANDAMUS AND PROHIBITION CHAP. XXXVI

**CONSTRUED:** Roscommon Twp. v. Midland County Supervisors, 49 Mich. 457.

**PEREMPTORY MANDAMUS:** This provision does not apply where issues material to relator's right to the writ are not submitted to the jury and determined in his favor. Loomis v. Rogers Twp., 53 Mich. 143.

(13442). Recovery to Bar Other Action.

SEC. 6. A recovery of damages by virtue of this chapter, against any party who shall have made a return to a writ of mandamus, shall be a bar to any other action against the same party for the making of such return.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 137, being C. L. '57, (5322); C. L. '71, (7108); How. 8667; C. L. '97, (9973). Unchanged.

(13443). Enlargement of Time for Return.

SEC. 7. The supreme court, or any justice thereof, or the judge of any circuit court, shall have the same power to enlarge the time for making a return and pleading thereto as in personal actions.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 137, being C. L. '57, (5323). As Am. '71, p. 245, Act 159, Eff. July 18; C. L. '71, (7109); How. 8668; C. L. '97, (9974). Unchanged.

(13444). When Court May Impose Fine.

SEC. 8. Whenever a peremptory mandamus shall be directed to any public officer, body or board, commanding them to perform any public duty, specially enjoined upon them by any provisions of law, if it shall appear to the court that such officer, or any member of such body or board, has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine not exceeding two hundred and fifty dollars, upon every such officer, or member of such body or board, which fine, when collected, shall be paid to the state treasurer, and be by him distributed and paid to the several county treasurers, and the same disbursed according to law.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 137, being C. L. '57, (5324); C. L. '71, (7110); How. 8669; C. L. '97, (9975), changing the phraseology as to the method of disbursements. Modified.

**FINE:** The provision for a fine applies only when a writ has actually issued and been disobeyed. Failure to make return to an order to show cause does not come within the statute. Where a peremptory writ issues it is res judicata, but an order to show cause determines nothing. Fletcher v. Kalamazoo Circuit Judge, 39 Mich. 302.

**(13445). Payment of Fine Bar to Action.**

Sec. 9. The payment of such fine shall be a bar to any action for any penalty incurred by such officer, or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 137, being C. L. '57, (5325); C. L. '71, (7111); How. 8670; C. L. '97, (9976). **UNCHANGED.**  
**CONSTRUED:** Schwab v. Coots, 44 Mich. 465.

**(13446). Writs of Prohibition.**

Sec. 10. Writs of prohibition shall be issued only out of the supreme court; and such writs shall be applied for upon affidavits, by petition, in the same manner as writs of mandamus; and if the cause shown shall appear to the court to be sufficient, a writ shall be thereupon issued, which shall command the court and the party to whom it shall be directed, to desist and refrain from any further proceedings in the suit or matter specified therein, until the next term of the said supreme court, and the further order of such court thereon; and then to show cause why they should not be absolutely restrained from any further proceedings in such suit or matter.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 137, being C. L. '57, (5326); C. L. '71, (7112); How. 8671; C. L. '97, (9977), changing "motion" to "petition," and making one other immaterial change in phraseology. **UNCHANGED.**

**THE WRIT OF PROHIBITION:** The writ of prohibition is an extraordinary judicial writ directed to an inferior judicial tribunal, or to an inferior ministerial tribunal possessing incidental judicial powers. *Triangle Land Co. v. Aud. Gen.*, 172 Mich. 219. See also *Eikhoff v. Charter Commission*, 176 Mich. 542. The restraining of acts of an administrative or ministerial character is not within the province of the writ. *Triangle Land Co. v. Aud. Gen.*, 172 Mich. 291. Apparently overruling *Com'r. of the State Land Office v. Aud. Gen.*, 131 Mich. 147. This writ cannot be issued to restrain any action of inferior courts, which can be reviewed by any of the ordinary methods. *People v. Wayne Circuit Court*, 11 Mich. 393; *Port Huron Savings Bank v. Judge*, 147 Mich. 553. It lies only where the court is acting without jurisdiction or in excess of its jurisdiction. *Nichols v. Judge of Superior Court, Grand Rapids*, 130 Mich. 189. As to the general scope, functions and purposes of the writ, see *Hudson v. Detroit Superior Court Judge*, 42 Mich. 248. Will not lie to restrain the prosecution of garnishment proceedings. *Gorman v. Calhoun Circuit Judge*, 140 Mich. 230. Nor to review allowance of appeals. *Bearse v. Aldrich*, 40 Mich. 529. To restrain appointment of administrator, *Lynch v. Wayne Probate Judge*, 101 Mich. 172. To stay judicial proceedings, *Maclean v. Wayne Circuit Judge*, 52 Mich. 258.



CITED: *Renaud v. State Court of Mediation*, 124 Mich. 655. See also *People ex rel McCloskey v. Wayne Circuit Judge*, 26 Mich. 99; *Hughes v. Recorder's Court*, 75 Mich. 574; *Speed v. Common Council*, 98 Mich. 361; *Oren v. Sec. of State*, 171 Mich. 590.

(13447). **Service and Return.**

SEC. 11. Such writ shall be served upon the court and party to whom it shall be directed, in the same manner as a writ of mandamus; and a return shall in like manner be made there-to by such court, which may be enforced by attachment.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 137, being C. L. '57, (5327); C. L. '71, (7113); How. 8672; C. L. '97, (9978). Unchanged.

(13448). **Proceedings When Party Adopts Return.**

SEC. 12. If the party to whom such writ of prohibition shall have been directed, shall, by an instrument in writing, to be signed by him, and annexed to such return, adopt the same return, and rely upon the matters therein contained, as sufficient cause why such court should not be restrained as mentioned in the said writ, such party shall thenceforth be deemed the defendant in such matter, and the person prosecuting such writ may plead to all or any of the material facts contained in said return, and the like proceedings shall be had for the trial of issues of law or fact joined between the parties, and for the rendition of judgment thereupon, as in mandamus cases.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 137, being C. L. '57, (5328); C. L. '71, (7114); How. 8673; C. L. '97, (9979), changing "personal actions" to "mandamus cases," and "take issue or demur to the matters so relied upon by such defendants" to "may plead to all or any of the material facts contained in said return." Modified.

(13449). **Proceedings Return Not Adopted.**

SEC. 13. If the party to whom such writ of prohibition shall be directed, shall not adopt such return as above provided, the party prosecuting such writ shall bring on the argument of such return as upon a rule to show cause; and he may, by his own affidavit, and other proofs, controvert the matters set forth in such return.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 137, being C. L. '57, (5329); C. L. '71, (7115); How. 8674; C. L. '97, (9980). Unchanged.

(13450). **Judgment if Return Not Adopted.**

SEC. 14. The court, after hearing the proofs and allegations

of the parties, shall render judgment, either that a prohibition absolute, restraining the said court and party from proceeding in such suit or matter, do issue, or that the petition be dismissed.

**HISTORY:** Re-enacts and supersedes Sec. 2, R. S. '46, Ch. 134, being C. L. '57, (5205); C. L. '71, (6988); How. 8549; C. L. '97, (9853), though such section was not expressly repealed by this act. Modified.

**WRIT OF CONSULTATION:** Heretofore the practice has been, if judgment be given against the party prosecuting a writ of prohibition, that a writ of consultation issue. In the place of this practice it is provided that in such a case the judgment be that the petition be dismissed.

**(13451). Judgment if Return Adopted.**

**SEC. 15.** If the party to whom such first writ of prohibition shall be directed, shall adopt the return of the court thereto as above provided, and judgment shall be rendered for the party prosecuting such writ, a prohibition absolute shall be issued; but if judgment be given against such party, such judgment shall be that the petition be dismissed.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 137, being C. L. '57, (5331); C. L. '71, (7117); How. 8676; C. L. '97, (9982), eliminating the last clause of the old section relating to writs of consultation, and substituting the last clause as above. Modified.

**(13452). Judgment Against Plaintiff for Costs.**

**SEC. 16.** Whenever judgments shall be entered against the plaintiff in any proceedings for a writ of mandamus, or of prohibition, in any court authorized to issue such writs, the defendant in such proceedings shall be entitled to a judgment for costs, to be taxed as other cases, against the plaintiff and his surety, if any, and may have execution therefor.

**HISTORY:** Re-enacts Sec. 1 of Act 65 of '71, being C. L. '71, (8118); How. 8677; C. L. '97, (9983), changing "relator" to "plaintiff," respondent" to "defendant," and inserting "or of prohibition." Unchanged.

**CHAPTER XXXVII.**  
**OF THE WRITS OF HABEAS CORPUS AND CER-**  
**TIORARI.**

- Habeas Corpus to Bring up a Person to Testify.

**(13453). Habeas Corpus for Witness.**

**SECTION 1.** Every court of record shall have power upon the application of any party in any suit or proceedings, civil or criminal, pending in such court, to issue a writ of habeas corpus for the purpose of bringing before such court any prisoner who may be detained in any jail or prison within this state, to be examined as a witness in such suit or proceeding, in behalf of the party making such application: *Provided*, No person under sentence for felony shall be so brought up to testify in any civil cause.

**HISTORY:** Re-enacts in part and supersedes in part Sec. 1 of Ch. 134, R. S. '46, being C. L. '57, (5204); C. L. '71, (6987); How. 8548; C. L. '97, (9852), being Compilers' Section (14586), and also supersedes a part of C. L. '97, (2133), being Compilers' Section (1752). Modified.

**CONSTRUED:** Compilers' Section (14586) is broader in its limitations than this section in that it prohibits bringing up any person under sentence for felony to testify in any proceedings, civil or criminal, while this section only prohibits those under sentence for felony from being brought up to testify in any civil cause. The two sections should be construed together.

**(13454). Application.**

**Sec. 2.** Every such application shall be verified by affidavit, and shall state:

1. The title and nature of the suit or proceeding, in regard to which the testimony of such prisoner is desired; and
2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel, and verily believes. But if the application be made by the attorney general or prosecuting attorney, it shall not be necessary to swear to such advice of counsel.

**HISTORY:** Re-enacts and supersedes Sec. 2, R. S. '46, Ch. 134, being C. L. '57, (5205); C. L. '71, (6988); How. 8549; C. L. '97, (9853), though such section was not expressly repealed by this act. Unchanged.

**(13455). By Whom Issued.**

**SEC. 3.** Such writs may also be issued by any justice of the supreme court, judges of a circuit court, or any officer authorized to perform the duties of such circuit judge, upon the like application of a party to any suit or proceeding pending in a court of record, or pending before any officer or body who may be authorized to examine witnesses in any suit or proceeding.

**HISTORY:** This section re-enacts and supersedes Sec. 3, R. S. '46, Ch. 134, being C. L. '57, (5206) As Am. '58, p. 11, Act. 4. Eff. May 6; C. L. '71, (6989); How. 8550; C. L. '97, (9854), though such section was not expressly repealed by this act.

**(13456). When Issued in Suits Before Justices.**

**SEC. 4.** Such writ may also be issued by any of the officers aforesaid, upon the application of a party to a suit before any justice of the peace, to bring any prisoner confined in the jail of the same county, or the county next adjoining that where such justice may reside, before such justice, to be examined as a witness.

**HISTORY:** Re-enacts and supersedes Sec. 4, R. S. '46, Ch. 134, being C. L. '57, (5207); C. L. '71, (6990); How. 8551; C. L. '97, (9855); though such section was not expressly repealed by this act. Unchanged.

**(13457). Certain Prisoners to be Remanded.**

**SEC. 5.** Whenever any person shall be in execution on any civil process, or committed on any criminal charge, and a writ of habeas corpus shall be issued to bring the body of such prisoner before any court, officer or body to testify, or to answer for any contempt or any other matter, and it be returned upon the writ that the prisoner is charged in execution, or committed as aforesaid, he shall be remanded after having testified; and if any order of commitment be made against such prisoner, he shall be so committed to the prison from which he was taken.

**HISTORY:** Re-enacts and supersedes Sec. 5, R. S. '46, Ch. 134, being C. L. '57, (5208); C. L. '71, (6991); How. 8552; C. L. '97, (9856), though such section was not expressly repealed by this act. Unchanged.

**(13458). Liability for Disobedience to Writ.**

SEC. 6. Whenever any writ of habeas corpus shall be issued pursuant to any of the foregoing provisions of this chapter, it shall be the duty of the officer to whom the same shall be delivered to obey and return such writ according to the command thereof, in the manner and within the time prescribed by law; and every officer who shall neglect or refuse so to do, shall be liable to the people of this state, when the writ was issued upon the application of the attorney general, or a prosecuting attorney, and in other cases to the party upon whose application the same shall have issued, in the sum of five hundred dollars.

HISTORY: Re-enacts and supersedes Sec. 6, R. S. '46, Ch. 134, being C. L. '57, (5209); C. L. '71, (6992); How. 8553; C. L. '97, (9857), though such section was not expressly repealed by this act. Unchanged.

**Habeas Corpus and Certiorari to Inquire Into Cause of Detention.**

**(13459). Who May Sue Out Writ.**

SEC. 7. Every person committed, detained, confined or restrained of his liberty within this state, for any criminal or supposed criminal matter, or under any pretense whatsoever, except in the cases in the next section specified, may prosecute a writ of habeas corpus or of certiorari according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint.

HISTORY: Re-enacts and supersedes Sec. 7, R. S. '46, Ch. 134, being C. L. '57, (5210); C. L. '71, (6993); How. 8554; C. L. '97, (9858), though such section was not expressly repealed by this act. Unchanged.

HABEAS CORPUS: The habeas corpus act of this state differs from the original English statute, in not being confined to persons held under charges of crime. Except in certain specified cases, in which the interference would be manifestly improper [See next section] the statute allows the writ where the imprisonment or detention is "under any pretense whatever." But it is also confined in its operation to persons "within this state." Jackson's Case, 15 Mich. 421.

When a child is imprisoned by an officer, any person may make application for a writ of habeas corpus, and the issue is between the child and the person detaining her. In re Mould, 162 Mich. 7. And the interest of the child, as between the person applying for the writ and the person detaining her is not to be considered, but the single question for the court is the legality of the child's detention. Id.

Habeas corpus is the proper remedy for a conviction without jurisdiction. *Hamilton's Case*, 51 Mich. 174. But when the defects are mere irregularities, the party must seek redress in some of the modes provided by statute. *Id.* Habeas corpus is a remedy to determine the proper custody of a child. *In re Knott*, 162 Mich. 17. Rights of parent when child is improperly committed to the State Public School. *Goodchild v. Foster*, 51 Mich. 599. When sentence is indefinite and uncertain. *Petition of Harris Bloom*, 53 Mich. 597.

(13460). Who Not Entitled to Writ.

Sec. 8. The following persons shall not be entitled to prosecute such writ:

1. Persons committed or detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or shall have acquired exclusive jurisdiction by the commencement of suits in such courts;

2. Persons committed for treason or felony, or for suspicion thereof, or as accessories before the fact to a felony, where the cause is plainly and specially expressed in the warrant of commitment;

3. Persons convicted, or in execution, upon legal process, civil or criminal;

4. Persons committed on original process in any civil action on which they were liable to be arrested and imprisoned, unless when excessive and unreasonable bail is required.

**HISTORY:** Re-enacts and supersedes Sec. 8, R. S. '46, Ch. 134, being C. L. '57, (5211); C. L. '71, (6884); How. 8555; C. L. '97, (9859), though such section was not expressly repealed by this act. Unchanged.

**EXCEPTED CASES:** Except in the above cases, the writ of habeas corpus issues to inquire into the imprisonment or detention of any person "under any pretense whatever," *Jackson's Case*, 15 Mich. 421.

**SUBDIVISION 1:** A person in the custody of a draft commissioner appointed by the governor of the state, was held to be detained by national authority, and the state judiciary had no jurisdiction to inquire into his imprisonment on habeas corpus. *Spangler's Case*, 11 Mich. 298; *Trombley v. Humphrey*, 23 Mich. 481.

**SUBDIVISION 3.** Where there is good reason to believe that a murder has been committed and a person is detained on reasonable grounds of suspicion, awaiting examination upon the charge of having been concerned therein, a higher court will not interfere to release him on habeas corpus. *People's Case*, 47 Mich. 626. *Brownell v. People*, 38 Mich. 734; *In re Joseph*, 206 Mich. 663.

**IMPRISONMENT UNDER ILLEGAL SENTENCE:** *Petition of Harris Bloom*, 53 Mich. 597; *In re Vitall*, 153 Mich. 515; *In re Satt*, 164 Mich. 473; *In re Forscutt*, 167 Mich. 439. Rights of paroled prison-

er. In re Adams, 169 Mich. 607. As to an infant not within this section, see In re Mould, 162 Mich. 1.

(13461). Application.

SEC. 9. Application for such writ shall be made by petition signed either by the party for whose relief it is intended or by some person in his behalf, as follows: To the supreme court during its session; to the circuit court, or the circuit judges thereof, of the county where the prisoner is detained, to any municipal court of record, or the judge thereof, of any city where the prisoner is detained; or, if there be no such municipal court within the city, or the judge thereof be absent from the city, and the circuit judge shall be absent from the county, or for any cause be incapable of acting, or having refused to grant such writ, the application may be made to the circuit court or to the circuit judge of any adjoining county. When a writ of habeas corpus or certiorari shall be allowed and heard by a circuit judge, sitting at chambers, he shall cause a record of his action or proceedings thereon to be made on the journals of the circuit court at its then next session. And any judge who shall wilfully or corruptly refuse or neglect to consider such application or petition shall be deemed guilty of malfeasance in office.

HISTORY: Re-enacts and supersedes Sec. 9. R. S. '46, Ch. 134, being C. L. '57, (5212); As Am. '58, p. 11, Act 4, Eff. May 6; C. L. '71, (6995); As Am. '81, p. 365; Act 266, Eff. Sept. 10, How. 8556; As Am. '89, p. 63, Act 59, Eff. Oct. 2; C. L. '97, (9860); though such section was not expressly repealed by this act. Unchanged.

CONSTITUTIONALITY: See Const. Art. VII, Sections 4 and 10; McBride v. Grand Rapids, 32 Mich. 360.

SUPREME COURT: Whether a writ of habeas corpus will issue from the supreme court to a person here, to bring into this state a minor child under guardianship here and who has been and continues to be detained in another state, *quaere*, the court being equally divided. Jackson's Case, 15 Mich. 417. The supreme court will not review on a writ of error a case of habeas corpus heard before a circuit judge at chambers. The proper remedy is by certiorari or habeas corpus in the supreme court. Faust v. Calhoun Circuit Judge, 30 Mich. 266.

Habeas corpus proceedings in the circuit court are no bar to similar proceedings in the supreme court. In re Mould, 162 Mich. 7. The determination of an inferior tribunal in habeas corpus proceedings cannot be relied upon in the supreme court. *Id.* But the court appears to make an exception in the case of proceedings between parents or guardians over the custody of a child. *Id.*

But if the proceedings were had in the circuit court, writ of error is the proper remedy. Hicks' Case, 20 Mich. 129. The supreme court will not re-examine on certiorari the evidence upon the hearing in

habeas corpus. It is confined to questions of law. If a consideration of evidence is required, the proper way is to take a habeas corpus from that court. *Corrie v. Corrie*, 42 Mich. 511. See note to Compilers' Section (13480).

**CIRCUIT COURT:** As to the jurisdiction of circuit courts to issue writs of habeas corpus, see Const. VII, 10; and notes to Const. of '51, VI. 8. *McBride v. Com. Coun. of Grand Rapids*, 32 Mich. 360. But the constitutional provision cited has been amended, so as to permit the issue of the writs mentioned "in all such other cases and matters as the supreme court shall by rule prescribe." A circuit judge is not an appellate tribunal for proceedings taken before a justice of the peace in a county not within his circuit; and if in such proceedings he exercises authority by habeas corpus, he has only the powers of a circuit court commissioner and cannot review the judgment. *Hamilton's Case*, 51 Mich. 174.

A circuit judge at chambers can issue the writ of habeas corpus to get possession of children sent to the state public school by order of the probate judge. *Goodchild v. Foster*, 51 Mich. 599. A circuit judge at chambers cannot pass upon the right of custody of minor children, as between the parents. *Rowe v. Rowe*, 28 Mich. 353.

**CIRCUIT COURT COMMISSIONER:** Prior to the amendment of '81 application for the writ of habeas corpus might be made to a circuit court commissioner. But a commissioner was not authorized to issue it in cases in which the relief sought was such as could not be afforded by an order made by a judge at chambers. *Rowe v. Rowe*, 28 Mich. 353. And he could not adjudicate the right to the custody of minor children as between the parents. *Id.* Nor in any case which contemplated the review or investigation of the proceedings of a judicial tribunal. *Buddington's Case*, 29 Mich. 474. Nor in case of persons held under the order, sentence or process of any court. *Burger's Case*, 39 Mich. 203. But see *Tomlin v. Fisher*, 27 Mich. 524.

Any person may make the application and the issue is between the child and the person detaining her, between the child and the law and procedure invoked as authority for her detention. *In re Mould*, 162 Mich. 1, 126 N. W. 1049. See also *In re Knott*, 162 Mich. 17.

### (13462). Proof Required on Application in Another County.

Sec. 10. Whenever application for any such writ shall be made to any officer not residing within the county where the prisoner shall be detained, he shall require proof by the oath of the party applying, or by other sufficient evidence, that there is no such officer in such county authorized to grant such writ, or if one reside there, that he is absent, or has refused to grant such writ, or for some cause to be specially set forth, is incapable of acting; and if such proof be not produced, the application shall be denied.

**HISTORY:** Re-enacts and supersedes Sec. 10, R. S. '46, Ch. 134, being C. L. '57, (5213); C. L. '71, (6996); How. 8557; C. L. '97, (9861); though such section was not expressly repealed by this act. Unchanged.



**(13463). Petition.**

**SEC. 11.** The petition must state in substance:

1. That the person in whose behalf the writ is applied for, is imprisoned or restrained of his liberty; the officer or person by whom he is so confined or restrained, and the place where; naming both parties, if their names be known, or describing them, if their names be not known;

2. That such person is not committed or detained by virtue of any process, judgment, decree or execution specified in the preceding eighth section;

3. The cause or pretense of such confinement or restraint, according to the best of the knowledge and belief of the party;

4. If the confinement be by virtue of any warrant, order or process, a copy thereof must be annexed; or it must be averred, that for some sufficient reason, a demand of such copy could not be made; or that such demand was made, and that such copy was refused;

5. If the imprisonment be alleged to be illegal, the petition must also state in what the alleged illegality consists;

6. It must specify whether the party applies for the writ of habeas corpus, or for the writ of certiorari; and

7. It must be verified by the oath of the party making the application.

**HISTORY:** Re-enacts and supersedes Sec. 11, R. S. '46, Ch. 134, being C. L. '57, (5214); C. L. '71, (6997); How. 8558; C. L. '97, (9862), though such section was not expressly repealed by this act. Unchanged.

**(13464). When Writ to be Granted.**

**SEC. 12.** Any court or officer empowered to grant any writ applied for under this chapter, to whom such petition shall be presented, shall grant such writ without delay, unless it shall appear from the petition itself, or from the documents annexed, that the party applying therefor is, by the provisions of this chapter, prohibited from prosecuting such writ.

**HISTORY:** Re-enacts and supersedes Sec. 12, R. S. '46, Ch. 134, being C. L. '57, (5215), C. L. '71, (6998); How. 8559; C. L. '97, (9863), though such section was not expressly repealed by this act. Unchanged.

**(13465). Form of Writ of Habeas Corpus.**

**SEC. 13.** Every writ of habeas corpus, issued under the provisions of this chapter, for the purpose of inquiring into the

cause of any imprisonment or restraint, shall be substantially in the following form:

"In the name of the people of the state of Michigan:

To the sheriff of the county of ..... (or to 'A. B.').

We command you, that you have the body of C. D. by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. shall be called or charged, before our justices of our supreme court (or 'before E. F., one of the justices of our supreme court,' or as the case may be), at, etc., on, etc., (or 'immediately after the receipt of this writ'), to do and receive what shall then and there be considered concerning the said C. D.

And have you then there this writ.

Witness, etc.

**HISTORY:** Re-enacts and supersedes Sec. 13, R. S. '46, Ch. 134, being C. L. '57, (5216); C. L. '71, (6999); How. 8560; C. L. '97, (9864), though such section was not expressly repealed by this act. Unchanged.

**(13466). Form of Writ of Certiorari.**

Sec. 14. Every writ of certiorari, issued pursuant to this chapter, shall be substantially in the following form:

"In the name of the people of the State of Michigan:

To the sheriff of, etc., (or 'to A. B.').

We command you that you certify fully and at large to our justices of our supreme court (or to 'E. F., one of the justices of our supreme court,' or as the case may be), at, etc., on, etc., (or 'immediately after the receipt of this writ'), the day and cause of the imprisonment of C. D., by you detained, as is said, by whatsoever name the said C. D. shall be called or charged.

And have you then there this writ.

Witness, etc."

**HISTORY:** Re-enacts and supersedes Sec. 14, R. S. '46, Ch. 134, being C. L. '57 (5217); C. L. '71, (7000); How. 8561; C. L. '97, (9865), though such section was not expressly repealed by this act. Unchanged.

**(13467). When Writs Sufficient.**

Sec. 15. Such writs of habeas corpus or certiorari shall not be disobeyed for any defect of form; but they shall be sufficient;

1. If the person having the custody of the prisoner be designated either by his name of office, if he have any, or by his own name; or if both such names be unknown or uncertain, he may be described by an assumed appellation; and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person;

2. If the person imprisoned or restrained, or who is directed to be produced, be designated by name; or if his name be uncertain or unknown, if he be described in any other way, so as to designate the person intended.

**HISTORY:** Re-enacts and supersedes Sec. 15, R. S. '46, Ch. 134, being C. L. '57, (5218); C. L. '71, (7001); How. 8562; C. L. '97, (9866), though such section was not expressly repealed by this act. Unchanged.

**(13468). Duty of Judges to Issue Writs in Certain Cases.**

**Sec. 16.** When the supreme court or any justice thereof, or judge of a circuit court shall have evidence from any judicial proceeding had before them, that any person within the county where such court or officer shall be, is illegally confined and restrained of his liberty, it shall be the duty of such court or officer to issue a writ of habeas corpus or certiorari for his relief, although no petition be presented, or application made for such writ.

**HISTORY:** Re-enacts and supersedes Sec. 16, R. S. '46, Ch. 134, being C. L. '57, (5219); C. L. '71, (7002); How. 8563; C. L. '97, (9867), though such section was not expressly repealed by this act. Unchanged.

**(13469). Liability for Refusing Writ.**

**Sec. 17.** If any court or officer authorized by the provisions of this chapter to grant writs of habeas corpus or certiorari, to inquire into the cause of any imprisonment or detention, shall refuse to grant such writ when legally applied for, every member of such court who shall have assented to such refusal, and every such officer, shall severally be liable to the party aggrieved, in one thousand dollars damages.

**HISTORY:** Re-enacts and supersedes Sec. 17, R. S. '46, Ch. 134, being C. L. '57, (5220); C. L. '71, (7003); How. 8564; C. L. '97, (9868), though such section was not expressly repealed by this act. Unchanged.

**(13470). Return to Writ.**

SEC. 18. The person upon whom any such writ shall have been duly served, shall state in his return, plainly and unequivocally;

1. Whether he have, or have not, the party in his custody, or under his power or restraint;

2. If he have the party in his custody or power or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large;

3. If the party be detained by virtue of any writ, warrant or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or officer before whom the same is returnable;

4. If the person upon whom such writ shall have been served, shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place.

**HISTORY:** Re-enacts and supersedes Sec. 18. R. S. '46, Ch. 134, being C. L. '57, (5221); C. L. '71, (7004); How. 8565; C. L. '97, (9869), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Copy of warrant. *Drennan v. People*, 10 Mich. 185. When return not sufficient. *Palmer v. Kalamazoo Circuit Judge*, 83 Mich. 534; *In re Knott*, 162 Mich. 16.

**(13471). Return to be Signed.**

SEC. 19. The return must be signed by the person making the same; and except when such person shall be a sworn public officer, and shall make his return in his official capacity, it shall be verified by his oath.

**HISTORY:** Re-enacts and supersedes Sec. 19, R. S. '46, Ch. 134, being C. L. '57, (5222); C. L. '71, (7005); How. 8566; C. L. '97, (9870), though such section was not expressly repealed by this act. Unchanged. See *In re Knott*, 162 Mich. 16.

**(13472). Body of Prisoner.**

SEC. 20. If a writ of habeas corpus be issued, the person or officer on whom it shall have been served, shall also bring the body of the person in his custody, according to the command

of such writ, except in case of the sickness of such person as hereinafter provided.

**HISTORY:** Re-enacts and supersedes Sec. 20, R. S. '46, Ch. 134, being C. L. '57, (5223); C. L. '71, (7006); How. 8567; C. L. '97, (9871), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** In re Knott, 162 Mich. 16.

**(13473). Proceedings on Disobedience to Writ.**

**SEC. 21.** If the person upon whom such writ of habeas corpus or certiorari shall have been duly served, shall refuse or neglect to obey the same by producing the party named in any such writ of habeas corpus, and making a full and explicit return to every such writ of habeas corpus or certiorari within the time required by this chapter, and no sufficient excuse shall be shown for such refusal or neglect, it shall be the duty of the court or officer before whom such writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person.

**HISTORY:** Re-enacts and supersedes Sec. 21, R. S. '46, Ch. 134, being C. L. '57, (5224); C. L. '71, (7007); How. 8568; C. L. '97, (9872), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** In re Knott, 162 Mich. 16.

**(13474). Attachment.**

**SEC. 22.** Such attachment shall be directed to the sheriff of any county within this State, and shall command him forthwith to apprehend such person, and bring him before such court or officer, and on being so brought, such person shall be committed to close custody in the jail of the county in which such court or officer shall be, without being allowed the liberties thereof, until he shall make return to such writ, and comply with any order which may be made by such court or officer, in relation to the person for whose relief such writ shall have been issued.

**HISTORY:** Re-enacts and supersedes Sec. 22, R. S. 46, Ch. 134, being C. L. '57, (5225); C. L. '71, (7008); How. 8569; C. L. '97, (9873), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** In re Knott, 162 Mich. 16.

**(13475). Proceedings Against Sheriff.**

**SEC. 23.** If a sheriff of any county shall have neglected to

return such writ, the attachment may be directed to any coroner or other person, to be designated therein, who shall have full power to execute the same; and such sheriff upon being brought up, may be committed to the jail of any county other than his own.

**HISTORY:** Re-enacts and supersedes Sec. 23, R. S. '46, Ch. 134, being C. L. '57, (5226); C. L. '71, (7009); How. 8570; C. L. '97, (9874); though such section was not expressly repealed by this act. Unchanged.

**(13476). Prisoner to be Produced.**

**SEC. 24.** The court or officer by whom any such attachment may be issued, may also, at the same time, or afterwards, issue a precept to the same sheriff, or other person to whom such attachment shall have been directed, commanding him to bring forthwith before such court or officer, the party for whose benefit such writ of habeas corpus or certiorari shall have been allowed; who shall thereafter remain in the custody of such sheriff or person, until he shall be discharged, bailed, or remanded, as such court or officer shall direct.

**HISTORY:** Re-enacts and supersedes Sec. 24, R. S. '46, Ch. 134, being C. L. '57, (5227); C. L. '71, (7010); How. 8571; C. L. '97, (9875); though such section was not expressly repealed by this act. Unchanged.

**(13477). Power of County.**

**SEC. 25.** In the execution of such attachment or precept, or either of them, the sheriff or other person to whom they shall be directed, may call to his aid the power of the county as in other cases.

**HISTORY:** Re-enacts and supersedes Sec. 25, R. S. '46, Ch. 134, being C. L. '57, (5228); C. L. '71, (7011); How. 8572; C. L. '97, (9876); though such section was not expressly repealed by this act. Unchanged.

**(13478). Proceedings on Return of Writ.**

**SEC. 26.** The court or officer before whom the party shall be brought on such writ of habeas corpus, shall, immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been for any criminal, or supposed criminal matter, or not.

**HISTORY:** Re-enacts and supersedes Sec. 26, R. S. '46, Ch. 134, be-

ing C. L. '57, (5229); C. L. '71, (7012); How. 8573; C. L. '97, (9877), though such section was not expressly repealed by this act. Unchanged.

**(13479). When Prisoner to be Discharged.**

**SEC. 27.** If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, such court or officer shall discharge such party from the custody or restraint under which he is held.

**HISTORY:** Re-enacts and supersedes Sec. 27, R. S. '46, Ch. 134, being C. L. '57, (5230); C. L. '71, (7013); How. 8574; C. L. '97, (9878). though such section was not expressly repealed by this act. Unchanged.

**(13480). When Prisoner to be Remanded.**

**SEC. 28.** It shall be the duty of such court or officer forthwith to remand such party, if it shall appear that he is detained in custody, either:

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or
2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or
3. For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged; and
4. That the time during which such party may be legally detained has not expired.

**HISTORY:** Re-enacts and supersedes Sec. 28, R. S. '46, Ch. 134, being C. L. '57, (5231); C. L. '71, (7014); How. 8575; C. L. '97, (9879), though section was not expressly repealed by this act. Unchanged.

**SUBDIVISION 2:** Habeas corpus is not the proper remedy to test the validity of an order of commitment to the state prison of a person acquitted of murder on the ground of insanity. Underwood's Case, 30 Mich. 502; In re Maguire, 114 Mich. 80. Nor to test the sufficiency of an information after conviction. Mary Eaton's Case, 27 Mich. 1. Nor to test the validity of a conviction. Case of Esther Coffeen, 38 Mich. 311. But a juvenile offender was released on habeas corpus from the state reform school, where the sentence was approved by the probate judge without any examination of the testimony given on the trial. Matter of Patrick O'Leary, 25 Mich. 144. Technical defects in a justice's warrant of commitment are not reviewable in habeas corpus proceedings; but in case of a conviction without jurisdiction habeas corpus is proper. Hamilton's Case, 51 Mich. 175.

**SUBDIVISION 3:** The regularity of a committal for contempt will

not be reviewed on an application for a writ of habeas corpus, if regular on its face. *Matter of Bissell*, 40 Mich. 63. But on habeas corpus, a person held on a commitment for contempt in refusing to testify may go behind the commitment, though fair on its face, and show that the court committing him had no jurisdiction of the proceedings in which he was called as a witness. *Morton's Case*, 10 Mich. 208.

**(13481). When Prisoner to be Discharged in Civil Cases.**

**SEC. 29.** If it appear on the return, that the prisoner is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such prisoner can only be discharged in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person;
2. Where, though the original imprisonment was lawful, yet, by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged;
3. Where the process is defective, in some manner of substance required by law, rendering such process void;
4. Where the process, though in proper form, has been issued in a case not allowed by law;
5. Where the person having the custody of the prisoner under such process, is not the person empowered by law to detain him; or
6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

**HISTORY:** Re-enacts and supersedes Sec. 29, R. S. '46, Ch. 134, being C. L. '57, (5232); C. L. '71, (7015); How. 8576; C. L. '97, (9880), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** The legality of an arrest on a *capias ad respondendum* may be tested on habeas corpus. *Miller v. Rosier*, 31 Mich. 475; legality of sentence, petition of *Harris Bloom*, 53 Mich. 597; In re *Forscutt*, 167 Mich. 439; In re *Vitali*, 153 Mich. 515; In re *Satt*, 164 Mich. 473; In re *Adams*, 169 Mich. 607.

**(13482). Restriction of Powers of Court or Officer.**

**SEC. 30.** But no court or officer, on the return of any habeas corpus or certiorari issued under this chapter, shall have power to inquire into the legality or justice of any process, judgment, decree or execution, specified in the preceding eighth section of this chapter; nor into the justice or propriety of any commitment for a contempt made by any court, officer or body,



according to law, and charged in such commitment as herein-before provided.

**HISTORY:** Re-enacts and supersedes Sec. 30, R. S. '46, Ch. 134, being C. L. '57, (5233); C. L. '71, (7016); How. 8577; C. L. '97, (9881), though such section was not expressly repealed by this act.

Under Const. Art. VII., Sec. 4, and this section the supreme court has authority to inquire into the justice or propriety of proceedings in contempt, whether before or after commitment, only so far as to ascertain whether the court below has jurisdiction. But that necessarily involves an inquiry whether the conduct alleged was in fact a contempt of the court committed under circumstances authorizing punishment therefor, and whether the proceedings were regular. Wood's Case, 82 Mich. 81.

**(13483). Irregular Commitments.**

**SEC. 31.** If it appear that the party has been legally committed for any criminal offense, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be guilty of any such offense, although the commitment be irregular, the court or officer before whom such party shall be brought, shall proceed to let such party to bail, if the case be bailable, and good bail be offered; or if not, shall forthwith remand such party.

**HISTORY:** Re-enacts and supersedes Sec. 31, R. S. '46, Ch. 134, being C. L. '57, (5234); C. L. '71, (7017); How. 8578; C. L. '97, (9882), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Matter of Charles Mason, 8 Mich. 74.

**(13484). Remanding Prisoner.**

**SEC. 32.** If the party be not entitled to his discharge, and be not bailed, the court or officer shall remand him to the custody, or place him under the restraint, from which he was taken, if the person under whose custody or restraint he was, be legally entitled thereto; if not so entitled, he shall be committed by such court or officer, to the custody of such officer or person as by law is entitled thereto.

**HISTORY:** Re-enacts and supersedes Sec. 32, R. S. '46, Ch. 134, being C. L. '57, (5235); C. L. '71, (7018); How. 8579; C. L. '97, (9883), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Matter of Charles Mason, 8 Mich. 74.

**(13485). Custody of Prisoner.**

**SEC. 33.** Until judgment be given upon the return, the court

or officer before whom such party shall be brought, may either commit such party to the custody of the sheriff of the county in which such court or officer shall be, or place him in such care, or under such custody, as his age and other circumstances may require.

**HISTORY:** Re-enacts and supersedes Sec. 33, R. S. '46, Ch. 134, being C. L. '57, (5236); C. L. '71, (7019); How. 8580; C. L. '97, (9884), though such section was not expressly repealed by this act. Unchanged.

(13486). Notice to Parties.

**Sec. 34.** When it shall appear from the return of such writ, that the party named therein is in custody on any process, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge, until it shall appear that the party so interested, or his attorney, if he have one, shall have had at least four days' notice of the time and place at which such writ shall have been made returnable.

**HISTORY:** Re-enacts and supersedes Sec. 34, R. S. '46, Ch. 134, being C. L. '57, (5237); C. L. '71, (7020); How. 8581; C. L. '97, (9885), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** The party so interested is entitled to the four days' notice and his appearance for the purpose of objecting to the want of such notice cannot be treated as a waiver. *People v. Kehl*, 15 Mich. 331. In an action for false imprisonment under a ca. sa. a former release by habeas corpus is res judicata and binding on the defendant. *Castor v. Bates*, 127 Mich. 285.

(13487). Notice to Prosecuting Attorney.

**Sec. 35.** When it shall appear from the return, that such party is detained upon a criminal accusation, such court or officer shall make no order for the discharge of such party, until sufficient notice of the time and place at which such writ shall have been returned, or shall be made returnable, shall be given to the prosecuting attorney of the county within which such court or officer shall be, or to the attorney general, if there be no such prosecuting attorney within such county.

**HISTORY:** Re-enacts and supersedes Sec. 35, R. S. '46, Ch. 134, being C. L. '57, (5238); C. L. '71, (7021); How. 8582; C. L. '97, (9886), though such section was not expressly repealed by this act. Unchanged.

**(13488). Evidence Against Return.**

SEC. 36. The party brought before any such court or officer, on the return of any writ of habeas corpus, may deny any of the material facts set forth in the return, or allege any fact, to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge; which allegations or denials shall be on oath; and thereupon such court or officer shall proceed in a summary way to hear such allegations and proofs as may be produced in support of such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require.

**HISTORY:** Re-enacts and supersedes Sec. 36, R. S. '46, Ch. 134, being C. L. '57, (5239); C. L. '71, (7022); How. 8583; C. L. '97, (9887), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** In re Palmer, 138 Mich. 37. See Oxford v. Berry, 204 Mich. 209.

**(13489). Sickness of Prisoner.**

SEC. 37. Whenever, from the sickness or infirmity of the person directed to be produced by any writ of habeas corpus, such person cannot, without danger, be brought before the court or officer before whom the writ is made returnable, the party in whose custody he is may state that fact in his return, verifying the same by his oath; and if such court or officer be satisfied of the truth of such allegation, and the return be otherwise sufficient, they shall proceed to decide upon such return, and to dispose of the matter in the same manner as if a writ of certiorari had been issued, instead of a writ of habeas corpus.

**HISTORY:** Re-enacts and supersedes Sec. 37, R. S. '46, Ch. 134, being C. L. '57, (5240); C. L. '71, (7023); How. 8584; C. L. '97, (9888), though such section was not expressly repealed by this act. Unchanged.

**(13490). When Writ of Certiorari May be Issued.**

SEC. 38. Whenever an application shall be made for a writ of habeas corpus, according to the provisions of this chapter, to any court or officer, if it appear to such court or officer upon the facts set forth in the petition, that the cause, matter or offense, for which the person is confined or detained, is not bailable, according to the provisions of law, instead of awarding such writ of habeas corpus, a writ of certiorari may be

granted, directed to the officer or person in whose custody, or under whose control such prisoner shall be alleged to be, in like manner as if such writ of certiorari has been applied for by the prisoner.

**HISTORY:** Re-enacts and supersedes Sec. 38, R. S. '46, Ch. 134, being C. L. '57, (5241); C. L. '71, (7024); How. 8585; C. L. '97, (9889), though such section was not expressly repealed by this act. Unchanged.

**CITED:** In re Adams, 169 Mich. 607.

**(13491). Proceedings on Return of Writ.**

**SEC. 39.** Upon the return of such certiorari being made, the court or officer before whom such writ shall be returnable shall proceed in the same manner as upon return to writs of habeas corpus, and shall hear the proofs of the parties in support of and against such return.

**HISTORY:** Re-enacts and supersedes Sec. 39, R. S. '46, Ch. 134, being C. L. '57, (5242); C. L. '71, (7025); How. 8586; C. L. '97, (9890), though such section was not expressly repealed by this act. Unchanged.

**(13492). When Order Made for Discharge.**

**SEC. 40.** If it appear that the person detained is illegally imprisoned, confined or restrained of his liberty, the court or officer shall make an order that those having such person in their custody, discharge him forthwith; and if it appear that such person is legally detained, imprisoned or confined, and is not entitled to be bailed, such court or officer shall cease from all further proceedings thereon.

**HISTORY:** Re-enacts and supersedes Sec. 40, R. S. '46, Ch. 134, being C. L. '57, (5243); C. L. '71, (7026); How. 8587; C. L. '97, (9891). Unchanged.

**(13493). Habeas Corpus May Issue After Return of Certiorari.**

**SEC. 41.** Notwithstanding any writ of certiorari may have been issued or returned according to the foregoing provisions, the court or officer before whom the same was returnable may issue a writ of habeas corpus, which shall, in all respects, be subject to the provisions hereinbefore contained; and if such court or officer refuse a writ of certiorari, or upon the return thereof, refuse to discharge the person detained, if such person claim the writ of habeas corpus, he shall be entitled to the same as hereinbefore provided.

**HISTORY:** Re-enacts and supersedes Sec. 41, R. S. '46, Ch. 134, being C. L. '57, (5244); C. L. '71, (7027); How. 8588; C. L. '97, (9892), though such section was not expressly repealed by this act. Unchanged.

**(13494). Order for Bail on Certiorari.**

**SEC. 42.** If upon the return of any writ of certiorari, it shall appear that the person detained is entitled to bail, the court or officer before whom the same was returnable, shall make an order directing the sum in which such person shall be held to bail, and the court at which he shall be required to appear; and that on such bail being entered into, in conformity to such order, and the provisions of law, such prisoner be discharged.

**HISTORY:** Re-enacts and supersedes Sec. 42, R. S. '46, Ch. 134, being C. L. '57, (5245); C. L. '71, (7028); How. 8589; C. L. '97, (9893), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** *People v. Dennis*, 4 Mich. 615.

**(13495). Recognizances.**

**SEC. 43.** Upon the production of such order to any circuit court commissioner of any county in which such prisoner may be, or to any judge of a court of record, he shall be authorized to take the recognizance of the person so detained, and of two sufficient sureties, in the sum so directed, with a condition for the appearance of such person at the court designated in such order; but previous to taking such recognizance, such officer shall be satisfied by the oath of persons offering themselves as sureties, that they are residents of the county, and are severally worth double the sum in which they shall be required to be bound, over and above all demand against them.

**HISTORY:** Re-enacts and supersedes Sec. 43, R. S. '46, Ch. 134, being C. L. '57 (5246). As Am. '58, p. 11, Act 4, Eff. May 6; C. L. '71, (7029); How. 8590; C. L. '97, (9894), changing "householders" to "residents," though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** *People v. Dennis*, 4 Mich. 615.

**(13496). When to be Discharged.**

**SEC. 44.** Such judge or commissioner shall file the recognizance taken by him, with the clerk of the court before which the prisoner shall be bound to appear, and shall certify on such order the compliance therewith; and the production of such order so certified, shall entitle such prisoner to be dis-

charged from imprisonment for the cause which shall have been returned to such certiorari.

**HISTORY:** Re-enacts and supersedes Sec. 44, R. S. '46, Ch. 134, being C. L. '57, (5247); C. L. '71, (7030); How. 8591; C. L. '97, (9895), though such section was not expressly repealed by this act. Unchanged.

**(13497). Obedience to Order for Discharge.**

**SEC. 45.** Obedience to any order for the discharge of any prisoner, granted pursuant to the provisions of this chapter, may be enforced by the court or officer granting such order, by attachment, in the same manner as is herein provided for neglect to make return to a writ of habeas corpus, and with the like effect in all respects; and the person-guilty of such disobedience, shall be liable to the party aggrieved in the sum of one thousand dollars damages, in addition to any special damages such party may have sustained.

**HISTORY:** Re-enacts and supersedes Sec. 45, R. S. '46, Ch. 134, being C. L. '57, (5248); C. L. '71, (7031); How. 8592; C. L. '97, (9896), though such section was not expressly repealed by this act. Unchanged.

**(13498). Officers Protected in Obeying Order.**

**SEC. 46.** No sheriff or other officer shall be liable to any civil action for obeying any such order of discharge; and if any action shall be brought against such officer for suffering any person committed to his custody to go at large, pursuant to any such order, he may give evidence thereof under his plea of the general issue in bar of the action.

**HISTORY:** Re-enacts and supersedes Sec. 46, R. S. '46, Ch. 134, being C. L. '57, (5249); C. L. '71, (7032); How. 8593; C. L. '97, (9897), though such section was not expressly repealed by this act. Unchanged.

**(13499). When Prisoner May be Recommitted for Same Cause.**

**SEC. 47.** No person who has been discharged by the order of any court or officer, upon a habeas corpus or certiorari issued pursuant to the provisions of this chapter, shall be again imprisoned, restrained or kept in custody for the same cause; but it shall not be deemed the same cause:

1. If he shall have been discharged from a commitment on a criminal charge, and be afterwards committed for the same offense, by the legal order or process of the court wherein he

shall be bound by recognizance to appear, or in which he shall be indicted or convicted for the same offense; or

2. If, after a discharge for defect of proof, or for any material defect in the commitment, in a criminal case, the prisoner be again arrested on sufficient proof, and committed by legal process for the same offense;

3. If in a civil suit the party has been discharged for any illegality in the judgment or process hereinbefore specified and is afterwards imprisoned by legal process for the same cause of action; or

4. If in any civil suit in which process may lawfully issue against the body he shall have been discharged from commitment on original process, and shall be afterwards committed on execution in the same cause, or on original process in any other suit, after such first suit shall have been discontinued.

**HISTORY:** Re-enacts and supersedes Sec. 47, R. S. '46, Ch. 134, being C. L. '57, (5250); C. L. '71, (7033); How. 8594; C. L. '97, (9898), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** *McBride v. Grand Rapids Com. Coun.*, 32 Mich. 360, 363. A person discharged on habeas corpus for a defect in a commitment issued by a justice may be lawfully imprisoned under a second commitment in due form. *Reinheimer's Case*, 97 Mich. 619. See *In re Adams*, 169 Mich. 607.

**CITED:** *In re Collins*, 135 Mich. 92.

**(13500). Liability for Re-Committing in Prohibited Cases.**

**SEC. 48.** If any person, either solely or as a member of any court, or in the execution of any order, judgment or process shall knowingly re-commit, imprison or restrain of his liberty, or cause to be recommitted, imprisoned or restrained of his liberty, for the same cause, except as provided in the last preceding section, any person so discharged, or shall knowingly aid or assist therein, he shall be liable to the party aggrieved in the sum of one thousand dollars damages, and shall also be deemed guilty of a misdemeanor.

**HISTORY:** Re-enacts and supersedes Sec. 48, R. S. '46, Ch. 134, being C. L. '57, (5251); C. L. '71, (7034); How. 8595; C. L. '97, (9899), though such section was not expressly repealed by this act. Unchanged.

**(13501). Concealment of Prisoner a Misdemeanor.**

**SEC. 49.** Any one having in his custody or under his power, any person who, by the provisions of this chapter, would be entitled to a writ of habeas corpus or certiorari, to inquire

into the cause of his detention, or for whose relief any such writ shall have been duly issued, who shall, with intent to elude the service of any such writ, or to avoid the effect thereof, transfer any such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor.

**HISTORY:** Re-enacts and supersedes Sec. 49, R. S. '46, Ch. 134, being C. L. '57, (5252); C. L. '71, (7035); How. 8596; C. L. '97, (9900), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Matter of Jackson, 15 Mich. 421; Malcomson v. Scott, 56 Mich. 463.

**(13502). Aiding in Concealment.**

**Sec. 50.** Every person who shall knowingly aid or assist in the violation of the last preceding section, shall be deemed guilty of a misdemeanor.

**HISTORY:** Re-enacts and supersedes Sec. 50, R. S. '46, Ch. 134, being C. L. '57, (5253); C. L. '71, (7036); How. 8597; C. L. '97, (9901), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Malcomson v. Scott, 56 Mich. 463.

**(13503). Penalty.**

**Sec. 51.** Every person convicted of any offense under either of the three last preceding sections, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, in the discretion of the court.

**HISTORY:** Re-enacts and supersedes Sec. 51, R. S. '46, Ch. 134, being C. L. '57, (5254); C. L. '71, (7037); How. 8598; C. L. '97, (9902), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Malcomson v. Scott, 56 Mich. 463.

**(13504). When Warrant May Issue for Prisoner.**

**Sec. 52.** Whenever it shall appear by satisfactory proof, that any one is held in illegal confinement or custody, and that there is good reason to believe that he will be carried out of the state, or suffer some irreparable injury, before he can be relieved by the issuing of a habeas corpus or certiorari, any court or officer authorized to issue such writs, may issue a warrant, reciting the facts, and directed to any sheriff,



constable or other person, and commanding such officer or person to take such prisoner, and forthwith to bring him before such court or officer, to be dealt with according to law.

**HISTORY:** Re-enacts and supersedes Sec. 52, R. S. '46, Ch. 134, being C. L. '57, (5255); C. L. '71, (7038); How. 8599; C. L. '97, (9903), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Matter of Jackson, 15 Mich. 421.

**(13505). When Warrant to Order Arrest of Person Having Prisoner in Custody.**

**Sec. 53.** When the proof mentioned in the last section shall also be sufficient to justify an arrest of the person having such prisoner in his custody, as for a criminal offense committed in the taking or detaining of such prisoner, the warrant shall also contain an order for the arrest of such person, for such offense.

**HISTORY:** Re-enacts and supersedes Sec. 53, R. S. '46, Ch. 134, being C. L. '57, (5256); C. L. '71, (7039); How. 8600; C. L. '97, (9904), though such section was not expressly repealed by this act. Unchanged.

**(13506). Execution of Warrant.**

**Sec. 54.** Any officer or person to whom such warrant shall be directed, shall execute the same by bringing the prisoner therein named, and the person who detains him, if so commanded by the warrant, before the court or officer issuing the same; and thereupon the person detaining such prisoner shall make a return, in like manner, and the like proceedings shall be had, as if a writ of habeas corpus had been issued in the first instance.

**HISTORY:** Re-enacts and supersedes Sec. 54, R. S. '46, Ch. 134, being C. L. '57, (5257); C. L. '71, (7040); How. 8601; C. L. '97, (9905), though such section was not expressly repealed by this act. Unchanged.

**(13507). Examination.**

**Sec. 55.** If the person having such prisoner in his custody shall be brought before such court or officer, as for a criminal offense, he shall be examined, committed, bailed or discharged, by such court or officer, in the like manner as in other criminal cases of the like nature.

**HISTORY:** Re-enacts and supersedes Sec. 55, R. S. '46, Ch. 134, be-

ing C. L. '57, (5258); C. L. '71, (7041); How. 8602; C. L. '97, (9906), though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: Matter of Jackson, 15 Mich. 422.

**(13508). Liability of Officer for Refusal of Copy of Process.**

Sec. 56. Any officer or other person ~~who~~ shall refuse or neglect for six hours, to deliver a copy of any order, warrant, process or other authority, by which he shall detain any person, to any one who shall demand such copy and tender the lawful fees therefor, shall be liable to the person so detained in the sum of two hundred dollars damages.

HISTORY: Re-enacts and supersedes Sec. 56, R. S. '46, Ch. 134, being C. L. '57, (5259); C. L. '71, (7042); How. 8603; C. L. '97, (9907), though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: A person who is a mere stranger has a right to a copy. Drennan v. People, 10 Mich. 185. This section is valid. Stewart v. Riopelle, 48 Mich. 177.

**General Provisions.**

**(13509). Recovery of Costs.**

Sec. 57. In all suits and proceedings under the provisions of this chapter, the prevailing party may recover his costs, to be awarded in the discretion of the court.

HISTORY: Re-enacts Act 237 of '13, p. 455, Eff. Aug. 14, with merely a necessary change in phraseology. Modified.

**(13510). Writs to be Under Seal.**

Sec. 58. All writs of habeas corpus or certiorari, issued by any court pursuant to the provisions of this chapter, shall be under the seal of the court to which they are awarded, and if awarded by any officer out of court, they shall be under the seal of the court to which they are made returnable; or if such writ be made returnable before some body other than a court of record, or before an officer out of court, it may be under the seal of the supreme court, or of the circuit court for the county in which it shall be issued or of the officer issuing the same.

HISTORY: Re-enacts and supersedes Sec. 57, R. S. '46, Ch. 134, being C. L. '57, (5260); As Am. '59, p. 442, Act 156, Eff. May 18; C. L. '71, (7043); How. 8604; C. L. '97, (9908), though such section was not expressly repealed by this act. This section, however, corrects a typographical error in the old section. Substantially unchanged.

**(13511). Return Day.**

**SEC. 59.** Every such writ may be made returnable at a day certain, or forthwith, as the case may require.

**HISTORY:** Re-enacts and supersedes Sec. 58, R. S. '46, Ch. 134, being C. L. '57, (5261); C. L. '71, (7044); How. 8605; C. L. '97, (9909), though such section was not expressly repealed by this act. Unchanged.

**(13512). Indorsement of Allowance.**

**SEC. 60.** Every such writ shall be indorsed with a certificate of the allowance thereof, and with the date of such allowance; which indorsement, if the writ be awarded by a court, shall be signed by the chief justice or other presiding officer of such court; if it be awarded by any officer out of court, the indorsement shall be signed by such officer.

**HISTORY:** Re-enacts and supersedes Sec. 59, R. S. '46, Ch. 134, being C. L. '57, (5262); C. L. '71, (7045); How. 8606; C. L. '97, (8810), though such section was not expressly repealed by this act. Unchanged.

**(13513). Habeas Corpus in Behalf of People.**

**SEC. 61.** Whenever a writ of habeas corpus shall be required in any action or matter civil or criminal, to which the people of this state shall be parties, the application therefor may be made by the attorney general, or prosecuting attorney having charge of such action or matter; and whenever so issued, the court or officer allowing it, shall state in their indorsement of the allowance of such writ, that it was allowed upon such application.

**HISTORY:** Re-enacts and supersedes Sec. 60, R. S. '46, Ch. 134, being C. L. '57, (5263); C. L. '71, (7046); How. 8607; C. L. '97, (9911), though such section was not expressly repealed by this act. Unchanged.

**(13514). Service of Writs of Habeas Corpus.**

**SEC. 62.** Writs of habeas corpus can be served only by an elector of some county within this state; and the service thereof shall not be deemed complete, unless the party serving the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable or marshal, the fees allowed by law for bringing up such prisoner.

**HISTORY:** Re-enacts and supersedes Sec. 61, R. S. '46, Ch. 134, being C. L. '57, (5264); C. L. '71, (7047); How. 8608; C. L. '97,

(9912), though such section was not expressly repealed by this act. Unchanged.

**(13515). Application of Last Section.**

SEC. 63. But the last section shall not apply, so far as provision is therein made for the payment of fees, to any case where the writ is sued out by the attorney general or a prosecuting attorney.

HISTORY: Re-enacts and supersedes Sec. 62, R. S. '46, Ch. 134, being C. L. '57, (5265); C. L. '71, (7048); How. 8609; C. L. '97, (9913), though such section was not expressly repealed by this act. Unchanged.

**(13516). Mode of Service.**

SEC. 64. Every writ of habeas corpus or certiorari, issued pursuant to this chapter, may be served by delivering the same to the person to whom it is directed; or, if he cannot be found, it may be served by being left at the jail or other place in which the prisoner may be confined, with any under officer, or other person of proper age, having charge for the time of such prisoner.

HISTORY: Re-enacts and supersedes Sec. 63, R. S. '46, Ch. 134, being C. L. '57, (5266); C. L. '71, (7049); How. 8610; C. L. '97, (9914); though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: *Palmer v. Kalamazoo Circuit Judge*, 83 Mich. 535.

**(13517). How Served When Person Conceals Himself.**

SEC. 65. If the person upon whom the writ ought to be served, conceal himself, or refuse admittance to the party attempting to serve such writ, it may be served by fixing it in some conspicuous place on the outside, either of his dwelling house, or of the place where the party is confined.

HISTORY: Re-enacts and supersedes Sec. 64, R. S. '46, Ch. 134, being C. L. '57, (5267); C. L. '71, (7050); How. 8611; C. L. '97, (9915); though such section was not expressly repealed by this act. Unchanged.

**(13518). Duty of Officers to Obey Writs Served on Them.**

SEC. 66. It shall be the duty of every sheriff, coroner, constable or marshal, upon whom a writ of habeas corpus shall be served, whether such writ be directed to him or not, upon the payment or tender of the charges allowed by law, to obey

and return such writ according to the exigency thereof; and it shall be the duty of every other person upon whom such writ shall be served, having the custody of the individual for whose relief the writ shall be issued, to obey and execute such writ according to the command thereof, without requiring the payment of any charges, unless the payment of such charges shall have been required by the officer issuing such writ.

**HISTORY:** Re-enacts and supersedes Sec 65, R. S. '46, Ch. 134, being C. L. '57, (5268); C. L. '71, (7051); How. 8612; C. L. '97, (9916); though such section was not expressly repealed by this act. Unchanged.

**(13519). Persons to Obey Certiorari.**

**SEC. 67.** It shall, in like manner, be the duty of the person upon whom any writ of certiorari, issued pursuant to the provisions of this chapter, shall be served, upon payment or tender of the fees allowed by law for making a return to such writ, and for copying the warrant or other process to be annexed thereto, to obey and return the same according to the exigency thereof.

**HISTORY:** Re-enacts and supersedes Sec. 66, R. S. '46, Ch. 134, being C. L. '57, (5269); C. L. '71, (7052); How. 8613; C. L. '97, (9917), though such section was not expressly repealed by this act. Unchanged.

**(13520). Fees to Persons Not Officers.**

**SEC. 68.** Every officer allowing a writ of habeas corpus directed to any person other than a sheriff, coroner, constable or marshal, may, in his discretion, require as a duty to be performed, in order to render the service thereof, effectual, that the charges of bringing up such prisoner shall be paid by the petitioner; and in such case he shall, in the allowance of the writ, specify the amount of such charges so to be paid, which shall not exceed the fees allowed by law to sheriffs for similar services.

**HISTORY:** Re-enacts and supersedes Sec. 67, R. S. '46, Ch. 134, being C. L. '57, (5270); C. L. '71, (7053); How. 8614; C. L. '97, (9918); though such section was not expressly repealed by this act. Unchanged.

**(13521). Time for Returning Writ.**

**SEC. 69.** If the writ be returnable at a certain day, such return shall be made, and such prisoner produced at the

time and place specified therein; if it be returnable forthwith, and the place be within twenty miles of the place of service, such return shall be made, and such prisoner shall be produced within twenty-four hours, and the like time shall be allowed for every additional one hundred miles.

**HISTORY:** Re-enacts Sec. 68, R. S. '46, Ch. 134, being C. L. '57, (5271); C. L. '71, (7054); How. 8615; C. L. '97, (9919); changing "twenty miles" in the last clause to "one hundred miles." Modified.

**HABEAS CORPUS:** Under the old statute, if a habeas corpus was returnable forthwith, twenty-four hours was allowed for every twenty miles between the place of service and the place of return. This has been changed so as to provide that if the place of return is within twenty miles of the place of service, twenty-four hours shall be allowed, and an additional twenty-four hours for every additional one hundred miles.

**(13522). Application of Provisions of Chapter.**

**SEC. 70.** The several provisions contained in this chapter shall be construed to apply, so far as they may be applicable, to every writ of habeas corpus authorized to be issued by any statute of this state.

**HISTORY:** Re-enacts and supersedes Sec. 69, R. S. '46, Ch. 134, being C. L. '57, (5272); C. L. '71, (7055); How. 8616; C. L. '97, (9920), though such section was not expressly repealed by this act. Unchanged.

**(13523). When Prisoners in County Jail Removable.**

**SEC. 71.** No prisoner detained in any county jail, awaiting or pending trial or sentence upon any criminal charge, shall be removed therefrom by any writ of habeas corpus, unless such writ shall have been issued by the supreme court, or by the circuit court of the same county, or shall be made returnable before it.

**HISTORY:** Re-enacts and supersedes Sec. 24, R. S. '46, Ch. 171, being C. L. '57, (6152); C. L. '71, (8041); How. 9657; C. L. '97, (2673). Unchanged.

## CHAPTER XXXVIII.

### OF INFORMATIONS IN THE NATURE OF A QUO WARRANTO, AND IN CERTAIN OTHER CASES.

#### (13524). Informations Filed by Attorney General Without Leave.

SECTION 1. Any information in the nature of a quo warranto may be filed in the supreme court, either in term time or vacation, by the attorney general, against individuals, upon his own relation, or upon the relation of any private party, and without applying to such court for leave, in either of the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state; or any office in any corporation created by the authority of this state;

2. Whenever any public officer, civil or military, shall have done or suffered any act which, by the provisions of law, shall work a forfeiture of his office;

3. When any association, or number of persons shall act as a corporation within this state, without being legally incorporated.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 136, being C. L. '57, (5291); C. L. '71. (7074); How. 8635; C. L. '97, (9939). Unchanged.

CONSTITUTIONALITY: See Const. VII. 4.

QUO WARRANTO: Leave to file an information is not required; and the attorney general may file one in behalf of a claimant to an office without the latter's consent. *People v. Knight*, 13 Mich. 230; *People v. Hartwell*, 12 Mich. 522. But the court formerly had discretion as to granting leave. *People v. Tisdale*, 1 Doug. 61. The attorney general has control of the information on the part of the people; notices of hearing must come from him, and no stipulation without his signature will be considered. *People v. Pratt*, 14 Mich. 333; 15 Mich. 184; *People v. Molitor*, 23 Mich. 341; 26 Mich. 450. *Mandamus* will lie to compel the attorney general to act. *Fuller v. Atty. Gen.* 98 Mich. 96.

The attorney general in the exercise of a proper discretion may decline to institute quo warranto proceedings. *Phillips v. Atty. Gen.*, 167 Mich. 687; *Pound v. Atty. Gen.*, 119 Mich. 530. *Mandamus* should not be resorted to when there is an adequate remedy by information in the nature of a quo warranto. *Lochance v. County Canvassers*, 157 Mich. 682. Ordinarily proceedings to try title to a public office cannot be brought after the term has expired, or when it is so nearly expired that the inquiry would be of no effect. *Osterhous v. Van-*

Duren, 168 Mich. 467. But an action commenced during the term of office may be prosecuted to judgment after the expiration of the term for the recovery of damages or costs. *Id.* Application of rules of court. *Schattler v. Wayne Circuit Judge*, 109 Mich. 567. See *People ex rel Ward v. Green*, 116 Mich. 505.

**SUBDIVISION 1: Public office.** *People v. Cicott*, 15 Mich. 326; *Farrington v. Turner*, 53 Mich. 27. Drawing lots for an office, as prescribed by law, does not preclude an inquiry by the attorney general on the relation of the losing party. *Keeler v. Robertson*, 27 Mich. 116. See *Evans v. Sutherland*, 41 Mich. 177. Lies against persons claiming to act as officers of a township not legally organized. *Scraftford v. Gladwin county Supervisors*, 41 Mich. 647. But not against an alleged township, whose organization is invalid on the face of the record. *Id.* The incumbent of a municipal office created by statute, elected or appointed in the manner therein prescribed, having a definite term fixed by statute and exercising functions derived from the charter as well as those derived from the municipal by-laws, must be deemed a public officer, within the meaning of this statute. *Ellis v. Lennon*, 86 Mich. 471. And an information will lie against one acting as alderman of a ward illegally constituted. *People v. Holihan*, 29 Mich. 116. Also to test the authority for holding and exercising the office of county superintendent of the poor. *Atty. Gen. v. James*, 73 Mich. 236.

An information will not be dismissed because the office has expired since it was filed. To oust the incumbent is not the only object of the proceeding, but, under the statute, if he is found guilty of intrusion, a fine may be imposed and costs recovered; and the relator, if found entitled to the office, may recover damages. *People v. Hartwell*, 12 Mich. 522. Whether an information lies in the case of any office not created by the state, *quaere*. *Throop v. Langdon*, 40 Mich. 673. The office of deacon in a church is a purely ecclesiastical office, not created or expressly authorized by state law, but created by an unincorporated ecclesiastical body and filled by election by a body which possesses no corporate powers or functions. Over the office and the election the state courts have no authority whatever. *Atty. Gen. v. Geerlings*, 55 Mich. 566-7. Corporate office. Where an information is filed for usurpation of office in a corporation, the existence of the corporation is a jurisdictional fact which must be averred unless judicially known, and the nature and duties of the office must be so described as to show whether it is such an office as comes within the purview of the law relative to the usurpation of franchises. *People v. DeMill*, 15 Mich. 164. Quo warranto is the usual method of settling questions of title to office and it is important that unnecessary delays should be avoided, that the term of office be not permitted to expire pending the law's delay. *Fuller v. Atty. Gen.* 98 Mich. 109. See *Atty. Gen. v. May*, 97 Mich. 568; *Frey v. Michie*, 68 Mich. 327. For further illustrative cases see *Atty. Gen. v. Jochim*, 99 Mich. 358; *Atty. Gen. v. Berry*, 99 Mich. 359; *Atty. Gen. v. Hambitzer*, 99 Mich. 380; *Atty. Gen. v. Parsell*, 99 v. 381; *Johnson v. Casnovia Canvassers*, 101 Mich. 193; *Bragdon v. Navarre*, 102 Mich. 269; *Atty. Gen. v. Glaser*, 102 Mich. 396, 405.

**SUBDIVISION 3: Mason v. Perkins**, 73 Mich. 313. This section applies only to cases where it is claimed that a number of persons assume to act as a corporation, within this state, without being legal-



ly incorporated, and such an information may be filed without leave of court. *Atty. Gen. v. Lorman*, 59 Mich. 161. The state cannot be estopped from instituting quo warranto proceedings against a private body on the ground that it has been recognized as a corporation by a municipality. *Atty. Gen. v. Hanchett*, 42 Mich. 436. A joinder in demurrer to a plea of incorporation leaves the legal incorporation of defendants the only question at issue. *Nelson v. McArthur*, 38 Mich. 204. See *Atty. Gen. v. Gay*, 162 Mich. 616.

**RIGHT TO FILE:** When relators show by their petition that they have an interest in the subject matter and seek an adjudication of the questions involved they should be permitted to file an information in the nature of quo warranto to have the right determined, and the matter should not be disposed of on affidavits. *Vertin v. Houghton Circuit Judge*, 195 Mich. 637.

### (13525). Summons.

**SEC. 2.** Whenever any such information shall be filed, a summons shall be issued thereon, which, together with a copy of the information, shall be served and returned in like manner as in personal actions; and the defendant shall appear and plead to such information within fifteen days after such service.

**HISTORY:** New section. Re-enacts in part and supersedes Sec. 2, R. S. '46, Ch. 136, being C. L. '57, (5292); C. L. '71, (7075); How. 8636; C. L. '97, (9940), changed by providing for appearance of defendant within fifteen days after service, instead of entry of appearance by the clerk.

**QUO WARRANTO:** In quo warranto cases, the defendant is required to plead to the information within fifteen days after service of the summons, together with a copy of the information, and the plaintiff is required to file a replication to the plea within fifteen days after service thereof. No other pleadings are allowed. If a suggestion of damages is filed instead of entering a rule to plead, the service of a copy of the suggestion with a notice to plead is required, the same as in ordinary actions. Where substituted service is permissible, the proceedings are the same as in chancery cases.

**PLEA: FORMER RULE:** Formerly after service of the writ the attorney general entered a rule requiring defendant to plead. See *People v. DeMill*, 15 Mich. 161; *Atty. Gen. v. Mich. State Bank*, 2 Doug. 359.

### (13526). Replication.

**SEC. 3.** Within fifteen days after service of such plea, the plaintiff shall file a replication thereto. Such replication shall not contain any new affirmative matters, except it may deny or controvert any affirmative matter set up in such plea, and upon the filing of such replication such cause shall be at issue. No other or further pleadings shall be allowed

but the court shall have the like power of amending pleadings, as in other cases.

**HISTORY:** New section.

See note to preceding section under black letter title.

**(13527). What May be Set Forth in Certain Cases.**

**SEC. 4.** Whenever any such information shall be filed against any person for usurping any office, the attorney general, in addition to the other matters required to be set forth in the information, may also set forth therein the name of the person rightfully entitled to such office, with an averment of his right thereto.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 136, being C. L. '57, (5293); C. L. '71, (7076); How. 8637; C. L. '97, (9941). Unchanged.

**INFORMATION:** For usurping, etc., office, requisites of. *Larke v. Crawford*, 28 Mich. 88; *People v. DeMill*, 15 Mich. 164; *People v. Miller*, 15 Mich. 354. And when the office is claimed by another, the information may be so framed as to try the right of such person to the office. *People v. Hartwell*, 12 Mich. 522; *People v. Knight*, 13 Mich. 231. It is not necessary in such cases for the relator to set forth his title to the office. *People v. Miles*, 2 Mich. 348. It is not necessary to set forth in the information the facts which would negative the respondent's title to the office. *Larke v. Crawford*, 28 Mich. 89. It is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers to show by what warrant they do so; and when the defendants set forth their claims by plea, the attorney general may reply and show the special grounds he relies on. *People v. River Raisin & L. E. R. Co.*, 12 Mich. 394-5.

**RESPONDENT'S PLEA:** He may deny that he holds or claims to hold the office. Such a plea is a disclaimer and no controversy of fact can arise upon it, beyond the simple question of his exercise of the office. If he does not disclaim he must justify, and by a plea of justification he is bound to show all the facts necessary to establish his lawful right to hold the office. *Larke v. Crawford*, 28 Mich. 89. See *People v. Miles*, 2 Mich. 350; *People v. Mayworm*, 5 Mich. 146; *People v. VanCleve*, 1 Mich. 365; *People v. River Raisin & L. E. R. Co.*, 12 Mich. 398. Admissions in respondent's plea are conclusive against him. *People v. Molitor*, 23 Mich. 341. Conclusion of plea. *People v. Hartwell*, 12 Mich. 525; *Larke v. Crawford*, 28 Mich. 89.

**ISSUE:** Upon replication. *Larke v. Crawford*, 28 Mich. 89; *People v. Miles*, 2 Mich. 350; *People v. River Raisin & L. E. R. Co.*, 12 Mich. 394-5, 397; *People v. Pratt*, 16 Mich. 65. See *Atty. Gen. v. Page*, 38, 286; *Atty. Gen. v. May*, 97 Mich. 573; *People v. Müller*, 15 Mich. 354.

**TRIAL:** Place of, *People v. Cicott*, 15 Mich. 326. As soon as the parties have come to an issue on the facts, it is to be tried before a jury like any other common law issue. *Larke v. Crawford*, 28 Mich. 89. The burden of proof is on respondent to justify his own title.

Keeler v. Robertson, 27 Mich. 116; Larke v. Crawford, 28 Mich. 89. He must show the continued existence of every qualification necessary to the enjoyment of the office; he must make out an undoubted case. *People v. Mayworm*, 5 Mich. 148. The relator's title is a collateral issue; disproving respondent's title does not prove his. *People v. Miles*, 2 Mich. 349; *People v. Connor*, 13 Mich. 238; *People v. Knight*, 13 Mich. 230; *People v. Molitor*, 23 Mich. 343; *Keeler v. Robertson*, 27 Mich. 116.

**(13528). Judgment.**

SEC. 5. In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so entitled; or only upon the right of the defendant, as justice shall require.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 136, being C. L. '57, (5294); C. L. '71, (7077); How 8638; C. L. '97, (9942). Unchanged.

JUDGMENT: If the issue is determined against the defendant, and if it is a necessary inference from this judgment and the facts upon which it is based, that the person alleged to be entitled to the office, the defendant has usurped in law and in fact is so, the court is authorized, from considerations of public policy quite apparent, to affirm his right by a direct adjudication. *People v. Miles*, 2 Mich. 350; *People v. Knight*, 13 Mich. 231. Upon the default of defendant, the court can give a judgment of ouster, but cannot determine the right of the relator to the office. *People v. Connor*, 13 Mich. 238. No judgment can be rendered for the relator, unless, upon the facts lawfully established in the case, his right necessarily appears from the finding. *People v. Molitor*, 23 Mich. 343. As to the sufficiency of the verdict on a jury trial. *People v. Doesburg*, 17 Mich. 135. And of the findings upon a trial by the court. *Cooley v. Ashley*, 43 Mich. 458. See *People ex. rel Williams v. Cicott*, 15 Mich. 327.

**(13529). Proceedings on Judgment for Relator.**

SEC. 6. If judgment be rendered upon the right of the person so averred to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing any official bond which may be required by law, to take upon him the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in such information, all the books and papers in his custody or within his power, belonging to such office.

HISTORY: Re-enacts Sec. 5, R. S. '46, Ch. 136, being C. L. '57, (5295); C. L. '71, (7078); How. 8639; C. L. '97, (9943). Unchanged.

CONSTRUED: *People v. Cicott*, 15 Mich. 327. He may qualify after obtaining a judgment and establishing his right to the office, although the statutory time for doing so has passed. *People v. Mayworm*, 5 Mich. 146, 150; *People v. Miller*, 16 Mich. 56; *People v. Miller*, 24 Mich. 460. Upon a judgment of a motion from office, the party removed is divested of all official authority and excluded from

office, so long as the judgment remains in force. When judgment is rendered for relator, he needs no writ to invest him with the office. Under this section he is entitled to take upon himself the execution of the office. *People v. Stephenson*, 98 Mich. 218-9.

**(13530). Penalty for Refusal to Deliver Books.**

SEC. 7. If such defendant shall refuse or neglect to deliver over any such books or papers, pursuant to such demand, he shall be deemed guilty of a misdemeanor; and the like proceedings shall be had, and with like effect, to compel the delivery of such books and papers, as are prescribed in the next chapter.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 136, being C. L. '57, (5296); C. L. '71, (7079); How. 8640; C. L. '97, (9944), changing the phraseology of the last clause in referring to the following chapter. Modified only as to phraseology.

**(13531). Suggestions of Damages.**

SEC. 8. If judgment be rendered upon the right of the person so averred to be entitled, in favor of such person, he may, at any time within one year after the rendering of such judgment, make and file a suggestion, that he has sustained damages to a certain amount, by reason of the usurpation by the defendant, of the office from which such defendant has been evicted, and praying judgment therefor.

HISTORY: Re-enacts Sec. 7, R. S. '46, Ch. 136, being C. L. '57, (5297); C. L. '71, (7080); How. 8641; C. L. '97, (9945). Unchanged.

SUGGESTION OF DAMAGES: *People v. Miles*, 2 Mich. 350; *People v. Hartwell*, 12 Mich. 522; *People v. Clcott*, 15 Mich. 327. He is entitled to recover the entire salary of the office for the period for which he was kept out of it, without any deduction for the services of the incumbent or for what he may have earned himself while ousted. *People v. Miller*, 24 Mich. 458; *Comstock v. Grand Rapids*, 40 Mich. 399. The statute having established the form of pleadings on a suggestion of damages, the supreme court will not prescribe any other. *People v. Sackett*, 15 Mich. 315.

**(13532). Suggestion Deemed Continuance.**

SEC. 9. Such suggestion shall be filed, and shall be deemed a continuation of the cause; it shall be served on the defendant, or his attorney, with a notice to plead thereto, in the same manner as upon filing a declaration in personal actions.

HISTORY: New section. Re-enacts in part and supersedes Sec. 8, R. S. '46, Ch. 136, being C. L. '57, (5298); C. L. '71, (7081); How. 8642; C. L. '97, (9946). Modified as to proceedings.

See note to Section 2 under black letter title.  
CONSTRUED: *People v. Cicott*, 15 Mich. 327.

(13533). **Plea to Suggestion.**

SEC. 10. The defendant may plead the general issue to such suggestion, which shall be, in substance, the same as in personal actions; and on trial of any such issue, the plaintiff therein shall be entitled to recover the damages which he may have sustained by reason of the usurpation.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 136, being C. L. '57, (5299); C. L. '71, (7082); How. 8643; C. L. '97, (9947). Unchanged.

(13534). **Determination of Issues.**

SEC. 11. All issues of fact or of law, that shall be joined between the parties, shall be tried and determined in the supreme court, or in the circuit court of such county as the supreme court may by special rule direct, and execution may issue on any judgment recovered on such trial as in other cases.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 136, being C. L. 57, (5300); C. L. '71, (7083); How. 8644; C. L. '97, (9948). Unchanged.

TRIAL OF ISSUE: The "issues" referred to in this section are such as arise on the question of damages for the detention of the office and not to those relating to the office itself. The "parties" are the relator, as plaintiff, and the defendant mentioned in the preceding section. The word "execution" is understood to refer to the writ by which damages or costs or both are collected. *People v. Cicott*, 15 Mich. 328. As to where the issue will be sent for trial. *Id.* The parties cannot be deprived of a jury against their consent. *People v. Doesburg*, 16 Mich. 133. Review by supreme court. *People v. Sackett*, 14 Mich. 243. A new trial may be granted on the same grounds and upon the same showing, as in civil cases generally. *Id.* What amounts to a mistrial. *People v. Doesburg*, 17 Mich. 135. Though the issue is sent down for trial the case still continues to be an original one in the supreme court. *Keeler v. Robertson*, 27 Mich. 116. Notice of hearing. *People v. Kopplekom*, 16 Mich. 61.

(13535). **Assessment of Damages on Default.**

SEC. 12. If no issue of fact be joined upon such suggestion, or if judgment be rendered against the defendant by default, or otherwise, an order may be entered that such damages be assessed at a circuit court, to be held in any county of this state as in other cases.

HISTORY: New section. Re-enacts in part and supersedes Sec. 11, R. S. '46, Ch. 136, being C. L. '57, (5301); C. L. '71, (7084); How.

8645; C. L. '97, (9949). Modified, by providing for assessment of damages.

(13536). Information against Corporations.

SEC. 13. An information in the nature of a quo warranto may also be filed by the attorney general, upon his own relation, or upon the relation of any private party, on leave granted, against any corporate body, whenever such corporation shall:

1. Offend against any of the provisions of the act or acts, creating, offering, or renewing such corporation; or

2. Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or

3. Whenever it shall have forfeited its privileges and franchises by non-user; or

4. Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or

5. Whenever it shall exercise any franchise or privilege not conferred upon it by law;

and it shall be the duty of the attorney general, whenever he shall have good reason to believe that the same can be established by proof, to file such information in every case of public interest; and also, in every other case in which satisfactory security shall be given to indemnify the people of this state against all costs and expenses to be incurred thereby.

**HISTORY:** This section re-enacts Sec. 12, R. S. '46, Ch. 136, being C. L. '57, (5302); C. L. '71, (7085); How. 8646; C. L. '97, (9950). Unchanged.

**APPLICATION:** The application should be so clear and positive in its statements of facts as to make out a clear case of right. *Boucha v. Alger* Circuit Judge, 159 Mich. 611. Granting leave to file an information in the nature of a quo warranto is discretionary. *Id.* Failure to obtain leave of court to file an information is but an irregularity and the question is waived by pleading issuably to the information. *Atty. Gen. v. A. Booth & Co.*, 143 Mich. 97.

**AGAINST CORPORATIONS:** As to the application of this section and the succeeding sections in the settlement of questions between contending claimants to municipal offices and between municipal corporations, see *Detroit v. Board of Public Works*, 23 Mich. 546, 552. Leave of the court must first be obtained in cases arising under these sections. *Atty. Gen. v. Lorman*, 59 Mich. 162; *Atty. Gen. v. Erie & K. R. R. Co.*, 55 Mich. 25. Discretion of the attorney general. *Yates v. Atty. Gen.*, 41 Mich. 728; *Coon v. Atty. Gen.*, 42 Mich. 65. Where, by its charter, a bank is located in one county, and it establishes an agency in another county, to receive deposits and buy and sell exchange, it thereby violates its charter. *People v. Oakland Co. Bank*,

1 Doug. 282; Atty. Gen. v. Oakland Co. Bank, Walk. 90. See *People v. River Raisin & L. E. R. R. Co.*, 12 Mich. 389; *Coon v. Plymouth P. R. Co.*, 31 Mich. 178; 32 Mich. 248; *People v. Wayland Wood Mfg. Co.*, 33 Mich. 413; *Maybury v. Mutual Gas Light Co.*, 38 Mich. 154; *People v. Every*, 38 Mich. 405; *Nelson v. McArthur*, 38 Mich. 204; *Scrafford v. Gladwin County Supervisors*, 41 Mich. 647; *Mayor v. Park Commissioners*, 44 Mich. 602; Atty. Gen. v. Ry. Co., 96 Mich. 65.

**QUO WARRANTO:** Is a proper remedy to inquire into the right of a foreign corporation to do business in this state. Atty. Gen. v. A. Booth & Co., 143 Mich. 97. See *People v. Sticky Fly Paper Co.*, 144 Mich. 229.

**SUBDIVISION 5:** See *People v. Mich. Sanitarium Assn.*, 151 Mich. 463.

**(13537). Who to Grant Leave.**

SEC. 14. Leave to file such information may be granted by the supreme court in term time, or by any justice thereof, but by no other officer, upon the application of the attorney general in vacation, and such court or justice may, in their discretion, direct notice of such application to be given to such corporation or its officers, previous to granting such leave, and may hear such corporation in opposition thereto.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 136, being C. L. '57, (5303); C. L. '71, (7086); How. 8647; C. L. '97, (9951). Unchanged.

**CITED:** Atty. Gen. v. Lorman, 59 Mich. 162; *People v. Detroit, G. H. & M. Ry. Co.*, 149 Mich. 123.

**(13538). Writ of Summons.**

SEC. 15. Upon such leave being granted and endorsed upon the information, under the hand of the clerk of the court, or of the justice granting the same the attorney general may forthwith file the same, and thereupon may issue a writ of summons against such corporation, commanding the sheriff to summon such corporation to appear in the said court, and to answer the said information.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 136, being C. L. '57, (5304); C. L. '71, (7087); How. 8648; C. L. '97, (9952). Unchanged.

**(13539). When Summons Not Necessary.**

SEC. 16. But when such corporation shall appear by counsel pursuant to the notice above authorized to be given, and shall be heard in opposition to granting such leave, the court or justice granting leave may also direct a rule to be entered requiring the defendants to appear and plead to such information within fifteen days after service of a copy thereof,

and notice of said rule; and in such case it shall not be necessary to issue a writ of summons.

**HISTORY:** Re-enacts Sec. 15, R. S. '46, Ch. 136, being C. L. '57, (5305); C. L. '71, (7088); How. 8649; C. L. '97, (9953); changing "twenty days" to "fifteen days." Modified only as to time.

**(13540). Proceedings Upon Return Not Served.**

**SEC. 17.** Whenever any such writ shall be returned not served, by reason of the defendants, or the officers of the defendants not being found, the like proceedings shall thereupon be had as in the case of absent, concealed and non-resident defendants in chancery cases, and default may be filed or entered as in other cases of service by publication.

**HISTORY:** New section: Re-enacts in part and supersedes Secs. 17 and 18, R. S. '46, Ch. 136, being C. L. '57, (5307)-(5308); C. L. '71, (7090)-(7091); How. 8651-2; C. L. '97, (9955)-(9956). Changed, manner of service, where defendant not found.

See note to Section 2 under black letter title.

**CONSTRUED:** In case of failure to obtain service and resort is had to advertisement, defendant is not entitled, on appearance to a copy of the information. *People v. Miller*, 15 Mich. 354.

**(13541). Information Against Several Persons.**

**SEC. 18.** When several persons claim to be entitled to the same office or franchise, one information may be filed against all such persons in order to try their respective rights to such office or franchise.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 136, being C. L. '57, (5309); C. L. '71, (7902); How. 8653; C. L. '97, (9957). Unchanged.

**CONSTRUED:** *People v. Knight*, 13 Mich. 231.

**(13542). Judgment on Conviction.**

**SEC. 19.** Whenever any defendant, whether a natural person or a corporation, against whom an information in the nature of a quo warranto shall have been exhibited, shall be found or adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be ousted, and altogether excluded from such office, franchise or privilege; and also, that the attorney general, or the relator, if there be one, recover his costs against such defendant.

**HISTORY:** Re-enacts Sec. 21, R. S. '46, Ch. 136, being C. L. '57, (5311); C. L. '71, (7094); How. 8655; C. L. '97, (9959). Unchanged.

**CONSTRUED:** Judgment of ouster and costs. *People v. Hartwell*,



12 Mich. 522; *People v. Connor*, 13 Mich. 238; *People v. Molitor*, 23 Mich. 341; *People v. Denton*, 35 Mich. 305; *Atty. Gen. v. Lorman*, 59 Mich. 161. See *Compilers' Section* (13528) and notes.

**(13543). Court May Impose Fine.**

SEC. 20. The court may also, in its discretion, impose a fine upon any such person or corporation against whom such judgment shall be rendered, not exceeding two thousand dollars; which fine, when collected, shall be paid to the state treasurer, and shall by him be distributed and paid to the several county treasurers to the credit of the several library funds, in the same proportions that the income of the primary school fund was apportioned to the several counties, at the then last apportionment of such school moneys.

**HISTORY:** Re-enacts Sec. 22, R. S. '46, Ch. 136, being C. L. '57, (5312); C. L. '71, (7095); How. 8656; C. L. '97, (9960). See also as to the disposal of fines, penalties, etc., Sec. 40 of Ch. 35, of this act. Unchanged.

**CONSTRUED:** Fine. *People v. Hartwell*, 12 Mich. 522; *People v. Cicott*, 15 Mich. 329; *People v. Miller*, 16 Mich. 205; *Atty. Gen. v. Lorman*, 59 Mich. 161.

**(13544). Judgment Against Corporation.**

SEC. 21. Whenever it shall be found or adjudged that any corporation against which an information in the nature of a quo warranto shall have been filed, has, by any misuser, non-user, or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that such corporation be ousted and altogether excluded from such corporate rights, privileges and franchises, and that the said corporation be dissolved; or, in lieu of such judgment (except in case of such surrender), the court may impose a fine not exceeding ten thousand dollars upon said corporation; but such fine shall not prevent further prosecution for any continuance or repetition of the conduct complained of, to be had on like leave of the court first had and obtained.

**HISTORY:** Re-enacts Sec. 23, R. S. '46, Ch. 136, being C. L. '57, (5313); C. L. '71, (7096); How. 8657; As Am. '87, p. 97, Act 89, Eff. Sept. 28; C. L. '97, (9961). Unchanged.

See note to Section 2 under black letter title.

**FINES AND FORFEITURES:** The judgment in the discretion of the court may be a suspension judgment of ouster with a fine or it may be a simple fine. *Atty. Gen. v. Nat. Cash Register Co.*, 182 Mich. 127. Prior to amendment (see history above) this section gave no range of discretion between fine and forfeiture. *Atty. Gen. v. Erie & K. Ry. Co.*, 55 Mich. 25.

**CITED:** *People v. Sticky Fly Paper Co.*, 144 Mich. 231.

**(13545). Collection of Costs.**

SEC. 22. If judgment be rendered upon any such information against any corporation, or against any persons claiming to be a corporation, the court may cause the costs therein to be collected, by execution against the persons claiming to be a corporation, or by attachment against the directors or other officers of any such corporation.

HISTORY: Re-enacts Sec. 24, R. S. '46, Ch. 136, being C. L. '57, (5314); C. L. '71, (7097); How. 8658; C. L. '97, (9962). Unchanged.

**(13546). Powers of Equity Courts.**

SEC. 23. Whenever any such judgment shall be rendered, any court having equity jurisdiction shall have the same powers to restrain the corporation against which it is rendered; to appoint a receiver of its property and effects; and to take an account and make distribution thereof among its creditors, as in case of the voluntary dissolution of a corporation and it shall be the duty of the attorney general, immediately after the rendering of any such judgment, to institute proceedings for that purpose in said court.

HISTORY: Re-enacts Sec. 25, R. S. '46, Ch. 136, being C. L. '57 (5315); C. L. '71, (7098); How. 8659; C. L. '97, (9963). Unchanged.

**(13547). Record of Judgment to be Filed.**

SEC. 24. Whenever any such judgment shall be rendered against a corporation, a copy of the record of such judgment shall be forthwith filed in the office of the secretary of state; and such secretary shall forthwith cause notice of the substance and effect of such recovery to be published for four successive weeks in some newspaper printed at the seat of government, and in a newspaper printed in the county where the principal office or place of business of such corporation shall be, if a newspaper be there printed.

HISTORY: Re-enacts Sec. 26, R. S. '46, Ch. 136, being C. L. '57, (5316); C. L. '71, (7099); How. 8660; C. L. '97, (9964). Unchanged.

**(13548). Information for Forfeited Property.**

SEC. 25. Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the people of this state, or to any officers, for their use, an information for the recovery of such property alleging the grounds of such forfeiture, may be filed by the attorney general in the circuit



court; upon which the like proceedings and judgment shall be had if the information be to recover personal property as in personal actions, and if to recover real property, as in actions of ejectment.

**HISTORY:** Re-enacts Sec. 27, R. S. '46, Ch. 136, being C. L. '57, (5317); C. L. '71, (7100); How. 8661; C. L. '97, (9965); changing "actions of trover" to "personal actions." Modified, as to form of action.

**(13549). Jurisdiction of Circuit Court.**

**SEC. 26.** An information in the nature of a quo warranto may be filed in the several circuit courts of this state, as well as in the supreme court, and all of the provisions of this chapter shall be applicable to such proceedings in such circuit courts, and all powers conferred upon the several judges of the supreme court by this chapter are hereby conferred upon the judges of the several circuit courts respectively: *Provided*, That no such information shall be filed and allowed by any such circuit court against any judge of the supreme court or any state officer.

**HISTORY:** Re-enacts Sec. 1 of Act 221 of '61, being C. L. '71, (7101); How. 8662; C. L. '97, (9966), making necessary changes of phraseology in reference to this chapter, and omitting the last proviso of the old section. Modified in phraseology and jurisdiction.

**IN CIRCUIT COURTS:** As to the jurisdiction of the circuit courts in the case of writs of quo warranto, see Const., VII, 10, and *McBride v. Grand Rapids Com. Coun.*, 32 Mich. 360. This act vests a qualified jurisdiction in the circuit courts to try titles to office. *Vrooman v. Michie*, 69 Mich. 44-5. Quo warranto proceedings ought generally to be instituted in the circuit court, unless the case is quite exceptional. *Coon v. Att'y Gen.*, 42 Mich. 65. Judges of probate are not within the exception of the first proviso. *Secord v. Foutch*, 44 Mich. 89.

See *Osterhaus v. VanDuren*, 168 Mich. 464; *Boucha v. Alger Circuit Judge*, 159 Mich. 610.

**CITED:** *Pound v. Att'y Gen.*, 119 Mich. 530; *People v. Detroit, G. H. & M. R. Co.*, 149 Mich. 122.

**(13550). By Whom Filed.**

**SEC. 27.** Informations under this chapter may be filed by the prosecuting attorney of the proper county, on his own relation, or that of any citizen of the county, without leave of the court, or, by any citizen of the county by special leave of the court or a judge thereof.

**HISTORY:** Re-enacts Sec. 2 of Act 221 of '61, being C. L. '71,

(7102); As Am. '93, p. 3. Act 1; Imd. Eff. Jan. 31; C. L. '97, (9967), changing "act" to "chapter." Modified, from "act" to "chapter."

**PRIVATE ACTION:** This is the first statutory authority for private action. It was evidently designed to allow the courts to permit suits to determine the private rights of relators, without bringing in the representative of the public and therefore without binding the public by the judgment. *Vrooman v. Michie*, 69 Mich. 45. See, *People ex rel Harrington v. Barnhart*, 206 Mich. 585; *Vertin v. Houghton* Circuit Judge, 195 Mich. 637.

Prior to the amendment of '93, (see history above) the judge at chambers could not grant the necessary leave. *McDonald v. Alcona County Supervisors*, 91 Mich. 461, citing *Eslow v. Albion*, 27 Mich. 4. See *People v. Detroit, G. H. & M. R. Co.*, 149 Mich. 125.

**(13551). Information for Election Frauds.**

**SEC. 28.** A petition may be filed in the circuit court of any county of this state whenever it shall be made to appear that material fraud or error has been committed at any election in such county at which there shall have been submitted any constitutional amendment, question or proposition to the electors of the state or any county, township or municipality thereof.

**HISTORY:** New section.

**FRAUD IN ELECTIONS AND SUBMISSION OF CONSTITUTIONAL AMENDMENTS:** Heretofore no method has been provided by which to review questions of fraud in elections at which constitutional amendments, questions or propositions have been submitted to the electors of the state or of any county, township or municipality. It is now provided that at any time within thirty days after such an election the attorney general or the prosecuting attorney of the proper county on his own relation or on the relation of any citizen without leave or any citizen by special leave of the court or a judge thereof, can institute proceedings analagous to quo warranto proceedings. The petition is to be filed against the municipality wherein such fraud or error is alleged to have been committed.

**(13552). When and by Whom Filed.**

**SEC. 29.** Such petition shall be filed within thirty days after such election by the attorney general or the prosecuting attorney of the proper county on his own relation, or on the relation of any citizen of said county without leave of the court, or by any citizen of the county by special leave of the court or a judge thereof. Such petition shall be filed against the municipality wherein such fraud or error is alleged to have been committed.

**HISTORY:** New section.

See note to Section 28 under black letter title.

**(13553). Proceedings.**

**SEC. 30.** After the filing of such petition the procedure shall conform as near as may be to that provided by law for informations in the nature of quo warranto.

**HISTORY:** New section.

See note to Section 28 under black letter title.

## CHAPTER XXXIX.

### COMPELLING DELIVERY OF OFFICIAL BOOKS AND PAPERS.

#### (13554). Delivery of Books to Successor.

SECTION 1. Whenever any person shall be removed from office, or the term for which he shall have been elected or appointed shall expire, he shall, on demand, deliver over to his successor all the books and papers in his custody as such officer, or in any way appertaining to his office, and every person violating this provision shall be deemed guilty of a misdemeanor.

HISTORY: Re-enacts Sec. 1. R. S. '46, Ch. 133, being C. L. '57, (5195); C. L. '71, (6953); How. 8539; C. L. '97, (9843). Unchanged.

CONSTRUED: Delivery of books and papers can be compelled. *Schneider v. McIvor*, 58 Mich. 511. This section is not adapted to a determination of the rights of contestants to an office. *Murta v. Carr*, 140 Mich. 606. Tests the constitutionality of the act under which the successor is appointed. *Fillmore v. Van Horn*, 129 Mich. 52. *Attorney General v. Lewis*, 151 Mich. 82.

#### (13555). Complaint.

SEC. 2. If any person shall refuse or neglect to deliver over to his successor, any books or papers, as required in the preceding section, such successor may make complaint thereof to any judge of a court of record, or to any circuit court commissioner for the county where the person so refusing shall reside.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 133, being C. L. '57, (5196); C. L. '71, (6954); How. 8540; C. L. '97, (9844). Unchanged.

CONSTRUED: These proceedings are summary and do not apply for determining the right to the office. *Curran v. Norris*, 58 Mich. 514-5. *Certiorari* does not lie to review the proceedings, unless a want of jurisdiction appears, or a gross violation of the statute. *Id.* 516.

In order to invoke the aid of this statute a *de jure* office must exist. *Fillmore v. Van Horn*, 129 Mich. 56.

CITED: *Murta v. Carr*, 140 Mich. 607; *Atty. Gen. v. Lewis*, 151 Mich. 82.

**(13556). Order to Cause.**

SEC. 3. If such officer be satisfied by the oath of the plaintiff and such other testimony as may be offered, that any such books or papers are withheld, he shall grant an order, directing the person so refusing to show cause before him, within a reasonable time, why he should not be compelled to deliver the same.

HISTORY: Re-enacts Sec. 3, R. S. '46, Ch. 133, being C. L. '57, (5197); C. L. '71, (6955); How. 8541; C. L. '97, (9845), changing "complainant" to "plaintiff" and changing "within some short and reasonable time" to "within a reasonable time." Modified, as to phraseology.

CONSTRUED: The officer granting the order must satisfy himself that the person who is alleged to have withheld the books and papers has been removed from office or his term has expired. *Curran v. Norris*, 58 Mich. 514. And ascertain whether the person claiming to be the successor has been by the proper authority declared elected or appointed. *Id.*

**(13557). Hearing.**

SEC. 4. At the time so appointed, or at any other time to which the matter may be adjourned, upon due proof being made of the service of such order, such officer shall proceed to inquire into the matters set forth in the complaint.

HISTORY: Re-enacts Sec. 4, R. S. '46, Ch. 133, being C. L. '57, (5198); C. L. '71, (6956); How. 8542; C. L. '97, (9846). Unchanged.

CONSTRUED: See *Curran v. Norris*, 58 Mich. 514.

**(13558). Proof of Delivery.**

SEC. 5. If the person charged with withholding such books and papers, shall make proof satisfactory to such officer, that he has truly delivered over to his successor all such books and papers in his custody, or appertaining to his office, within his knowledge, all further proceedings before such officer shall cease, and the person complained against shall be discharged.

HISTORY: Re-enacts Sec. 5, R. S. '46, Ch. 133, being C. L. '57, (5199); C. L. '71, (6957); How. 8543; C. L. '97, (9847), changing "affidavit before such officer" to "proof satisfactory to such officer." Modified, only as to phraseology.

**(13559). Commitment Until Delivered.**

SEC. 6. If the person complained against shall not make such satisfactory proof, and it shall appear that any such

books or papers are withheld, the officer before whom such proceedings shall be had shall, by warrant, commit the person so withholding to the jail of the county, there to remain until he shall deliver such books and papers, or be otherwise discharged according to law.

HISTORY: Re-enacts Sec. 6, R. S. '46, Ch. 133, being C. L. '57, (5200); C. L. '71, (6958); How. 8544; C. L. '97, (9848), changing "affidavit" to "satisfactory proof." Modified only as to phraseology.

**(13560). Search Warrant.**

SEC. 7. In the case stated in the last section, if required by the plaintiff, such officer shall also issue his warrant directed to the sheriff or any constable of the county, commanding them, in the day time, to search such places as shall be designated in such warrant, for such books and papers as belonged to the officer so removed, or whose term of office expired, in his official capacity, and which appertained to such office, and seize and bring them before the officer issuing such warrant.

HISTORY: Re-enacts Sec. 7, R. S. '46, Ch. 133, being C. L. '57, (5201); C. L. '71, (6959); How. 8545; C. L. '97, (9849), changing "complainant" to "plaintiff." Unchanged.

**(13561). Proceedings on Return.**

SEC. 8. Upon any books or papers being brought before such officer by virtue of such warrant, he shall inquire and examine whether the same appertain to the office, from which the officer so refusing to deliver was removed, or of which the term expired, and if the same pertain to such office, he shall cause them to be delivered to the plaintiff.

HISTORY: Re-enacts Sec. 8, R. S. '46, Ch. 133, being C. L. '57, (5202); C. L. '71, (6960); How. 8546; C. L. '97, (9850), changing "complainant" to "plaintiff." Unchanged.

**13562). Death or Vacancy.**

SEC. 9. If any person appointed or elected to any office shall die, or his office shall in any way become vacant, and any books or papers belonging or appertaining to such office shall come to the hands of any person, the successor in any such office may, in like manner as hereinbefore prescribed, demand such books or papers from the person having the same in his possession; and if withheld, an order may be obtained,

and the person charged may in like manner make satisfactory proof of the delivery of all such books and papers that ever came to his possession; and in case of omission to make such satisfactory proof, and to deliver up the books and papers so demanded, such person may be committed to jail, and a search warrant may be issued, and the property seized may be delivered to the plaintiff, as hereinbefore prescribed. -

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 133, being C. L. '57, (5203); C. L. '71, (6961); How. 8547; C. L. '97, (9851), changing "complainant" to "plaintiff," and "affidavit" to "satisfactory proof." Modified, only in phraseology.

CITED: Culver v. Armstrong, 77 Mich. 199. See Murta v. Carr, 140 Mich. 607.

## CHAPTER XL.

### THE VOLUNTARY DISSOLUTION OF CORPORATIONS AND WINDING UP OF CORPORATIONS WHOSE TERMS HAVE EXPIRED.

Of the Voluntary Dissolution of Corporations.

#### (13563). Who May Apply for Dissolution.

SECTION 1. Whenever the directors, trustees or other officers having the management of the concerns of any corporation, or the majority of them, shall discover that the stock, property and effects of such corporation have been so far reduced by losses or otherwise, that it will not be able to pay all just demands to which it may be liable, or to afford a reasonable security to those who may deal with such corporation, or whenever such directors, trustees or officers, or a majority of them, shall, for any reason, deem it beneficial to the stockholders that such corporation should be dissolved, they may apply by petition to the court of chancery for the county wherein said corporation is located for a decree dissolving such corporation, pursuant to the provisions of this chapter: *Provided*, That the provisions of this chapter shall not extend to any incorporated library or lyceum society; to any religious corporation; to any incorporated academy or select school not organized for pecuniary profit; nor to the proprietors of any burying ground incorporated under the laws of this state.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 118, being C. L. '57, (4873); C. L. '71, (6586); How. 8174; C. L. '97, (10852), changing the phraseology of the last two clauses in the old section and adding the proviso as above, which proviso follows the provisions of C. L. '97, (9780), the same being Compilers' Section (13603). Unchanged except as to phraseology and the added proviso.

CONSTRUED: For cases construing the provisions of the proviso to this section, see notes to Compilers' Section (13603). A corporation cannot be dissolved by its own act except by proceedings under the provisions of this chapter of the Judicature Act, see *Calkins v. Bumps*, 120 Mich. 342. Receivers appointed under this chapter of the Judicature Act are subject to garnishment. See *Van-Bianchi v. Wayne Circuit Judge*, 124 Mich. 462. A corporation dis-



solved by voluntary proceedings under C. L. '97, Chapter 300, (superseded by this chapter) does not survive for three years after a decree of dissolution within the provisions of Compilers' Section (11335). *Jacobs v. E. Bements' Sons*, 161 Mich. 415. A court of chancery cannot take from the directors of a corporation or vest in a receiver the management and control of the corporate business, except in proceedings under this chapter or under Compilers' Sections (13578) (13603) *Port Huron & Gratiot R. R. Co., v. St. Clair Circuit Judge*, 31 Mich. 456. The difference between the adverse and voluntary proceedings under this chapter of the Judicature Act and the next succeeding chapter explained. *Cady v. Knit Goods Mfg. Co.*, 48 Mich. 133.

The rule in this state has been established since the case of *Town v. Bank*, 2 Doug. 530, that a corporation may deal with its property precisely as an individual and may prefer one creditor over another; and hence its assets do not become a trust fund, for pro rata distribution, until steps are taken under this chapter. *Bank of Montreal v. The J. E. Potts Salt & Lumber Co.*, 90 Mich. 345. See further as to this section, *Calkins v. Angell*, 123 Mich. 78; *Taft v. Kent Circuit Judge*, 129 Mich. 312. See *Travis v. McBride*, 166 Mich. 126. *Taft v. Chapel*, 146 Mich. 115; *In re Angell*, 131 Mich. 345; *Webber v. Hovey*, 108 Mich. 49.

**JUDGMENT CREDITORS:** A creditor who has obtained a judgment in justice's court and taken out an execution thereon, which has been returned unsatisfied, may intervene in the proceedings for dissolution and file a judgment creditor's bill under the statute (Chap. 269, C. L. '97 without transcripts being taken to the circuit court and executions issued thereon. *In re Abbott*, 187 Mich., 229; 22 D. L. N., 625; 153 N. W., 795. The dissolution of a corporation cannot be accomplished either by a sale of its property and franchises to an individual or by the voluntary acts of its officers, except by a proceeding in court under the statute. *Simm v. Bialy Hardware & Supply Co.*, 187 Mich., 375; 22 D. L. N., 700; 153 N. W., 821.

**DISSOLUTION—WHEN:** Where it appears that a corporation is a solvent, prosperous, going concern with a large cash surplus, and the business is not to be discontinued, a petition for dissolution will be denied, on the opposition of minority stockholders. *Paine v. Saulsbury*, 200 Mich. 58.

**CITED:** *Wooster v. Calhoun Circuit Judge*, 150 Mich. 460; *Citizens Sav. Bank v. Globe Brass Works*, 155 Mich. 4.

### (13564). Application.

**SEC. 2.** Every such application shall contain a statement of the reasons which induce the applicants to desire a dissolution of the corporation and there shall be annexed thereto:

1. An inventory of all the estate, both real and personal, in law and equity, of such corporation, and of all the books, vouchers and securities relating thereto;

2. An account of the capital stock of such corporation, specifying the names of the stockholders, their residence when known, the number of shares belonging to each, the amount

paid in upon such shares respectively, and the amount still due thereon;

3. A statement of all incumbrances on the property of such corporation;

4. An account of all the creditors of such corporation and of all engagements entered into by such corporation, which may not have been fully satisfied and canceled, specifying the place of residence of each creditor and of every person to whom such engagements were made, if known, and if not known, the fact to be so stated; the sum owing to each creditor; the nature of each debt or demand; and the true cause and consideration of such indebtedness in each case;

5. An affidavit of the applicants, that the facts stated in such application, accounts, inventories and statements, are full and true, so far as the applicants respectively know, or have the means of knowing.

**HISTORY:** This section merges and re-enacts Sec's 2 and 3, R. S. '46, Ch. 118, being C. L. '57, (4874)-(4875); C. L. '71, (6587)-(6588); How. 8175-6; C. L. '97, (10853)-(10854), changing the phraseology somewhat so as to omit unnecessary words. Unchanged, except as to phraseology.

#### (13565). Order to Show Cause.

**SEC. 3.** Upon such application being filed, an order shall be entered requiring all persons interested in such corporation to show cause, if any they have, why such corporation should not be dissolved, before the court or some circuit court commissioner to be named in such order at some time and place to be therein specified not less than thirty days from the date thereof; and notice of the contents of such order shall be served by mail upon all creditors and stockholders at least thirty days before the date of such hearing, and shall be published once in each week for three weeks successively in such newspaper as the court may direct.

**HISTORY:** New section. Re-enacts in part and supersedes Sec's 4 and 5, R. S. '46, Ch. 118, being C. L. '57, (4876)-(4877); C. L. '71, (6589)-(6590); How. 8177-8; C. L. '97, (10855)-(10856). Changed, as to time and before whom heard.

**VOLUNTARY DISSOLUTION OF CORPORATIONS:** Hearings upon application for the voluntary dissolution of corporations may be had before the court as well as before a circuit court commissioner, at the option of the court granting the order to show cause, and notice of such hearing must be given to all creditors and stockholders by mail at least 30 days before such day of hearing. This is in addition to notice by publication as heretofore required. Pending such

hearing the court may in its discretion appoint a temporary receiver or receivers with such powers as the court may prescribe. Instead of detailed provisions relating to the powers and duties of receivers, reference is had to the provisions of law relating to the powers and duties of assignees under common law assignments and such provisions are made applicable. It is provided, however, that stockholders as well as creditors are entitled to notice of the filing of claims and of such other matters as the court may require and they may with like effect as creditors, request that claims be contested. The court may authorize receivers to continue the business of a corporation for such period, not exceeding one year as the court shall permit.

CITED: C. L. '97, (10855)-(10856) *Taft v. Chapel*, 146 Mich. 117.

#### (13566). Hearing.

SEC. 4. On the day appointed in such order such court or circuit court commissioner shall proceed to hear the allegations and proofs of the parties and shall take testimony in relation thereto, and in case of a circuit court commissioner, shall, with all convenient speed, report the same to the court with a statement of the property, effects, debts, credits, engagements and conditions of such corporation. Upon said hearing before the court or upon the coming in of the report of the circuit court commissioner, if it shall appear to the court that such corporation is insolvent or that for any reason a dissolution thereof will be beneficial to the stockholders and not injurious to the public interest, a decree shall be entered dissolving such corporation and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved and shall cease: *Provided, however,* That pending the hearing on said application the court may, in its discretion, appoint a temporary receiver or receivers with such powers as the court may prescribe.

HISTORY: New section. Re-enacts in part and supersedes Sec's 6, 7 and 8, R. S. '46, Ch. 118, being C. L. '57, (4878)-(4879)-(4880); C. L. '71, (6591)-(6592)-(6593); How. 8179-80-81; C. L. '97, (10857)-(10858)-(10859). Modified as to hearing and control by Court of Assets.

See note to Section 3 under black letter title.

CONSTRUED: A corporation cannot apply in its corporate capacity and name to be put into the custody of a receiver. *Kimball v. Goodburn*, 32 Mich. 10. See *Cady v. Knit Goods Mfg. Co.*, 48 Mich. 136, *Jacobs v. E. Bement's Sons*, 161 Mich. 419. See *Paine v. Saulsbury* 200 Mich. 58.

#### (13567). Appeal.

SEC. 5. Any corporation or person claiming to be aggrieved

ed by any decree or final order of any circuit court in chancery in any proceeding mentioned in this chapter, may appeal therefrom to the supreme court as in other cases.

**HISTORY:** New section. Supersedes Sec. 39, R. S. '46, Ch. 118, As Added '93, p. 42, Act. 40, Imd. Eff. Apr. 25, being C. L. '97, (10890). Changed, as to proceedings for an appeal.

**CONSTRUED:** *Wooster v. Calhoun* Circuit Judge, 150 Mich. 462; *Abbott v. VanZile*, Wayne Circuit Judge, 182 Mich. 75.

Complainant's lien against a boat for an engine and materials supplied was not lost by reason of his failure to state the correct amount due. *Perkins v. The Golden Girl*, 185 Mich., 200; 22 D. L. N., 56; 151 N. W., 660.

### (13568). Bond and Qualification.

SEC. 6. Upon giving bond and qualifying, as the court may direct, such permanent receiver shall be vested with all the estate, real and personal, of such corporation and shall be trustee thereof for the benefit of its creditors and stockholders, and shall have all the powers, authority and remedies of an assignee for an insolvent debtor, and also the power to continue the business of such corporation for such period not exceeding one year as the court shall permit; and so far as they may be applicable, shall be subject to all the duties and obligations of such an assignee, except where other provisions are herein made. The provisions of law regulating common law assignments with reference to sales of property, notice to creditors to prove claims, the proving, contesting and allowing of claims, the making of set-offs, the powers of the court in chancery or judge thereof, the making and filing of accounts, the closing of the estate, the distribution of dividends and the compensation of the receiver, shall apply and be followed except that (a) stockholders as well as creditors shall be given notice of claims filed and may with like effect request that any claim be contested; (b) stockholders shall be given notice of such other matters and in such manner as the court may require; (c) in distributing dividends any surplus remaining after payment of expenses and after creditors are paid in full, shall be distributed among the stockholders according to their respective rights, as determined by the court.

**HISTORY:** New section. This and the following two sections supersede Sec's 9 to 38, R. S. '46, Ch. 118, being C. L. '57, (4881) to (4910) incl.; C. L. '71, (6594) to (6623) incl.; How. 8182 to 8311 incl.; C. L. '97, (10860) to (10889) incl. Changed, as to proceedings.

See note to Section 3 under black letter title.

**CONSTRUED:** The propriety of the appointment as receiver of an insolvent corporation, of any of the directors, trustees, or any other officers of the corporation is recognized. *Covert v. Rogers*, 38 Mich. 368. As to powers and duties of receivers, see *Jacobs v. E. Bement's Sons*, 161 Mich. 415; *Detroit Trust Co. v. Goodrich*, 175 Mich. 168. The statute of limitations begins to run against unpaid stock subscriptions immediately upon the appointment of the receiver. *Webber v. Hovey*, 108 Mich. 49. See *Cady v. Knit Goods Mfg. Co.*, 48 Mich. 137; *In re Angell*, 131 Mich. 347-351.

**(13569). Sales After Application to be Void.**

**SEC. 7.** All sales, assignments, transfers, mortgages and conveyances of any part of the assets of such corporation made after the filing of such application for dissolution, in payment of or as security for any existing or prior debt, and all judgments confessed by such corporation after that time and all subsequent levies or garnishments shall be absolutely void as against the receiver who may be thereafter appointed.

**HISTORY:** New section. See note to Sec. 6, compilers' section (13568). Changed, as to suits and preferences.

**FORMER RULE:** See *Travis v. McBride*, 166 Mich. 126. In *Jacobs v. E. Bement's Sons*, 161 Mich. at p. 419, the Court says: "Section 10865 indicates, as do all the other essential sections, that the corporation does not have control of its defense."

**(13570). Suits by Receiver in Own Name.**

**SEC. 8.** Suits may be brought and carried on by the receiver in his own name and may be continued by his successor or co-receiver. Suits commenced by or against the corporation before the filing of said application shall not abate thereby nor by the decree of dissolution but may be prosecuted or defended by the receiver. The court in which any such action is pending may on motion make any necessary order of substitution or otherwise in the premises.

**HISTORY:** New section. See note to Sec. 6, compilers' section (13568).

See note to Section 3 under black letter title.

**Of the Winding up of Mining and Manufacturing Corporations Whose Charters Have Expired.**

**(13571). How May be Wound Up.**

**SEC. 9.** Any corporation heretofore or hereafter to be organized under the laws of this state for the purpose of carrying on the business of mining, smelting or manufacturing,

under general acts of the legislature authorizing such organization, or under any special act of the legislature organizing such corporation, whose term of existence as fixed by its articles of association or organization or by such special act, and whose further term for winding up its business allowed by the laws of this state has expired or shall expire (no other valid proceedings having been completed, to wind up its corporate affairs), may be wound up and its assets disposed of and distributed pursuant to the provisions of sections forty to forty-six (nine to fifteen, are meant), inclusive of this chapter: *Provided*, That nothing in this chapter contained shall be construed to prevent the reorganization or the extension of the renewal of the corporate term on the part of corporations authorized by law so to act, nor to affect or impair the organization rights of property of any de facto corporation actively carrying on its proper business.

**HISTORY:** Re-enacts section 1 of Act 262, '89, being C. L. '97, (7083), As Am. '05, p. 11, Act 10, Imd. Eff. Mar. 1, changing "act" to "chapter." Act 39 of '95, amended sections 1-8 and repealed sections 9-28 of the original act of '89, and substituted other sections in place of the repealed ones, thus virtually enacting a new law. The old law is How. 4161d7-g4. Changed, from act to chapter, amendment and substitution.

**NOTE:** In the last clause before the proviso above, the section refers to Secs. 40 to 46 incl. of this chapter. This is an error, as this chapter contains only 15 sections. The original draft of this chapter of the Judicature Act, however, contained 46 sections, and in changing and reducing the number of sections this reference was probably overlooked and left unchanged. Those sections in the original draft are sections 9 to 15 inclusive of this chapter.

**CONSTITUTIONALITY:** The original act of '89 (see history above) was sustained in *Brown v. Pontiac Mining Co.*, 105 Mich. 653; Id. 109 Mich. 535.

### (13572). Stockholder May File Bill.

Sec. 10. Any stockholder (whether his title to the stock be legal, equitable, absolute or in trust) in such corporation, or any creditor of such corporation whose demand is in full force and is not barred by any statute of limitations, may file a verified bill in the circuit court in chancery of any county of this state in which any of the real or personal property of such corporation may be situated, for the purpose of winding up the affairs of such corporation and disposing of and distributing its property among the persons entitled thereto, which bills shall set forth in substance:

1. The nature of plaintiff's interest in the property, the

date of organization of the corporation or the date of approval of the special act under which it may have been organized, with the title of such act, as the case may be, its term of corporate existence and a copy of its articles of association, if any, if the same be on file or of record in the office of the secretary of state or county clerk, or if such corporation be organized by special act, then a copy of such special act;

2. A statement of the assets, real and personal, belonging either in law or equity to such corporation, so far as is known to plaintiff;

3. A statement of the amount of capital stock and of the amount thereof paid in, if known, together with the names of stockholders, their residence and the number of shares owned by them as shown in the last report of the officers of the corporation on file in the office of the secretary of state or county clerk, if any such report has been filed and can be found therein, and if there be no such report on file, then the foregoing facts shall be set forth as, and in so far as they may appear, by the articles of association or organization on file in the office of the secretary of state or county clerk, if any such there be, or by the special act of the legislature organizing such corporation: *Provided*, That if the stock books of the corporation are accessible to plaintiff, he shall also state the names of the stockholders, their place of residence, and the number of shares held by each, in so far as in such books they appear;

4. A statement of all incumbrances upon any of the property of the corporation, together with all adverse claims upon the same, with the names and residence of the persons holding or asserting the same, so far as known to plaintiff.

5. A statement of the debts of the corporation, if any, the names and residence of all its creditors, the nature of their demands and the consideration of any such indebtedness, so far as known to plaintiff;

6. If the creditors or owners of the stock of such corporation, or any of them, are unknown to the plaintiff, the bill shall set forth that fact, and the bill shall aver that it is filed, not only on behalf of the plaintiff, but also of all other persons interested in the property of the corporation, whether as stockholders, creditors or otherwise, who may choose to come in as parties plaintiff and share the expense of the proceedings;

7. Such bill shall pray that the affairs of the corporation be wound up and its assets disposed of and distributed, and

may pray for the appointment of a receiver of its property, and may contain any other appropriate averments of fact and pray for any other appropriate relief.

**HISTORY:** Re-enacts and merges Sec. 2 of Act 262 of '89, being C. L. '97, (7084), As Am. '05, p. 11, Act 10, Imd. Eff. Mar. 1; and Sec. 3 of Act 262 of '89, being C. L. '97, (7085), changing "complainant" to "plaintiff." Modified, in phraseology. See *Grimm v. Sec. of State*, 137 Mich. 136, and *Traverse City Gas Co. v. Traverse City*, 130 Mich. 17.

**(13573). Parties Defendant.**

SEC. 11. Such corporation shall be made a party defendant by its corporate name; all persons claiming any incumbencies upon the property thereof, may be parties defendant. It shall not be necessary to make any stockholder or creditor of such corporation, a party defendant.

**HISTORY:** Re-enacts Sec. 4 of Act 262 of '89, being C. L. '97, (7086), eliminating "or owner of the stock or any part thereof." Modified, as regards parties defendant.

**(13574). Process for Appearance.**

SECTION 12. *Upon the filing of such bill, process for appearance may be issued and served and orders of publication in proper cases made and published in the same manner and with like effect as in other chancery cases, and the court or judge thereof may also make an order for the appearance and answer of such corporation, its stockholders and creditors at a future day, therein to be specified, not less than three months from the date of the order. Such order shall, among other things, set forth the general nature and object of the proceeding, describe the property to be affected by it with a particular description of all the real estate, and shall give notice that the bill of complaint will be taken as confessed against said corporation and against all its stockholders and creditors who shall not, in the time therein limited, appear and contest the same. Such order shall be published within twenty days after the date thereof once in each week for six weeks in succession in such newspaper or newspapers as the court may direct, which newspapers shall be specified in the order. Thereupon on filing proof of such publication and after the expiration of the time designated in such order for the appearance of the corporation defendant, its stockholders and creditors, if there shall have been no appearance of such corporation or of any person or persons hereafter mentioned*



*entitled to appear and contest the proceedings in its behalf, an order may be entered taking the bill as confessed against such corporation defendant and against its stockholders and creditors. Within the time fixed by such order of appearance any person or persons who were stockholders in such corporation while it subsisted and who still retain their rights in its property by virtue of having owned stock therein, and any assignee, purchaser, heir, devisee, administrator or executor of such former owner and any creditor or creditors of such corporation, whose claim is subsisting and is not barred by limitation of time, may appear and defend such suit as fully as such corporation might do. All persons so appearing and defending shall plead in the name of the corporation. If there be any other party defendant made by the bill besides such corporation defendant, such other party defendant shall be summoned to answer in the usual manner if process can be served, and if not brought in by publication in the usual manner. The publication of such order for the appearance of such corporation defendant shall be full and complete notice to and service upon such corporation and all persons, natural and artificial, interested in its property because of having been stockholders in such corporation while subsisting, or of having in any manner acquired the rights of such stockholders, or because of being creditors thereof, for all the purposes of this proceeding and to enable the court to order and complete the sale of all its property, and to distribute, according to law, the avails thereof. The subsequent proceedings in such cases shall be the same, so far as applicable, as are provided for in the voluntary dissolution of corporations.*

**HISTORY:** New section. This section supersedes Secs. 6, 7 and 8 of Act 262 of '89, being C. L. '97, (7088)-(7089)-(7090), as amended by Act No. 66, P. A. '17. Modified, as to process for appearance.

**(13575). Appointment of Receiver.**

**SEC. 13.** The court, or the judge thereof, may at any time on proper application of plaintiff, and notice to the proper parties, to be given personally or by publication in such manner as the court or judge thereof may order, appoint a receiver of the property of the corporation.

**HISTORY:** New section. This section re-enacts a part of Sec. 9 of Act 262 of '89, being C. L. '97, (7091). Modified, as to appointment of receiver.

**(13576). Powers and Duties of Receiver.**

**SEC. 14.** Such receiver shall be vested with all the estate, real and personal, of such corporation, and shall, under the direction of the court, proceed to wind up the affairs of such corporation, and distribute its assets among its creditors and stockholders, in the same manner as near as may be, as is provided by law in the case of voluntary dissolution of corporations.

**HISTORY:** New section. Supersedes Secs. 10 to 15 incl. of Act 262 of '89, being C. L. '97, (7092)-(7093)-(7094)-(7095)-(7096)-(7097), and Secs. 17 to 19 incl. Act 262 of '89, being C. L. '97, (7099)-(7100)-(7101); C. L. '97, (7102-4) are repealed as covered by general provisions relating to chancery appeals. Modified, as to powers and duties.

See note to (13563).

**(13577). Proceedings to go on For Another Stockholder When Plaintiff Fails.**

**SEC. 15.** In case the claim of the plaintiff to be a stockholder or creditor of such corporation shall fail or be disproved, the proceeding may go on at the desire and for the benefit of any other stockholder or stockholders, creditor or creditors, who may have appeared in such proceeding, and whose right to continue the same shall be made to appear.

**HISTORY:** This section re-enacts Sec. 16 of Act 262 of '89, being C. L. '97 (7098). Substantially unchanged.

See note to (13563).

## CHAPTER XLI.

### PROCEEDINGS AGAINST CORPORATIONS IN CHANCERY.

#### (13578). Injunctions Against Corporations.

SECTION 1. Upon a bill being filed under the direction of the attorney general, in any court having equity jurisdiction, the court shall have power to restrain by injunction, any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business not authorized by the charter of such corporation; and in the same manner to restrain any individuals from exercising any corporate rights, privileges or franchises, not granted to them by any law of this state.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 117, being C. L. '57, (4847); C. L. '71, (6560); How. 8148; C. L. '97, (9755). Unchanged.

For proceedings against delinquent insurance corporations, see Compilers' Sections (9290) et seq.

As to suits at law or in equity against foreign corporations, see Compilers' Sections (12432) and (12340), subdivision 1, and notes.

CONSTRUED: This act apparently does not deprive equity of jurisdiction in any matters it may possess by virtue of its general powers. *C. H. Little Co. v. Woodward Ave. Cemetery Ass'n.*, 135 Mich. 249; *People v. Mich. Sanitarium & Benevolent Ass'n.*, 151 Mich. 452. Or take away the right to a creditor's bill against a cemetery association. *C. H. Little Co. v. Woodward Ave. Cemetery Ass'n.*, 135 Mich. 249. A court of chancery cannot take from the directors of a corporation, or vest in a receiver the management and control of the corporate business except under the statutes to dissolve the corporation. (This and the next succeeding chapter of the Judicature Act.) *Port Huron & G. Ry. Co. v. St. Clair Circuit Judge*, 31 Mich. 456. Remedy in equity does not preclude proceedings by quo warranto. *People v. Mich. Sanitarium & Benevolent Ass'n.*, 151 Mich. 463. Private contributors to the construction of a railroad have no standing in court under this chapter, but suit must be brought by the proper officers of the state. *Henry v. Ann Arbor R. Co.*, 116 Mich. 314. A bill in equity will lie to restrain a corporation organized for charitable purposes from engaging in business for profit. *People v. Mich. Sanitarium & Benevolent Ass'n.*, 151 Mich. 452. When suit will not lie. *Fuller v. McCormick*, 156 Mich. 521; *Reis v. Applebaum*, 182 Mich. 582. At common law the state granting a charter to a corporation is the only party who can enforce a forfeiture. *Heap v. Heap Mfg. Co.*, 97 Mich. 148; See further as to the construction of this section. *Cady v. Knit Goods Mfg. Co.*, 48 Mich. 135. See also *Strelow v. American Color Co.*, 162 Mich. 711.

**(13579). Issue and Continuance Injunction.**

SEC. 2. Such injunction may be issued before the coming in of the answer, upon satisfactory proof that the defendants complained of have usurped, exercised or claimed, any franchise, privilege, liberty or corporate right not granted to them, and after the coming in of the answer, such injunction may be continued until judgment at law shall have been had.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 117, being C. L. '57, (4848); C. L. '71, (6561); How. 8149; C. L. '97, (9756). Unchanged. See *Henry v. Ann Arbor R. Co.*, 116 Mich. 317.

**(13580). Jurisdiction of Courts Over Officers.**

SEC. 3. The circuit court in chancery within the proper county shall have jurisdiction over directors, managers, trustees, and other officers of corporations, and over any persons who may have held such offices, in any corporation, provided that proceedings are commenced within one year after they have ceased to be such directors, managers, trustees, and other officers:

1. To compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge;

2. To decree and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees, or other officers;

3. To suspend any such trustee or officer from exercising his office whenever it shall appear that he has abused his trust;

4. To remove any such trustee or officer from his office upon proof or conviction of gross misconduct;

5. To direct new elections to be held by the body or board duly authorized for that purpose, to supply any vacancy created by such removal;

6. In case there be no such body or board, or all the members of such board be removed, then to report the same to the governor, who shall be authorized, with the consent of the senate, to fill such vacancies;

7. To set aside all alienations of property made by the trustees or other officers of any corporation contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporations, in cases where the per-

son receiving such alienation knew the purpose for which the same was made; and

8. To restrain and prevent any such alienation in cases where it may be threatened or there may be good reason to apprehend that it is intended to be made.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 117, being C. L. '57, (4849); C. L. '71, (6562); As Am. '79, p. 194, Act 215, Eff. Aug. 30; How. 8150; C. L. '97, (9757), inserting, however, in the first line, "in chancery." Unchanged.

**CONSTRUED:** In the absence of statute, the courts of equity cannot interfere with the action of such officers as have been placed by the corporation in the control of its affairs, unless in excess of their discretion or in case of fraud. *Cicotte v. Anciaux*, 53 Mich. 234; *McMillan v. Miller*, 177 Mich. 515. Failure to pay stock subscriptions not ground for equitable relief. *Fuller v. McCormick*, 156 Mich. 521. Before equity will enforce liability of stockholder for unpaid subscriptions of capital stock, claim must be reduced to judgment and execution returned unsatisfied. *Strelow v. Am. Color Co.*, 162 Mich. 709.

**STOCKHOLDER'S BILL:** Where a majority stockholder reduced the number of directors from five to three—placing his brother on the board with himself and a non-resident stockholder—and at a meeting of the directors at which, besides himself, only his brother was present, the other member of the board having received no legal notice of the meeting, the real estate of the corporation was transferred to him individually, a decree was properly entered setting aside the deed and ordering an accounting on a bill filed. *Shaw v. Hehl*, 189 Mich. 425; 22 D. L. N., 1052; 155 N. W., 419.

**CITED:** *Coxe v. Hart*, 53 Mich. 558; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 393; *Heap v. Heap Mfg. Co.*, 97 Mich. 149; *Mains v. Homer Steel-Fence Co.*, 116 Mich. 538; *Smith v. George T. Smith Mfg. Co.*, 119 Mich. 15.

See also *McKee v. City Garbage Co.*, 140 Mich. 497; *Town v. Duplex Power Car Co.*, 172 Mich. 529.

**TRUSTEE IN BANKRUPTCY:** Has the same rights as a judgment creditor with an execution returned unsatisfied, to file a creditor's bill in this state. *Grand Rapids Trust Co. v. Nichols*, 199 Mich. 133.

#### (13581). Construction of Last Section.

SEC. 4. When any of the visitorial powers enumerated in the preceding section, over any corporation, are or shall be vested, by statute, in any corporate body or public officer, the provisions of that section shall not be construed to divest or impair the powers so vested.

**HISTORY:** Re-enacts Sec. 4, R. S. '46, Ch. 117, being C. L. '57, (4850); C. L. '71, (6563); How. 8151; C. L. '97, (9758). Unchanged.

**CONSTRUED:** *Coxe v. Hart*, 53 Mich. 558. See *McMillan v. Miller*, 177 Mich. 511.

**(13582). How Jurisdiction Exercised.**

SEC. 5. The jurisdiction conferred in the third section of this chapter shall be exercised as in ordinary cases on bill or petition, as the case may require, or as the court may direct, at the instance of the attorney general, prosecuting in behalf of the people of this state, or at the instance of any creditor of such corporation, or at the instance of any director, trustee, or other officer of such corporation having a general superintendence of its concerns, or by any stockholder of such corporation.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 117, being C. L. '57, (4851); C. L. '71, (6564); As Am. '79; p. 195, Act 215, Eff. Aug. 30; How. 8152; C. L. '97, (9759). Unchanged.

**CONSTRUED:** This statute was chiefly, if not solely, designed to protect business corporations having stockholders with pecuniary interests involved in its management. *Cicotte v. Anclaux*, 53 Mich. 235. A "creditor" within the meaning of this section must be a judgment creditor. *McKee v. City Garbage Co.*, 140 Mich. 503. The insolvency of the company is not ground for interference by a stockholder to wind up its affairs. *Fuller v. McCormick*, 156 Mich. 521, citing *Heap v. Heap Mfg. Co.*, 97 Mich. 147. Ordinarily the wrongs to a corporation must be redressed by corporate action. *Robinson v. DeLuxe Motor Car Co.*, 176 Mich. 166. But when fraud has been perpetrated against a corporation and the directors of the company are a party to the fraud, a stockholder can intervene in equity in behalf of the company. *Id.* And the stockholder before bringing suit is excused from making any effort to induce the directors to act. *Id.* See also *Smith v. George T. Smith Mfg. Co.*, 119 Mich. 11; *Coxe v. Hart*, 53 Mich. 558; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 394. See *Shaw v. Hehl*, 189 Mich. 425; 22 D. L. N. 1082; 155 N. W. 419; *Carpenter v. Landman*, 192 Mich. 545.

**(13583). Sequestration of Property.**

SEC. 6. Whenever a judgment at law, or a decree in chancery, shall be obtained against any corporation, incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied in part or in whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the circuit court within the proper county may sequester the stock, property, things in action and effects of such corporation, and may appoint a receiver of the same.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 117, being C. L. '57, (4852); C. L. '71, (6565); How. 8153; C. L. '97, (9760). Unchanged.

**CONSTRUED:** A judgment creditor before seeking equitable relief under this sub-chapter must have an execution returned unsatisfied

*Grenell v. Ferry*, 110 Mich. 264. A stockholder who has not paid his subscriptions to the capital stock may be joined as a defendant in a judgment creditor's bill against the corporation. *Schaub v. Welded-Barrel Co.*, 130 Mich. 608. A suit started by a judgment creditor cannot be discontinued without the consent of intervening creditors who have been made parties to the suit. *Deane v. Kent Circuit Judge*, 155 Mich. 645; See also *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 394; *Smith v. George T. Smith Mfg. Co.*, 119 Mich. 11.

**SEQUESTRATION:** It is not the intention of this section that the condemnation shall precede an adjudication, or the adjudication a hearing. *Cook v. Detroit & M. R. R. Co.*, 45 Mich. 455. After the return of the execution no further proceedings to collect the judgment can be had at law and equity alone can furnish the proper remedy, as sequestration can be had in no other court. *Miner v. Mich. Mut. Ben. Assn.*, 65 Mich. 88-9. A creditor whose debt has not been merged in a judgment has no right to intervene in an answer and file a cross-bill resisting sequestration. *Riverside Iron Works v. Wayne Circuit Judge*, 100 Mich. 124. A judgment creditor who petitions for sequestration gains no advantage over other creditors and any interests which they have in the property or equities sought to be reached are not disturbed by the sequestration. *Id.* For cases involving proceedings under this statute, see *Painter v. Lebanon Land Co.*, 178 Mich. 48. Cited in *In re Abbott*, 187 Mich. 229; 22 D. L. N. 625, 153 N. W. 795.

#### (13584). Distribution Upon Decree.

**SEC. 7.** Upon a final decree on any such petition, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among the creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided in the case of a voluntary dissolution of a corporation.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 117, being C. L. '57, (4853); C. L. '71, (6566); How. 8154; C. L. '97, (9761), changing the phraseology to omit unnecessary words. Unchanged, except in phraseology.

**CONSTRUED:** *Deane v. Kent Circuit Judge*, 155 Mich. 645. Under this statute, it was clearly within the power of the court to order the property sold in order to cause a distribution of the property of the corporation and the proceeds thereof to be made among the fair and honest creditors of such corporation, where creditors proceeded in an orderly and legal manner, by petitioning the court in charge of whose receiver the property was, for permission to intervene. *In re Abbott*, 187 Mich. 229; 22 D. L. N. 625; 153 N. W. 795.

#### (13585). Surrender of Corporate Rights.

**SEC. 8.** Whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes, or

other evidence of debt, it shall be deemed to have surrendered the rights, privileges, and franchises granted by any act of incorporation, or acquired under the laws of this state, and shall be adjudged to be dissolved.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 117, being C. L. '57, (4854); C. L. '71, (6567); As Am. '77, p. 40, Act 52, Eff. Aug. 21; How. 8155; C. L. '97, (9762). Unchanged.

**DISSOLUTION:** The acts mentioned do not ipso facto dissolve the corporation without a judicial proceeding for that purpose. *People v. Bank of Pontiac*, 12 Mich. 527. And until the state chooses to insist upon the forfeiture, no one has a right to question the existence of the corporation, collaterally. *Id.* Nor can a private person institute proceedings to dissolve a corporation. *Heap v. Heap Mfg. Co.*, 97 Mich. 149. Nor a stockholder. *Id.* See also *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. 124; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400. This statute is applicable to corporations chartered before it was passed. *People v. Bank of Pontiac*, 12 Mich. 527. It is well settled that the power to dissolve corporations for cause was always legal and not equitable. *Atty. Gen. v. Bank of Mich.*, Har. 321; *Cady v. Knit Goods Mfg. Co.*, 48 Mich. 135; *Heap v. Heap Mfg. Co.*, 97 Mich. 148; *People v. Sticky Fly Paper Co.*, 144 Mich. 231; *Fuller v. McCormick*, 156 Mich. 521.

#### (13586). Proceedings Against Certain Insolvent Corporations.

**SEC. 9.** Whenever any corporation having banking powers, or having the power to make loans, on pledges or deposits, or authorized by law to make insurances, shall become insolvent or unable to pay its debts, or shall neglect or refuse to pay its notes or evidences of debt on demand, or shall have violated any of the provisions of its act or acts of incorporation, or of any other act binding on such corporation, any court having equity jurisdiction may, by injunction, restrain such corporation and its officers, from exercising any of its corporate rights, privileges or franchises, and from collecting or receiving any debts or demands, and from paying out or in any way transferring or delivering to any person, any of the moneys, property or effects of such corporation, until such court shall otherwise order.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 117, being C. L. '57, (4855); C. L. '71, (6568); How. 8156; C. L. '97, (9763). Unchanged.

**CONSTRUED:** This section and Compilers' Section (13597) have no reference to ordinary business corporations, but refer solely to corporations having banking powers. *McKee v. City Garbage Co.*, 140 Mich. 499; *Atty. Gen. v. Bank of Mich.*, Har. 315; *Atty. Gen. v. Oakland Co. Bank*, Walk. 98.



**(13587). Who May Apply for Injunction.**

SEC. 10. Such injunction may be issued on the application of the attorney general in behalf of the people of this state, or on the application of any creditor or stockholder of such corporation, upon bill or petition, filed for that purpose, and upon due proof of any of the facts in the last section required, to authorize the issuing of the same. Whenever such injunction shall issue against any bank, for any violation of its charter, on the application of any creditor, the court shall proceed to final decree in such case, and adjudge a forfeiture if the proof is sufficient, notwithstanding such creditor may settle with such corporation, and relinquish his claim against said corporation, and in all such cases the attorney general, under the direction of the governor or any creditor, shall have the right to appear and prosecute such suit, and such suit shall not be discontinued if either of them so appear and prosecute such suit to final judgment.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 117, being C. L. '57, (4856); C. L. '71, (6569); How. 8157; C. L. '97, (9764). Unchanged.

CONSTRUED: Barnum v. Bank of Pontiac, Har. 116; Fay v. Erie & K. R. Bank, Har. 194; Heap v. Heap Mfg. Co., 97 Mich. 150.

**(13588). Appointment of Receivers.**

SEC. 11. Upon such application being made, and in any stage of the proceedings thereupon, the court may appoint one or more receivers, to take charge of the property and effects of such corporation, and to collect, sue for and recover the debts and demands that may be due, and the property that may belong to such corporation, who shall, in all respects, be subject to the control of the court.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 117, being C. L. '57, (4857); C. L. '71, (6570); How. 8158; C. L. '97, (9765). Unchanged.

CONSTRUED: When application will be denied. Rumney v. Detroit & M. Cattle Co., 116 Mich. 640.

**(13589). Powers and Duties of Receivers.**

SEC. 12. Such receivers shall possess all the powers and authority conferred, and be subject to all the obligations and duties imposed upon receivers appointed in case of the voluntary dissolution of a corporation.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 117, being C. L. '57, (4858); C. L. '71, (6571); How. 8159; C. L. '97, (9766), omitting "in the next succeeding chapter." Substantially unchanged.

**(13590). When Directors Made Parties.**

Sec. 13. If such application be made by a creditor of any corporation, whose directors or stockholders are made liable by law for the payment of such debt in any event or contingency, such directors or stockholders may be made parties to the bill or petition, either on the filing thereof, or in any subsequent stage of the proceedings, whenever it shall become necessary to enforce such liability.

HISTORY: Re-enacts Sec. 13, R. S. '46, Ch. 117, being C. L. '57, (4859); C. L. '71, (6572); How. 8160; C. L. '97, (9767). Unchanged.

**(13591). Directors Made Parties After Decree.**

Sec. 14. If any creditor of a corporation desires to make such directors or stockholders parties to the suit, after a decree therein against the corporation, he may do so, on filing a supplemental bill against them, founded upon such decree, and if such decree was rendered in a proceeding instituted by the attorney general, such creditor may, on his application, be made plaintiff therein, with or instead of the attorney general, and may, in like manner, make the directors and stockholders sought to be charged, defendants in such suit.

HISTORY: Re-enacts Sec. 14, R. S. '46, Ch. 117, being C. L. '57, (4860); C. L. '71, (6573); How. 8161; C. L. '97, (9768), changing "complainant" to "plaintiff." Substantially unchanged.

**(13592). Bill Against Stockholders.**

Sec. 15. Whenever any creditor of a corporation shall seek to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his bill for that purpose in any court having chancery jurisdiction, which shall possess jurisdiction to enforce such liability.

HISTORY: Re-enacts Sec. 15, R. S. '46, Ch. 117, being C. L. '57, (4861); C. L. '71, (6574); How. 8162; C. L. '97, (9769). Unchanged.  
CITED: *Schaub v. Welded-Barrel Co.*, 130 Mich. 608.

**(13593). Proceedings Thereon.**

Sec. 16. The court shall proceed thereon as in other cases, and when necessary, shall cause an account to be taken of the property and debts due to and from corporation, and shall appoint one or more receivers, who shall possess all the pow-

ers conferred, and be subject to all the obligations imposed on receivers in case of the voluntary dissolution of a corporation.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 117, being C. L. '57, (4862); C. L. '71, (6575); How. 8163; C. L. '97, (9770), omitting the next to the last clause in the old section. Unchanged.

**(13594). Proceedings in Case of Insolvency.**

**SEC. 17.** But if, on the coming in of the answer, or upon the taking of any such account, it shall appear that such corporation is insolvent, and that it has no property or effects to satisfy such creditor, the court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same, by its decree, as in other cases.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 117, being C. L. '57, (4863); C. L. '71, (6576); How. 8164; C. L. '97, (9771). Unchanged.

**(13595). Distribution of Property.**

**SEC. 18.** Upon a final decree being made upon any such application to restrain a corporation, or upon any such bill filed against directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its creditors, in the order and in the proportions prescribed in the case of a voluntary dissolution of a corporation.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 117, being C. L. '57, (4864); C. L. '71, (6577); How. 8165; C. L. '97, (9772), changing the phraseology to omit unnecessary words. Unchanged.

**(13596). Compelling Stockholders to Pay on Stock.**

**SEC. 19.** In all cases in which the directors or other officers of a corporation, or the stockholders thereof, shall have been made parties to a suit in which a decree shall be rendered, if the property of such corporation shall be insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as shall be necessary to satisfy the debts of the company.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 117, being C. L. '57, (4865); C. L. '71, (6578); How. 8166; C. L. '97, (9773). Unchanged. See *Schaub v. Welded-Barrel Co.*, 130 Mich. 608.

**(13597). Enforcing Payment by Directors.**

SEC. 20. If the debts of the company shall remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to decree the amount payable by each, and enforce such decree as in other cases.

HISTORY: Re-enacts Sec. 20, R. S. '46, Ch. 117, being C. L. '57, (4866); C. L. '71, (6579); How. 8167; C. L. '97, (9774). Unchanged.

**(13598). Discovery by Corporation.**

SEC. 21. Upon any application to the court having jurisdiction, in any of the cases provided in this chapter, such court may compel such corporation to discover any stock, property, things in action or effects alleged to belong, or to have belonged to it, the transfer and disposition thereof, and the consideration, and all the circumstances of such disposition.

HISTORY: Re-enacts Sec. 21, R. S. '46, Ch. 117, being C. L. '57, (4867); C. L. '71, (6580); How. 8168; C. L. '97, (9775). Unchanged.

CONSTRUED: *McCreery v. Bay Circuit Judge*, 93 Mich. 466-7.

**(13599). Discovery by Officers.**

SEC. 22. Every officer, agent or stockholder of any corporation, against which proceedings shall be instituted, according to the provisions of this chapter, and every person to whom it shall be alleged that any transfer of any property or effects of such corporation has been made, or in whose possession or control any such property or effects shall be alleged to be, may be compelled, in the discretion of the court, to answer a bill filed to obtain any discovery in the preceding section specified, notwithstanding such answer may expose the corporation of which he is a member to a forfeiture of its corporate rights, or any of them.

HISTORY: Re-enacts Sec. 22, R. S. '46, Ch. 117, being C. L. '57, (4868); C. L. '71, (6581); How. 8169; C. L. '97, (9776). Unchanged.

See *McCreery v. Bay Circuit Judge*, 93 Mich. 467.

**(13600). Compelling of Answers.**

SEC. 23. The answers of the officers and agents of any corporation, shall be evidence against the corporation, in the same manner, and to the same extent as if such answers had been given upon an examination of such officers or agents,

as witnesses in the cause, and such officers or agents may subsequently be examined as witnesses by either party, under the order of the court, but no such answer shall be compelled, unless by special order of the court.

**HISTORY:** Re-enacts Sec. 23, R. S. '46, Ch. 117, being C. L. '57, (4869); C. L. '71, (6582); How. 8170; C. L. '97, (9777). Unchanged. See *McCreery v. Bay Circuit Judge*, 93 Mich. 466-7.

**(13601). Answer Not to be Used on Indictment.**

**SEC. 24.** Neither the answer of any such officer or agent, nor his testimony upon any such subsequent examination, shall be used as evidence upon any indictment, or other criminal prosecution or proceeding against him.

**HISTORY:** Re-enacts Sec. 24, R. S. '46, Ch. 117, being C. L. '57, (4870); C. L. '71, (6583); How. 8171; C. L. '97, (9778). Unchanged.

**(13602). Staying Proceedings at Law.**

**SEC. 25.** Whenever any bill shall be filed, or any application made against any corporation, its directors or other superintending officers, or its stockholders, according to the provisions of this chapter, the court may, by injunction, on the application of either party, and at any stage of the proceedings, restrain all proceedings at law, by any creditor against the defendants in such suit; and whenever it shall appear necessary or proper, may order notice to be published in such manner as the court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the suit, within a reasonable time, not less than six months from the first publication of such order, and in default thereof, to be precluded from all benefit of the decree which shall be made in such suit, and from any distribution which shall be made under such decree.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 117, being C. L. '57, (4871); C. L. '71, (6584); How. 8172; C. L. '97, (9779). Unchanged.

**(13603). Exception of Certain Corporations.**

**SEC. 26.** The provisions of this chapter shall not extend to any incorporated library or lyceum society; to any religious corporation, or any incorporated academy or select school; nor to the proprietors of any burying ground incorporated under the laws of this state.

**HISTORY:** Re-enacts Sec. 26, R. S. '46, Ch. 117, being C. L. '57, 4872; C. L. '71, (6585); How. 8173; C. L. '97, (9780). Unchanged.

**CONSTRUED:** This section apparently is limited to suits brought under this act and this does not deprive equity of any jurisdiction it may have over this class of corporations independent of this statute. *C. H. Little Co. v. Woodward Ave. Cemetery Assn.*; 135 Mich. 249; *People v. Michigan Sanitarium & Benevolent Assn.*, 151 Mich. 452. Equity will compel the payment of subscriptions to the capital stock of a cemetery association where necessary to protect creditors. *C. H. Little Co. v. Woodward Ave. Cemetery Assn.*, 135 Mich. 249. A corporation organized for charitable purposes cannot conduct business for profit. *People v. Michigan Sanitarium & Benevolent Assn.*, 151 Mich. 452. See *Cicotte v. Anciaux*, 53 Mich. 234-4.

## CHAPTER XLII.

### ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

#### (13604). When Assignments to be Void.

SECTION 1. All assignments commonly called common law assignments for the benefit of creditors shall be void unless the same shall be without preferences as between such creditors and shall be of all the property of the assignor not exempt from execution, and the instrument of assignment or a duplicate thereof, an inventory of the assigned property, a list of creditors of the assignor, and a bond for the faithful performance of the trust by the assignee shall be filed in the office of the clerk of the circuit court where said assignor resides, or if he is not a resident of this state, then of the county where the assigned property is principally located, within ten days after the making thereof: *Provided*, That no such assignment shall be effectual to convey the title to the property to the assignee until such bond shall be filed with and approved by said clerk: And *Provided further*, That no attachment or execution levied upon any assigned property of such assignor after such assignment and before the expiration of the time provided herein for filing such bond, shall be valid or create any lien upon such property. Such assignment shall be acknowledged before some officer authorized to take acknowledgments. Such inventory shall be a detailed statement as near as may be of the general description, value and location of all the property and rights assigned, and in cases of persons engaged in business, specifying the original cost of any goods, wares, merchandise, fixtures and furniture. Such list of creditors shall, as far as the assignor can state the same, contain the name and postoffice address of each creditor, the amount due as near as may be over and above all defenses, the actual consideration for the debt, when contracted, and all securities and the value thereof held by each creditor. Such inventory and list of creditors shall be sworn by the assignor to be full, true and correct to the best of his knowledge, information and belief. Such bond shall be to the assignor for the joint and several use and benefit of himself and each, any and all of the creditors of such assignor in a penal sum

at least double the value of the assigned property as shown by such inventory, and conditioned for the prompt and faithful administration of the trust by the assignee and shall be signed by the assignee and sufficient surety or sureties, who shall, under oath indorsed on said bond, testify that they are worth in the aggregate over and above all exemptions, incumbrances and debts, the penal sum of said bond.

**HISTORY:** New section. Re-enacts in part and merges Sec. 1 of Act 198 of '79, being How. 8739; As Am. '89, p. 318, Act 215, Eff. Oct. 2; As Am. '95, p. 249, Act 124, Eff. Aug. 30; C. L. '97, (9539), and Sec. 2, of Act 198 of '79, As Am. '81, p. 391, Act 278, Imd. Eff. June 11; being How. 8740; C. L. '97, (9540), should be (9539). Unchanged.

**INSOLVENT DEBTORS:** Chapter 262, Compiled Laws '97, entitled "Relief of insolvent debtors from their debts"; Chapter 263, Compiled Laws '97, entitled "Relief of insolvent debtors from imprisonment"; Chapter 264, Compiled Laws '97, entitled "General provisions relating to relief of insolvent debtors"; Chapter 265, Compiled Laws '97, entitled "Powers and duties of assignees of insolvents"; have all been repealed. Such statutory law as is retained relating to the powers and duties of assignees is found in Chapter XLII on assignments for the benefit of creditors.

Chapter 266, Compiled Laws '97, entitled "Relief of poor debtors from imprisonment" is retained with change as Chapter XLIII.

**COMMON LAW ASSIGNMENTS:** The law relating to common law assignments has been re-arranged in a more logical order and greatly condensed. A few changes in substance are noted. In case of non-resident assignors, the assignment must be filed in the office of the clerk of the circuit court of the county where the assigned property is principally located, instead of the county where the assignee resides.

Instead of requiring the consent of creditors, the consent of the court is required to the bringing of a chancery suit by the assignee involving less than five hundred dollars.

No power conferred upon the judge can be exercised by a circuit court commissioner, except upon a special reference by the court.

Notice of not less than ten days of the hearing of the petition for an order as to the manner of disposing of the assets shall be given all creditors.

In making proof of claims, if the claim is founded upon an account, an itemized statement thereof must be furnished, and when the claim is founded upon a note or a similar instrument, a copy thereof must be attached and the production of the original may be required by the assignee.

Taxes due the United States or any state, county or municipality are entitled to preference in the distribution of funds.

The provision that debts owing by the assignor as guardian, executor, administrator or trustee be preferred, is stricken out. This, of course, does not prevent the application of the general rule that where trust funds can be traced and identified, they will be applied to the purposes of the trust, but only prevents the application of the general funds of the assignor to the trust purposes.



The provisions of Secs. 9654 to 9660, C. L. '97, relating to concealment, embezzlement or failure to deliver property of the assignor have been eliminated. The procedure by warrant is done away with and the court is authorized to bring any person before him by citation for examination on oath, relating to any matters material to the administration of the estate.

In case of fraud on the part of an assignee, or failure to perform his duties, any interested person may file a bill in chancery for the enforcement of the trust and the court may appoint receivers or assignees to take charge of the assets and execute the trust.

In case of an application for an extension of time within which to close the estate, notice of such application must be given to all creditors.

**CONSTRUED:** The words "common-law assignment for the benefit of creditors" are technical words having a well defined meaning and apply only to general assignments in writing of substantially all the assigned property for the benefit of creditors in which preferences are attempted. *Charles Maloney & Co. v. Goonhue*, 152 Mich. 325.

This statute (C. L. '97, 9539) being in derogation of the common law, will not be extended to embrace cases not within its terms, such as an ordinary assignment to secure a particular creditor. *Neumann v. Calumet & Hecla Mining Co.*, 57 Mich. 106; *The First Natl. Bank of Oshkosh v. First Natl. Bank of Ironwood*, 100 Mich. 495. The purpose of this statute is to put all creditors and their claims on a footing of equality, free from any preferences. *Farwell v. Myers*, 66 Mich. 679; *Dwight v. Scranton, etc., Lumber Co.*, 67 Mich. 512; *Fuller v. Hasbrouck*, 46 Mich. 78; *Commercial Natl. Bank of Detroit v. Mosser*, 57 Mich. 389. This section of the law has no extra-territorial force. It was intended to affect such assignments as are made in this state and was not intended to affect assignments made in other states by the citizens thereof. *Butler v. Wendell*, 57 Mich. 67. The amendment of '89 (see history above), in so far as it provided for the removal of the assignee upon the petition of a majority in number and value of the unsecured creditors was not retroactive in its operation. *Old Natl. Bank v. Joslin*, 81 Mich. 413. This amendment, providing for proceedings by petition for the removal of the assignee, was intended to facilitate proceedings in assignment cases. *Appeal of Geo. T. Smith*, 86 Mich. 159. See criticism on this act in *Warner v. Littlefield*, 89 Mich. 349-50. (C. L. '97, 9539) applies only when the instrument can fairly and legitimately be said to possess all of the essential features of an assignment; and courts should not permit such essentials to be dispensed with or substitute real or supposed equities for them, or unduly construe instruments intended for securities to be assignments. *The First Natl. Bank of Oshkosh v. Natl. Bank of Ironwood*, 100 Mich. 495-6.

A bill of sale cannot be held to have been an assignment under this statute where no bond was given or the bill of sale and an inventory of all the property filed with the clerk. *Youghioghemey & Ohio Coal Co. v. Anderson*, 186 Mich. 349.

**INSOLVENCY:** A person may be insolvent, in the proper signification of that term, although his assets may exceed his liabilities. A person may be said to be insolvent when he is unable to pay his

debts as they mature in the ordinary course of his business. *Munson v. Ellis*, 58 Mich. 335.

**ASSIGNOR:** The assignor need not be insolvent to make his assignment valid. *Munson v. Ellis*, 58 Mich. 331. The creditors are not the only persons interested in an assignment. The assignor has a resulting interest and, except for the statute of '89, would have a right to be heard upon an application for the removal of the trustee whom he has put in charge of his estate. *Old Natl Bank v. Joslin*, 81 Mich. 413.

**ASSIGNEE:** The assignment law regards the assignee as a trustee or representative of the creditors for all purposes auxiliary to the assignment. *Root v. Potter*, 59 Mich. 504; *Sweetzer v. Higby*, 63 Mich. 20; *Brown v. Brabb*, 67 Mich. 24. He cannot renew debts, keep them in force or bind his assignor to pay them. *Parsons v. Clark*, 59 Mich. 414. He cannot continue the business of assignor; nor sell on credit. *Wilhelm v. Byles*, 60 Mich. 561. Nor divest the assigned property of its trust character. *Morrison v. Mayer*, 63 Mich. 245. An insolvent's assignee can attack his assignor's transfers for fraud. *Heineman v. Hart*, 55 Mich. 64. Only the assignee can attack securities or conveyances made by the assignor to third parties and creditors cannot sue. *Angell v. Pickard*, 61 Mich. 574; *Root v. Potter*, 59 Mich. 499. In the absence of evidence to show an actual appropriation of goods, or of money received upon sales, it would be a harsh rule to hold a trustee liable for an assigned stock of goods at their appraised value. *In re Accounting of Harvey Joslin*, 101 Mich. 509. The assignee stands in the place of his assignors and the creditors of his assignors. *Mich. Trust Co. v. Webber*, 109 Mich. 87, and cases cited.

**ASSIGNEE'S TITLE:** A general assignee is not a bona fide purchaser. *Farrington v. Sexton*, 43 Mich. 456; *Lentz v. Ry. Co.*, 53 Mich. 446; *Brown v. Brabb*, 67 Mich. 23. In the absence of fraud and statute regulations he takes only the debtor's rights; and consequently he is affected with claims, liens and equities which exist as against the debtor were he asserting claim to the property. *Brown v. Brabb*, 67 Mich. 22; *Wakeman v. Barrows*, 41 Mich. 363. He cannot claim anything to which his assignor had no right. *Lentz v. F. & P. M. Ry. Co.*, 67 Mich. 444. He cannot question the validity of a recorded mortgage. *Wakeman v. Barrows*, 41 Mich. 363. But the assignor's whole estate, except exemptions, vests in him. *Kinter v. Pickard*, 67 Mich. 125. The assignee is the general owner of the assigned property until his trust is fully performed and then the resulting trust restores to the assignor the general ownership in what is left. *Rodman v. Nathan*, 45 Mich. 607.

**CORPORATIONS:** An insolvent corporation has the right unless prohibited by its charter or by statute to make a general assignment of its property for the benefit of creditors. *Boynton v. Roe*, 114 Mich. 401. And the directors of the corporation may make the assignment in such case without the consent of the stockholders. *Id.* See also as to assignments by corporation. *Conely v. Collins*, 119 Mich. 519.

**EFFECT OF ASSIGNMENT:** As a general rule, the effect of a general assignment by a debtor of his property for the benefit of his creditors is to put an end to the transaction of his business, as ordinarily conducted, and to the ordinary operations of purchase, manufacture

and sale, as effectually as if the assignor were dead and his property had passed to his administrator by operation of law, or to his executor by force of his last will. *Wilhelm v. Byles*, 60 Mich. 567. As a general proposition, the assignor cannot, in the deed of assignment, authorize his assignees to continue and carry on the business either for the benefit of the creditors or for his own benefit; and such attempts to control the discretion of the assignee and the disposition of the property have generally been condemned as fraudulent and void by the courts. *Wilhelm v. Byles*, 60 Mich. 567-8. Nor can the assignee substitute his discretion for that of the assignor and hinder and delay creditors while he carries on the business and speculates upon the chances of making or losing. He may carry on to completion such operations as are necessary for the preservation of the property by finishing of articles in the process of manufacture, but cannot carry on business generally. If the unanimous consent of the creditors was obtained, it might be done, because none would complain; but any creditor not consenting has a right to have the trust enforced according to its terms and spirit. *Wilhelm v. Byles*, 60 Mich. 568-9. An assignment does not affect the rights of the creditor. He may still look to the debtor's general estate for the payment of his debt. The assignment affects the remedy merely. The creditor can no longer proceed according to the usual forms of law to subject his debtor's property to the payment of his debts. Such property has by the assignment become a trust fund, and the creditor's only remedy is to insist upon the due execution of the trust. *Third Natl. Bank v. Haug*, 82 Mich. 611-2. This statute does not by its terms prevent the further continuance of any proceedings at law by a competent court, pending at the time of the assignment. *Barnum Wire & Iron Works v. Speed*, 59 Mich. 277. The assignor's whole estate except exemptions, vests in the assignee under an assignment for the benefit of creditors and is not subject to seizure by any particular creditor. *Kinter v. Pickard*, 67 Mich. 125.

**MORTGAGE OR ASSIGNMENT:** There ought to be and is some underlying principle from which to determine whether an instrument is a chattel mortgage or a common law assignment. If the instrument is a conveyance upon condition, given as a security for a pre-existing debt, and contains no trust in the body of the instrument whereby the property is withdrawn from the right of the mortgagor or others to redeem, who ordinarily have such right in cases of chattel mortgages, or whereby the property is placed beyond the reach of the execution as to any surplus, then the instrument is not an assignment, but a chattel mortgage. But if it conveys the absolute title to a trustee for the benefit of creditors and thus places the property and surplus beyond the reach of creditors, it is a common law assignment. *Warner v. Littlefield*, 89 Mich. 347-8; *The First Natl Bank of Oshkosh v. Natl Bank of Ironwood*, 100 Mich. 495. See *Canfield v. W. J. Gould & Co.*, 115 Mich. 461; *Beckman v. Noble*, 115 Mich. 523.

**REQUISITES:** Of assignment for benefit of creditors under this act. *McCuaig v. City Sav. Bank*, 111 Mich. 356.

**PREFERENCES:** Assignments with preferences for the benefit of creditors are valid instruments at the common law. *Butler v. Wendell*, 57 Mich. 67. Preferences are valid at the common law. *Neumann v. Calumet & H. Mining Co.*, 57 Mich. 106. A debtor may always prefer any of his creditors, so long as it is not done with some

unlawful or forbidden purpose. He may pay any creditor in full, or secure him in full, and no unpreferred creditor can complain that such preference has been made. *Johnson v. Stellwagen*, 67 Mich. 13; *Austin v. First Natl. Bank*, 100 Mich. 620. See *McMorran v. Moore*, 113 Mich. 101, and cases cited. The law does not declare such preferences fraudulent; they are not fraudulent in fact. Preferences are void only in common law assignments because forbidden by statute. The statute inhibits the debtor from preferring a creditor in the instrument. If it is done by another and separate instrument contemporaneous with the assignment, it can be held void only as an evasion of the law by the parties to the instrument. *Dwight v. Scranton & Watson Lumber Co.*, 67 Mich. 513. The law does not avoid honest transfers or securities which are not general assignments. *Rollins v. Van Baalen*, 56 Mich. 615. The assignment law does not avoid dealings previous to the assignment, whether near or remote, which were in no way connected with it in the intention of the parties. The statute only avoids preferences made by the assignment itself, that is, the preferences must be made in separate form, to avoid the effect of the statute in annulling them, if they were included in the assignment itself. *Root v. Potter*, 59 Mich. 507. An honest mortgage is not affected by its proximity to a general assignment. *Root v. Harl*, 62 Mich. 422; *Funke v. Cone*, 65 Mich. 590; *Field v. Fisher*, 65 Mich. 611; *Burnham v. Haskins*, 79 Mich. 39; *Kalamazoo Spring Co. v. Winans, Pratt & Co.*, 106 Mich. 198. A creditor has a right to obtain payment or security in full for his claim against a failing debtor, even though the creditor may know that the debtor is insolvent. He may also be aware that his payment or security will hinder and delay, or even defeat, other creditors and yet such knowledge will not avoid or impair his security taken for an honest preceding indebtedness. *Sweetzer v. Higby*, 63 Mich. 22; citing *Olmstead v. Mattison*, 45 Mich. 617; *Beurmann v. VanBuren*, 44 Mich. 496; *Loomis v. Smith*, 37 Mich. 595; *Jordan v. White*, 38 Mich. 253; *State Bank of Bay City v. Chapelle*, 40 Mich. 447; *Helneman v. Hart*, 55 Mich. 83. See *Natl Bank v. Natl Bank*, 100 Mich. 485. The intent of a mortgagor to evade the provisions relative to preferences, by executing a mortgage to secure a bona fide debt in anticipation of and contemporaneous with the assignment, will not affect the validity of the security, unless the purpose is mutual by the mortgagor and mortgagee. *Dwight v. Scranton & Watson Lumber Co.*, 67 Mich. 513. A husband indebted to his wife may prefer her to his other creditors. *Jordan v. White*, 38 Mich. 253. And a son, his father. *State Bank of Fenton v. Whittle*, 48 Mich. 1. An assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor, by proof of an unlawful preference, or of "any fraud in the matter of such assignment." *Wolf v. Slosson*, 83 Mich. 543; *Coots v. Radford*, 47 Mich. 37. So long as no assignment is in fact made, or what is done does not amount to an assignment, an insolvent may pay or secure any creditor at the expense of others. *Sheldon v. Mann*, 85 Mich. 265. Act 193 of '83 prohibited preferences, but that act was held unconstitutional in *Risser v. Hoyt*, 53 Mich. 185. See *Commercial Natl Bank v. Mosser*, 57 Mich. 388; *Gott v. Hoschna*, 57 Mich. 416; *Sheldon v. Mann*, 85 Mich. 274-5; *Rouse, Hazard & Co. v. Donovan*, 104 Mich. 241. The act of '83 was repealed by act 58 of '85.

**FRAUDULENT ASSIGNMENTS:** A transfer for the benefit of creditors, or by way of security, will not be adjudged fraudulent as a conclusion of law drawn from the frame of the instrument, unless that construction is a necessary result in view of its peculiar shape and scope. Wherever the case will permit it, the court will ascribe an honest purpose and infer a lawful disposition. *Palmer v. Mason*, 42 Mich. 150. The fraudulent character of an assignment cannot depend upon the opinions of the assignors that what they do is not legally fraudulent. If they withhold from the assignment what should be put into it, and if they make gifts or excessive liens on property which should not be thus encumbered or given away, it is a fraud, and their belief that it is not will not save it from the consequences of fraud. *Hubbard v. McNaughton*, 43 Mich. 225. It is fraud to intentionally withhold property which ought to be assigned. Though broad enough in terms to cover any property belonging to the assignor, the assignment is nevertheless invalid if property is secretly kept back from the assignee and used for private purposes. *Farrington v. Sexton*, 43 Mich. 455. A fraudulent assignment is not so absolutely void that the parties may not lose their right of complaint by waiver or acquiescence. They cannot attack it until they have acquired a legal standing in some way, and they may let it stand if they please. *Blake v. Hubbard*, 45 Mich. 5; *Appeal of Geo. T. Smith*, 86 Mich. 157.

Where property is turned over to an assignee to be applied to the payment of debts, and the assignee receives the property in good faith, the fact that the assignors have withheld some insignificant portion of the assets ought not to be conclusive against the trust. *Parsell v. Patterson*, 47 Mich. 507.

**EXEMPT PROPERTY:** Where an assignment for the benefit of creditors limits the transfer to property, "which might be reached by any of the creditors" of the assignee, it sufficiently excludes such property as would be exempt by law. *Chandler v. Jenks*, 50 Mich. 152. Debtors have a right, as against creditors, to do as they please with their exemptions. *Root v. Harl*, 62 Mich. 422. Where an assignment is made of property subject to exemption, and from which the exempt part has not been selected, the exempt interest comes of necessity within the body of the trust, until steps are taken for its separation. Under such circumstances it is the duty of the claimant to take some steps, by demand or otherwise, before the trustee can be put in fault and made liable to an action. *Chipman v. Kellogg*, 60 Mich. 442; *Sheldon v. Rounds*, 40 Mich. 425. An assignment is not void on its face for excepting property exempt from execution without specifying it. A bona fide selection is as practicable here as under a levy. *Smith v. Mitchell*, 12 Mich. 180.

**BOND:** Where an assignee has assumed the trust, his omission to file a bond within ten days does not render the assignment absolutely void, but only voidable, and creditors may proceed by bill in equity for the enforcement of the trust. *Fuller v. Hasbrouck*, 46 Mich. 78; *Commercial Natl Bank v. Mosser*, 57 Mich. 389; *Munson v. Ellis*, 58 Mich. 336. Where the assignee holds the property for the ten days and then instead of filing the bond, relinquishes the trust, equity will compel the assignee to execute the trust. *Pickersgill v. Riker*, 50 Mich. 98. The indorsement of the clerk's approval does not seem necessary to its validity. *Munson v. Ellis*, 58 Mich. 331. As

to the assignee's powers prior to filing the bond. *Sibley v. Prescott Ins. Co.*, 57 Mich. 18. But no property passes to the assignee until the bond is executed, approved and filed. *Beard v. Clippert*, 63 Mich. 716; *Springett v. Colerick*, 67 Mich. 362; *Abbott v. Chaffee*, 83 Mich. 258. See *Munson v. Ellis*, 58 Mich. 334. After the expiration of the time for filing the bond, a creditor has two remedies open to him in case no bond is filed. He may proceed upon the equity side of the court, to have the trust carried out through the intervention of a receiver and the supervisory powers of a court of chancery, or he may, if no other creditor invokes the aid of chancery, proceed to enforce his claim against the property by attachment or execution, as if the attempted assignment had not been made. *Beard v. Clippert*, 63 Mich. 719-20. See *Fuller v. Hasbrouck*, 78 Mich. 82. Making the penalty of the bond less than double the amount of the inventory will not invalidate the assignment. *Munson v. Ellis*, 58 Mich. 331. Where the property assigned is mortgaged, a bond with a penalty double the value of the equity of redemption is sufficient. *Coots v. Radford*, 47 Mich. 40.

**ATTACHMENT OR EXECUTION:** Invalid if levied between the execution of the assignment and the filing of the bond. *Fuller v. Hasbrouck*, 46 Mich. 82; *Coots v. Radford*, 47 Mich. 37. A levy to satisfy a personal tax is also prohibited during the ten days. *Lyon v. Receiver of Taxes*, 52 Mich. 275. For other questions arising out of attachments, etc., see *Commercial Natl Bank v. Mosser*, 57 Mich. 386; *Gott v. Hoschna*, 57 Mich. 413; *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272; *Angell v. Pickard*, 61 Mich. 561; *Bedford v. Penney*, 65 Mich. 667.

See further as to the construction of this section. *Stamp v. Case*, 41 Mich. 267; *Kitttridge v. Washtenaw Circuit Judge*, 80 Mich. 202; *Warner v. Littlefield*, 89 Mich. 334.

Such jurisdiction as the court of equity may have had to entertain a bill filed by creditors of an insolvent to set aside certain proceedings and sales of the assignee for irregularities in his appointment and in sales and for fraud was derived from Ch. 260 C. L. '97 (9539), *supra*, et seq.—providing for the regulation and enforcement of voluntary assignments for the benefit of creditors, and under which the assignment was made and filed: *Gordon v. Sherman*, 178 Mich. 629. In C. L. '97 (9539), *supra*, the words "common law assignment for the benefit of creditors" are technical words having a well defined meaning in the law, in accordance with which the statute must be construed to apply only to general assignments in writing of substantially all the assignor's property for the benefit of creditors in which preferences are attempted. *Charles Moloney & Co. v. Gonthue*, 152 Mich. 325. C. L. '97 (9539), How. 8059 was held not to apply to a transaction where a large number of instruments of different kinds, running to different persons, and executed at different times, and which do not cover all of the debtor's property, are given to secure his debts. *Webber v. Hayes*, 117 Mich. 256. Assignment held void because creating illegal preference, in *Conely v. Collins*, 119 Mich. 519. See *Wood v. Eldredge*, 147 Mich. 554. See also *In re Jones*, 151 Fed. 108.

The purchaser of personal property from an assignee for the benefit of creditors of the assignor under an assignment, which is invalid under Chapter 260, C. L. '97, is liable as garnishee of a creditor of

the assignor, where both sales violate the "Bulk Sales Act," Act No. 223, P. A. '05. *Youghiogheny & Ohio Coal Company v. Anderson*, 186 Mich., 349; 22 D. L. N., 362; 152 N. W., 1025.

(13605). **What to Convey.**

SEC. 2. Such assignment shall be deemed to convey to the assignee all property of the assignor not exempt from execution, and all rights legal or equitable of said assignor. The assignee shall also be trustee of the estate of the debtor for the benefit of his creditors and may recover all property or rights or equities in property which might be recovered by any creditor. When more than one assignee is appointed, the debts and property of the assignor may be collected and received by one of them and when there are more than two assignees, every power and authority of the whole may be exercised by any two of them. The survivor or survivors of any assignees shall have all their powers and rights and all property in the hands of any assignee at the time of his death, removal or incapacity, shall be delivered to the remaining assignee or assignees if there be any, or to the successor of the one so dying, removed or incapacitated, who may demand and sue for the same.

**HISTORY:** New Section. Re-enacts in part and supersedes Sec. 3 of Act 198 of '79, being How. 8741; As Am. '89, p. 318, Act 215, Eff. Oct. 2; As Am. '95, p. 250, Act 124, Eff. Aug. 30; C. L. '97, (9541), and Secs. 1, 3, 4, R. S. '46, Ch. 145, being C. L. '57, (5479)-(5481), (5482); C. L. '71, (7266), (7268), (7269); How. 8843, 8845, 8846; C. L. '97, (9645), (9647), (9648). Modified.

**POWERS OF ASSIGNEE:** The assignee can attack his assignor's transfers for fraud. *Heineman v. Hart*, 55 Mich. 64. And he instead of the creditors is authorized to complain of the assignor's frauds as to them. *Root v. Potter*, 59 Mich. 504. He has the right to recover all property that might have been reached by the creditors if there has been no assignment. *Coots v. Radford*, 47 Mich. 37; *Angell v. Pickard*, 61 Mich. 574; *Sweetzer v. Higby*, 63 Mich. 19; *Brown v. Brabb*, 67 Mich. 24. He alone can pursue property fraudulently disposed of by the assignor to the injury of the creditors. *Scott v. Chambers*, 62 Mich. 538; *Angell v. Pickard*, 61 Mich. 574; *Funke v. Cone*, 65 Mich. 590; *Brown v. Brabb*, 67 Mich. 24. And where, at the time of the assignment, a creditor has any special rights peculiar to himself, which have not become a fixed lien, they are transferred to and must be enforced through the assignee. *Farrell Foundry & Machine Co. v. Preston Nat. Bank*, 93 Mich. 582. Assignees cannot proceed under the statute for the dissolution of an attachment. *Rowe v. Kellogg*, 54 Mich. 208; *Gott v. Hoschna*, 57 Mich. 417. But equity has jurisdiction to remove attachments. *Gott v. Hoschna*, 57 Mich. 418. Creditors only can attack an assignment on account of preferences. *Butler v. Wendell*, 57 Mich. 62. But they

cannot attack fraudulent disposals of property by an assignor, until they have obtained a standing by legal proceedings. *Scott v. Chambers*, 62 Mich. 538. As to the continuance of the assignor's business by the assignee. *Wilhelm v. Byles*, 60 Mich. 561. See *Boynton v. Roe*, 114 Mich. 408; *Splitzley v. Garrison*, 201 Mich. 365.

**(13606). Specific Powers of Assignee.**

SEC. 3. Among other things the said assignee shall have power to:

1. Sue in his own name as such assignee and recover all the estate, debts and things in action belonging or due to such assignor in the manner and with like effect as he might or could have done if an assignment had not been made, but no suit in chancery shall be brought by the assignee involving less than five hundred dollars without the consent of the court.

2. Take into his hands all the estate of such assignor whether delivered to him or afterwards discovered, and all books, vouchers and papers relating to the same;

3. From time to time sell the assets at public auction or at private sale, as herein provided;

4. Redeem all mortgages and conditional contracts or other incumbrances and pledges of personal property; or sell such property subject to such incumbrances, contracts or pledges;

5. Settle all matters and accounts between such assignor and his debtors and creditors, and examine, on oath to be administered by him, any person touching such matters and accounts;

6. Compound with any person indebted to such assignor, under order of said court or judge;

7. Prosecute or defend suits pending in favor of or against said assignor.

HISTORY: New section. Re-enacts in part and supersedes Sec. 7, R. S. '46, Ch. 145, being C. L. '57 (5485); C. L. '71, (7272); How. 8849; C. L. '97, (9651). Modified, as to powers.

See note to Section 1 under black letter title.

CONSTRUED: All claims of an insolvent corporation which are assets as to creditors are assets of the receiver. *Detroit Trust Co. v. Goodrich*, 175 Mich. 174. Dividends paid by an insolvent corporation in fraud of creditors can be recovered from the stockholders. *Id.* But such recovery is barred by the Statute of Limitations after six years where the stockholders are innocent of the fraud, as no express trust is created. *Id.*

**(13607). Appraisement of Property.**

SEC. 4. As soon as practicable after receiving said assign-



ment, the assignees shall cause an appraisement of such property to be made by two disinterested competent persons under oath, and filed with the clerk of the court. Within ten days after completion of the appraisal, the assignee shall apply to the circuit court in chancery or the judge thereof for direction as to the disposition of the assets. Such application shall be by petition, showing what, in the opinion of the assignee, is the most advantageous method of effecting such disposition. Notice of such application of not less than ten days shall be given by mail to all creditors known to the assignee, and proof thereof filed with the clerk prior to such hearing. The assigned property and assets shall be sold at public or at private sale, in one parcel or separately, as said court or judge may direct. At least fourteen days notice of the time and place of any public sale shall be given by publishing the same in a newspaper printed and circulated in the county where the sale shall be made, if there be one, and if not then in such paper as the court shall direct, once in each week for at least two successive weeks prior to said sale and by mailing a copy of the same to all creditors. All sales of personal property shall be for cash, but on sales of real property credit may be given for not exceeding one year and for not more than three-fourths of the purchase money, which shall be secured by mortgage on the property sold.

**HISTORY:** New section. Re-enacts parts of and supersedes Sec. 3 of Act 198 of '79, being How. 8741; As Am. '89, p. 318, Act 215, Eff. Oct. 2; As Am. '95, p. 250, Act 124, Eff. Aug. 30; C. L. '97 (9541); and Sec. 5 of Act 198 of '79, being How. 8743; C. L. '97, (9543); and Sec. 7, R. S. '46, Ch. 145, being C. L. '57, (5485); C. L. '71, (7272); How. 8849; C. L. '97, (9651). Modified, as to duties.

See note to Section 1 under black letter title.

See Gibbs v. Judge, 123 Mich. 616.

#### (13608). Notice to Creditors.

**SEC. 5.** Within ten days after receiving such trust, the assignee shall give notice to all creditors personally or by mail (accompanied by blank proof of claim) requiring them to prove their claims within ninety days thereafter by a proof of claim to be filed with the assignee, or in default thereof, that the assignee will proceed to distribute the estate as soon as practicable without reference to claims not proved when dividends are paid. It shall not be obligatory upon the assignee to receive proofs of claim after the expiration of said ninety day period except upon order of the court, and the court shall not allow any claim by any creditor so notified to

be received after the expiration of one year from the date on which the assignment is filed. Within ten days after the expiration of said ninety day period the assignee shall serve personally or by mail upon each of the creditors a complete list of all creditors who have filed proof of claim giving in each instance the name, postoffice address and amount claimed. After the expiration of twenty days from the time when said notice is given, the assignee shall file all proofs of claim with the clerk of the court accompanied by any notices of contest which he may decide to make.

**HISTORY:** New section. Re-enacts in part and supersedes Sec. 4, of Act 198. of '79; As Am. '81, p. 391, Act. 278, Imd. Eff. June 11; How. 8742; C. L. '97, (9542). Modified, as to time and filing.

**CLAIMS:** The claim for a personal tax stands no other or better chance against the estate of the insolvent than the claim of an individual. *Lyon v. Receiver of Taxes*, 52 Mich. 276. As to contested claims, see *Barnum Wire & Iron Works v. Speed*, 59 Mich. 278; *Farwell v. Myers*, 66 Mich. 678; *Third Nat. Bank v. Haug*, 82 Mich. 615; *Fornbrook Mfg. Co. v. E. T. Barnum Wire & Iron Works*, 63 Mich. 199.

#### (13609). Proofs of Claims to be Sworn.

**SEC. 6.** Each proof of claim must be sworn to and must state the actual amount unpaid and owing the actual consideration thereof, when the same was contracted, when the same has become or will become due, whether any or what securities are held therefor, whether any and what payments have been made thereon, that the sum claimed is justly owing from the assignor to the claimant, and that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than that set forth in such proof. When the claim is founded upon an account an itemized statement thereof shall be given and when the claim is founded upon any note or similar instrument, a copy thereof shall be attached and the production of the original may be required by the assignee.

**HISTORY:** New section. Re-enacts parts of and supersedes Secs. 8 and 9 of Act 198 of '79; As Added '81, p. 392, Act 278, Imd. Eff. June 11, being How. 8746-7; C. L. '97, (9546)-(9547); should be (9545). Modified, as to claims to be proved.

See note to Section 1 under black letter title.

**CONTEST OF CLAIMS:** See note to Compilers' Section (13608). The assignee is the proper person to contest claims, when applied to by creditors interested. *Barnum Wire & Iron Works v. Speed*, 59 Mich. 278-9. The creditors may, in case of his refusal to contest claims, by summary application, obtain an order to compel his

action. *Scott v. Chambers*, 62 Mich. 539; *Sweetzer v. Higby*, 63 Mich. 21; *Funke v. Cone*, 65 Mich. 591. See *Third National Bank v. Haug*, 82 Mich. 614.

LAW SIDE: *Farwell v. Myers*, 59 Mich. 182; *Forncook Mfg. Co. v. E. T. Barnum Wire & Iron Works*, 63 Mich. 199; *Farwell v. Myers*, 66 Mich. 679; *Dunlap v. J. P. Donaldson Co.*, 74 Mich. 291.

**(13610). Assignee May Contest Claims.**

SEC. 7. The assignee may contest any claim. Any creditor desirous of having a claim contested may by writing request the assignee to do so and the service of any such request shall operate to stay the payment of any dividend upon such claim until the further order of the court; or any creditor may petition the court for an order requiring the assignee to contest any claim. The contest of any claim shall be instituted by serving, personally or by mail, a notice upon the claimant stating that such claim will be contested and for what reasons. Upon said proof of claim and proof of such service being filed with the clerk of said court, he shall enter such contest upon the law side of the court as a cause in the name of such creditor against such assignor. The circuit court of such county shall proceed with the trial of said cause in the same manner as in other suits at law and shall have power to cause further pleadings to be filed and to allow new or amended ones as may be deemed necessary. The costs or any part thereof may be awarded to either party as the court may deem just and right under the circumstances. Whenever costs are awarded to the creditor, they shall be taxed and shall be paid by the assignee out of the assets if he has sufficient for that purpose.

HISTORY: Re-enacts Sec. 7 of Act 198 of '79; As Added '81, p. 392, Act 278, Imd. Eff. June 11, being How. 8745; C. L. '97, (9545), making immaterial changes in phraseology and adding the last sentence as above. Modified, only to this extent.

See note to Section 1 under black letter title.

See *Third National Bank v. Haug*, 82 Mich. 614.

**(13611). Set Off of Mutual Debts.**

SEC. 8. In all cases of mutual debts or mutual credits between the estate of an assignor and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid. A set-off or counter claim shall not be allowed in favor of any debtor of the assignor which is not provable against his estate, or which was purchased by or transferred to such debtor after the filing

of the assignment or prior to the filing thereof with a view to such use and with knowledge or notice that such assignor was insolvent.

**HISTORY:** Re-enacts parts of and supersedes Secs. 7, 33 and 34, R. S. '46, Ch. 145, being C. L. '57, (5485), (5511), (5512); C. L. '71, (7272), (7298), (7299); How. 8849, 8875, 8876; C. L. '97, (9651), (9677), 9678). Modified, as to purchase of claims for filing.

See note to Section 1 under black letter title.

**(13612). Circuit Court in Chancery to Have Supervisory Power.**

SEC. 9. The circuit court in chancery for said county shall have supervisory power of all matters, questions and disputes arising under such assignment, (except as otherwise provided in this chapter) and may on the application of the assignee or any person interested, make all necessary and proper orders for the management and disposition of the assigned property, the allowance of claims, the re-examination thereof, the distribution of assets and avails, the recovery of all property claimed by third persons, the prevention of any fraudulent transfer or change in the property or effects of the assignor or the allowance or payment of any unjust or fraudulent claim, the furnishing from time to time of new bonds or sureties who shall justify as herein provided, the removal of any assignee for cause and the appointment of a successor to any assignee who shall die, resign or be removed; and the judge of said court may, on the application of the assignee or any creditor require the assignor or any other person upon reasonable notice to appear before him and submit to examination under oath upon all matters relating to the disposal of the property of the assignor, to his trade and dealings with others and his accounts concerning the same, and all debts due or claimed from him, and any and all other matters concerning his property and estate or the concealment or embezzlement thereof and the due settlement of the estate according to law, which examination may, at the request of any party to the proceedings be reduced to writing and filed in said matter with the county clerk of said county; and may likewise at any time before the final settlement of the accounts of the assignee, require the attendance of and examine the assignee as to all matters appertaining to the estate of the assignor or the administration of said trust, and upon such examinations make such order in regard to costs as he shall deem proper. No power conferred upon the judge by this chapter shall be exercised by a circuit court commissioner except under a special reference made by the court.

**HISTORY:** New section. Re-enacts a part of and supersedes Sec. 1 of Act 198 of '79, being How. 8739; As Am. '89, p. 318, Act 215, Eff. Oct. 2; As Am. '95, p. 249, Act 124, Eff. Aug. 30; C. L. '97, (9539); and Sec. 3 of Act 198 of '79, being How. 8741; As Am. '89, p. 318, Act 215, Eff. Oct. 2; As Am. '95, p. 250, Act 124, Eff. Aug. 30; C. L. '97, (9541), and Sec. 11 of Act 198 of '79; As Added '81, p. 393, Act 278, Imd. Eff. June 11; being How. 8749; As Am. '89, p. 210, Act 181, Eff. Oct. 2; C. L. '97, (9549). Modified, as to exercise of powers.

See note to Section 1 under black letter title.

**CONSTRUED:** C. L. '97, (9549) (see history above) was not intended to repeal C. L. '97, (434). Compilers' Section (12340), Sub. Div. 12, or to divest other circuit courts of jurisdiction in chancery, when the subject matter is local. Chapin v. Montcalm Circuit Judge, 104 Mich. 233.

**SUPERVISORY POWER:** The court has power to direct and control the assignee or receiver in collecting and disbursing the property of the assignor. Gordon v. Sherman, 178 Mich. 637. The jurisdiction of the court of chancery exists to remove attachments on lands. Gott v. Hoschna, 57 Mich. 417-18. This section (C. L. '97, 9549) does not vest the exclusive jurisdiction in the court of chancery to determine the claims of third persons to the assigned property; but such court may dispose of such claims if the parties consent. But the right to bring an action against the assignee for property wrongfully taken or converted must exist and remain in a court of law, where a jury can be had, if desired. Edwards v. Symons, 65 Mich. 353-4; Chapin v. Montcalm Circuit Judge, 104 Mich. 233. A party who voluntarily goes before the court in chancery, and submits such a matter to it, is bound by the decision of the court. Sawyer v. McAdie, 70 Mich. 388. It was the intention of the court to place common law assignments fully under the control and supervision of the circuit courts in chancery. From the time of the filing of the assignment in the office of the clerk, it may be said to be a proceeding pending in that court, for all the purposes of the act. Kittridge v. Washtenaw Circuit Judge, 80 Mich. 203-4.

It is proper for any creditor to file a bill against the assignee to enforce the prompt execution of the trust. Wilhelm v. Byles, 60 Mich. 573. But such a bill is only proper in case of neglect or refusal of the assignees to promptly and faithfully perform such trust. *Id.* See also Scott v. Wayne Circuit Judges, 58 Mich. 313; Wilhelm v. Byles, 60 Mich. 566; Angell v. Pickard, 61 Mich. 574; Southern Mich. Nat. Bank v. Byles, 67 Mich. 307; Smith v. Wayne Circuit Judge, 84 Mich. 567; Smith's Appeal, 86 Mich. 159; In re Assignment of Am. Wheel Co. v. Scofield Buggy Co., 89 Mich. 16; Burnham v. Dillon, 100 Mich. 356; Wheeler v. Ocker & Mord Mfg. Co., 162 Mich. 211. See Youghiogheny & Ohio Coal Co. v. Anderson, 186 Mich. 349; 22 D. L. N. 362; 152 N. W. 1025.

### (13613). Assignee to Keep Accounts.

SEC. 10. The assignee shall keep a regular account of all money received by him, to which account every creditor or other interested person shall be at liberty at all reasonable times to have access. Within three months after receiving

such trust, the assignee shall file a report in said clerk's office of the condition of said estate, containing a statement of all property whatsoever received by him and the disposition made thereof, and of all moneys received, disbursed and on hand, and shall quarterly thereafter make like report covering all matters since the preceding report. It shall be the duty of the assignee to close his trust if practicable within one year from the date the assignment is filed, but such court or judge shall have power upon cause shown to extend the time allowed for that purpose, for such further periods as may be reasonably necessary, but in case of application for any such extension, notice thereof by mail or otherwise as said court or judge may direct shall be given to the creditors who shall have the right to appear and be heard with reference thereto.

**HISTORY:** Re-enacts a part of and supersedes Sec. 3 of Act 198 of '79, being How. 8741; As Am. '89, p. 318, Act 215, Eff. Oct. 2; As Am. '95, p. 250, Act 124, Eff. Aug. 30; C. L. '97 (9541), and Sec. 5 of Act 198 of '79, being How. 8743; C. L. '97, (9543). Modified, as to closing trust.

See note to Section 1 under black letter title.

#### (13614). Order of Payment.

SEC. 11. Funds available for distribution shall be applied to the payment of the following items and in the following order:

1. All taxes legally due and owing by the assignor to the United States, state, county or municipality;
2. The cost of administration;
3. All labor debts entitled to preference under the laws of this state;
4. All other debts which under the laws of the United States or of this state are entitled to priority;
5. All other claims preferred and allowed;
6. Any remaining surplus to be paid to the assignor, his representatives or assigns.

In case the funds shall be insufficient to pay any class in full, then the same shall be distributed pro rata among such class. No dividend on general claims shall be paid until twenty days after the second notice required by section five has been given and proof of service thereof filed with the clerk. If at the time any dividend is made, any suit or claim be pending in which a demand against such assignor may be established, the assignee shall retain in his hands the proportion which would belong to such demand if established, and the necessary costs and expenses of such suit or proceeding to be

applied according to the event thereof or to be distributed in a subsequent dividend. Any creditor, who shall have neglected to make proof of his claim before any dividend but who shall make proof before a subsequent dividend, shall receive the sum or sums he would have been entitled to on any former dividend or dividends before any further distribution be made to other creditors. It shall be the duty of the assignee to endeavor to make payment of all dividends to the persons entitled thereto. If any dividend that shall have been declared shall remain unpaid to the person entitled thereto until the estate is otherwise ready to be closed, the assignee shall consider it relinquished and shall distribute it among the other creditors unless otherwise ordered by the court.

**HISTORY:** Re-enacts parts of and supersedes parts of Sec. 4 of Act 198 of '79; As Am. '81, p. 391, Act 278, Imd. Eff. June 11; How. 8742; C. L. '97, (9542), and Secs. 29, 30 and 39, R. S. '46, Ch. 145, being C. L. '57, (5507) (As Am. '69, p. 319, Act 161, Eff. July 5), (5508), (5517); C. L. '71, (7294), (7295), (7304); How. 8871, 8872, 8881; C. L. '97, (9673), (9674), (9683). Modified, as regards distribution.

See note to Section 1 under black letter title.

**DISTRIBUTION:** It is obviously the duty of the assignee to proceed without unnecessary delay to convert the property assigned into money and apply the proceeds to the payment of the debts. In the management of the property he is bound to use the same care, and exercise the same degree of prudence and caution, that a prudent man would with his own property. *Wilhelm v. Byles*, 60 Mich. 567. The assignee should distribute the funds without regard to a claim for which the assignor is not personally liable, such as a debt secured by a mortgage on lands purchased by the assignor subject to an encumbrance. *Booth v. Conn. M. L. Ins. Co.*, 43 Mich. 299. See *Third Nat. Bank v. Haug*, 82 Mich. 607. See *In re Jones*, 151 Fed. Rep. 108.

#### (13615). Compensation of Assignee.

**SEC. 12.** The assignee shall receive for his services, such compensation as may be allowed by the court. In the event of an estate being administered by more than one assignee or by successive assignees, the court shall apportion the compensation between them according to the services actually rendered so that there shall not be paid to the assignees for the administering of any estate a greater amount than one assignee would be entitled to. The court may in its discretion withhold all compensation from any assignee who has been removed for cause. Ten days' notice by mail shall be given to the creditors of all applications for the allowance to the assignee of compensation and expenses, stating the

amount of compensation and the items of expenses for which allowance is asked.

**HISTORY:** Re-enacts in part and supersedes parts of Sec. 10, of Act 198 of '79; As Added '81, p. 393, Act. 278, Imd. Eff. June 11, being How. 8748; C. L. '97, (9548), and Sec. 28, R. S. '46, Ch. 145, being C. L. '57, (5506); C. L. '71, (7293); How. 8870; C. L. '97, (9672). Modified, as regards compensation of assignee.

See note to Section 1 under black letter title.

### (13616). Fraud in Assignment.

**SEC. 13.** In case there shall be any fraud in the matter of said assignment, or if the assignee shall fail to file the same, or to qualify or to comply with any of the provisions of this chapter, or to promptly and faithfully execute said trust, any person interested therein may file his bill in the circuit court in chancery in the proper county for the enforcement of said trust; and the court in its discretion may appoint a receiver or assignee therein and shall have power to order the summary examination before himself or a circuit court commissioner of any party or witness at any stage of said cause or other proceedings under this chapter, relative to the matters of said trust, and enforce attendance and the giving of testimony in the same manner as in the trial of causes in said circuit court in chancery. Any such receiver shall have the same rights, powers, duties and compensation and be subject to all the obligations and liabilities of an assignee.

**HISTORY:** Re-enacts in part and supersedes Sec. 6 of Act 198 of '79, being How. 8744; C. L. '97, (9544). Modified, as to enforcing trust.

See note to Section 1 under black letter title.

**ENFORCEMENT OF TRUST:** Creditors may file a bill for. *Fulmer v. Hasbrouck*, 46 Mich. 78; *Coots v. Radford*, 47 Mich. 39; *Pickersgill v. Ricker*, 50 Mich. 98; *Sibley v. Prescott Ins. Co.*, 57 Mich. 19; *Scott v. Wayne Circuit Judges*, 58 Mich. 312; *Wilhelm v. Byles*, 60 Mich. 566; *Scott v. Chambers*, 62 Mich. 539; *Sweetzer v. Higby*, 63 Mich. 21; *Beard v. Clippert*, 63 Mich. 719; *Funke v. Cone*, 65 Mich. 581; *Burnham v. Dillon*, 100 Mich. 352. This section is intended to give the creditors ample relief against the incompetency, neglect, or fraud of the assignee. *Burnham v. Haskins*, 72 Mich. 240.

See *Heineman v. Hart*, 55 Mich. 83; *Austin v. First Nat. Bank*, 100 Mich. 618; *Gordon v. Sherman*, 178 Mich. 636.

**RECEIVER:** Appointment of. *Munson v. Ellis*, 58 Mich. 334-5; *Scott v. Chambers*, 62 Mich. 539; *Beard v. Clippert*, 63 Mich. 719; *Smith's Appeal*, 86 Mich. 158.



## CHAPTER XLIII.

### OF THE RELIEF OF POOR DEBTORS FROM IMPRISONMENT.

#### (13617). Who May Apply for Discharge.

SECTION 1. Every person who shall be imprisoned by virtue of one or more executions in civil causes, may make application for his discharge from imprisonment in the cases and in the manner hereinafter specified.

HISTORY: Re-enacts and supersedes Sec. 1 of R. S. '46, Ch. 146; As Am. '47, p. 172, Act 105, Eff. May 16, being C. L. '57, (5535); C. L. '71, (7322); How. 8899; C. L. '97, (9701), though such section was not expressly repealed by this act. Unchanged.

CONSTRUED: The word "imprisonment" in this chapter is used in the same restricted sense in which it is used elsewhere in the statutes, and the legislature intended to extend the relief provided only to such persons as are in actual confinement in jail. *Miller v. Strabbing*, 92 Mich. 300; *Griffin v. Helme*, 94 Mich. 494. If the debtor gave bonds for jail limits, and after lapse of the period provided in the preceding section, is surrendered by bondsmen to sheriff, he cannot thus be relieved, but must have been imprisoned in jail for a period as fixed by statute before he can be relieved. *Rusilewski v. Michalski*, 135 Mich. 530. See *Funke v. Hurst*, 119 Mich. 182.

#### (13618). When May Apply.

SEC. 2. Such application may be made at the times following, that is to say:

1. If the amount due on such executions shall not exceed twenty-five dollars, after he shall have been imprisoned thirty days;

2. If the amount due on such executions be more than twenty-five dollars, and not exceeding fifty dollars, after he shall have been imprisoned sixty days;

3. If the amount due on such executions be more than fifty dollars, and not exceeding one hundred dollars, after he shall have been imprisoned ninety days;

4. If the amount due on such executions be more than one hundred dollars, and not exceeding five hundred dollars, after he shall have been imprisoned six months;

5. If the amount due on such executions shall exceed five

hundred dollars, after he shall have been imprisoned nine months.

**HISTORY:** Re-enacts and supersedes Sec. 2 of R. S. '46, Ch. 146; As Added '47, p. 172, Act 105, Eff. May 16, being C. L. '57, (5536); C. L. '71, (7323); How. 8900; C. L. '97, (9702), though such section was not expressly repealed by this act. Unchanged.

See notes to preceding section.

**(13619). Representation to Jailer.**

**SEC. 3.** The person so entitled to apply for his discharge may represent to the jailor or sheriff in whose custody he shall be, that he is unable to pay the amount due on the execution or executions by virtue of which he is imprisoned, and is desirous to take the benefit of the law for the relief of poor debtors, and thereupon such sheriff or jailor shall make such desire known to a circuit court commissioner or judge of the circuit court for the same county, or to the judge of any superior court from which the execution or executions issued by virtue of which the person so entitled to apply for his discharge is imprisoned or held by such sheriff or jailor.

**HISTORY:** Re-enacts and supersedes Sec. 2, R. S. '46, Ch. 146, being C. L. '57, (5537); C. L. '71, (7324); As Am. '79, p. 192, Act 211, Eff. Aug. 30; How. 8901; C. L. '97, (9703), though such section was not expressly repealed by this act. Unchanged.

**(13620). Time for Examination.**

**SEC. 4.** The officer to whom such desire shall be so made known, shall thereupon appoint a time and place within the same county, for the examination of such debtor, and notice of such time and place shall be given to the plaintiff in every such execution or his attorney, if within the same or any adjoining county, at least three days before such examination.

**HISTORY:** Re-enacts and supersedes Sec. 3, R. S. '46, Ch. 146, being C. L. '57, (5538); C. L. '71, (7325); How. 8902; C. L. '97, (9704), though such section was not expressly repealed by this act. Unchanged.

**(13621). Publication of Notice.**

**SEC. 5.** If neither such plaintiffs nor their attorneys shall be found within either of such counties, such notice shall be published by posting the same upon the outer door of the jail in which such person is imprisoned, at least six days before such examination.

**HISTORY:** Re-enacts and supersedes Sec. 4, R. S. '46, Ch. 146, being C. L. '57, (5539); C. L. '71, (7326); How. 8903; C. L. '97, (9705), though such section was not expressly repealed by this act. Unchanged.

**(13622). Examination.**

**SEC. 6.** On the day appointed for such examination, the sheriff or jailor shall have the prisoner at the place designated by such officer; and on due proof of notice having been given as hereinbefore provided, such judge or commissioner shall examine the prisoner on oath concerning his estate and effects, and the disposal thereof, and his ability to pay the sum for which he is committed, or any part thereof, and shall hear any other legal and pertinent evidence that may be produced by the prisoner or any plaintiff in such execution.

**HISTORY:** Re-enacts and supersedes Sec. 5, R. S. '46, Ch. 146, being C. L. '57, (5540); C. L. '71, (7327); How. 8904; C. L. '97, (9706), though such section was not expressly repealed by this act. Unchanged.

**NOTE:** That part of the last clause in this section which reads "prisoner of any plaintiff," is undoubtedly an error and should read, "prisoner or any plaintiff."

**(13623). Oath to be Administered to Debtor.**

**SEC. 7.** If the officer before whom such examination is had, shall be satisfied of the truth of the facts set forth in the oath to be taken by the debtor, and in the certificate to be made by such officer, as required in the two following sections, he shall administer to such debtor the oath hereinafter prescribed.

**HISTORY:** Re-enacts and supersedes Sec. 6, R. S. '46, Ch. 146, being C. L. '57, (5541); C. L. '71, (7328); How. 8905; C. L. '97, (9707), though such section was not expressly repealed by this act. Unchanged.

**(13624). Form of Oath.**

**SEC. 8.** Such oath shall be in the following form: "I, . . . . ., do solemnly swear (or affirm, as the case may be), that I have no estate, real or personal, to the amount of twenty dollars, except such goods and chattels as are by law exempt from execution, and that I have not any other estate, now conveyed or concealed, with design to secure the same to my use, or to the use of my family, or to defraud my creditors," which oath shall be signed by the person making the same, and be certified by the officer.

**HISTORY:** Re-enacts and supersedes Sec. 7, R. S. '46, Ch. 146, being C. L. '57, (5542); C. L. '71, (7329); How. 8906; C. L. '97, (9708), though such section was not expressly repealed by this act. Unchanged.

**(13625). Certificate to be Made.**

SEC. 9. After administering such oath, such officer shall make a certificate under his hand, in substance in the following form:

"County of ....., ss.

"To the keeper of the jail of said county:

"I, the subscriber, judge of the circuit court (superior court, or a circuit court commissioner, as the case may be), for said county, do hereby certify that A. B., a poor prisoner, confined upon execution in a civil cause, in the jail of said county, has caused C. D., the person at whose suit he is imprisoned, to be notified according to law, of his desire to take the benefit of the law for the relief of poor debtors; that in my opinion the said A. B. has no estate, real or personal, to the amount of twenty dollars, except such goods and chattels as are by law exempt from execution, and has not any other estate now conveyed or concealed, or in any way disposed of with design to secure the same to his own use or the use of his family, or to defraud his creditors; and that I have, after due examination of the said A. B., administered to him the oath prescribed by law to be taken by poor prisoners, who are committed on execution in civil causes."

**HISTORY:** Re-enacts and supersedes Sec. 8, R. S. '46, Ch. 146, being C. L. '57, (5543); C. L. '71, (7330); How. 8907; C. L. '97, (9709), though such section was not expressly repealed by this act. The clause in parenthesis, however, is changed in this section so as to include judge of the superior court. Modified, to this extent only.

**(13626). Jailor to Discharge Prisoner.**

SEC. 10. The jailor upon receiving such certificate, shall discharge the prisoner so far as he is held in prison on the execution or executions therein mentioned, and such certificate, and the oath taken by such prisoner, shall be filed and preserved in the office of the clerk of the county in which the proceedings were had.

**HISTORY:** Re-enacts and supersedes Sec. 9, R. S. '46, Ch. 146, being C. L. '57, (5544); C. L. '71, (7331); How. 8908; C. L. '97,

(9710), though such section was not expressly repealed by this act. Unchanged.

**(13627). When Officer to Remand Prisoner.**

SEC. 11. If the officer to whom any application shall be made under the provisions of this chapter, after the examination of the prisoner, shall not be satisfied that he is entitled to his discharge, such prisoner shall be remanded to prison; but he shall not thereby be prevented from obtaining his discharge upon new notice to the creditor or creditors, and new proceedings before the same or some other proper officer, in the manner herein provided.

HISTORY: Re-enacts and supersedes Sec. 10, R. S. '46, Ch. 146, being C. L. '57, (5545); C. L. '71, (7332); How. 8909; C. L. '97, (9711), though such section was not expressly repealed by this act. Unchanged.

See Funke v. Hurst, 119 Mich. 182.

**(13628). Exemption from Arrest or Imprisonment.**

SEC. 12. The debtor, after being so discharged, shall be forever exempted from arrest or imprisonment, for the same debt, unless he shall be convicted of having sworn falsely upon his examination before the officer, or in taking the oath before prescribed.

HISTORY: Re-enacts and supersedes Sec. 11, R. S. '46, Ch. 146, being C. L. '57, (5546); C. L. '71, (7333); As Am. '77, p. 79, Act 99, Eff. Aug. 21; How. 8910; C. L. '97, (9712), though such section was not expressly repealed by this act. Unchanged.

**(13629). Penalty for False Swearing.**

SEC. 13. If he shall be so convicted, he shall have no benefit from the proceedings had under this chapter, and shall be liable to the punishment of perjury; and the creditor or creditors may have new executions against the body, or against the goods and chattels, lands and tenements of the debtor, in like manner as if he had not been committed on execution.

HISTORY: Re-enacts and supersedes Sec. 12, R. S. '46, Ch. 146, being C. L. '57, (5547); C. L. '71, (7334); How. 8911; C. L. '97, (9713), though such section was not expressly repealed by this act. Unchanged.

## CHAPTER XLIV.

### OF THE PUNISHMENT OF FRAUDULENT DEBTORS.

#### (13630). Abolishment of Imprisonment for Debt.

SECTION 1. No person shall be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of a court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract expressed or implied, or for the recovery of any damages for the non performance of any contract.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 141, being C. L. '57, (5387); C. L. '71, (7174); How. 8750; C. L. '97, (9553). Unchanged.

**CONSTITUTIONALITY:** The act abolishing imprisonment for debt does not impair the obligation of contract. *Bronson v. Newberry*, 2 Doug. 38. This chapter does not conflict with Const. Art. II, Sec. 30, nor with Id. Art. II, Sec. 15, *Dummer v. Nungesser*, 107 Mich. 481. See also *Fuller v. Bowker*, 11 Mich. 204.

**CONSTRUED:** Imprisonment on an execution in replevin in circuit court does not fall within the prohibition of the constitution or of the statute, but is contrary to the common law and therefore illegal. *Fuller v. Bowker*, 11 Mich. 204. But allowable on an execution from a justices' court. *Tomlin v. Fisher*, 27 Mich. 524. A woman can be imprisoned for refusal to obey a decree in equity ordering her to deliver trust funds to another. *Carnahan v. Carnahan*, 143 Mich. 398. As to fraud, see *Wm. Barrie Dry Goods Co. v. Casler*, 131 Mich. 25, 29; *Id.* 138 Mich. 173. See *Badger v. Reade*, 39 Mich. 772; *Forsythe v. Washtenaw Circuit Judge*, 180 Mich. 633.

**CIVIL OR CRIMINAL:** As to whether the proceedings under this law are civil or criminal the court was equally divided in *Bromley v. People*, 7 Mich. 142. They are not of such a criminal nature as to require a jury. *Johnson v. Maxon*, 23 Mich. 143-4. Held not to be criminal and that the officer's fees are not a charge upon the county, but upon the parties. *Wayne Co. v. Randall*, 43 Mich. 137; *Watson v. Randall*, 44 Mich. 514. As to the case of frauds committed outside of the state, see *Bromley v. People*, 7 Mich. 472.

#### (13631). Exceptions.

SEC. 2. The preceding section shall not extend to proceedings as for contempts to enforce civil remedies; nor to actions for fines, penalties, or forfeitures, or on promises to marry where fraud is alleged, or for moneys collected by any public

officer, or for any misconduct or neglect in office, or in any professional employment.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 141, being C. L. '57, (5388); C. L. '71, (7175); How. 8751; C. L. '97, (9554); inserting after "promise to marry" "where fraud is alleged." Substantially unchanged. See note in preceding section.

**CONSTRUED:** The failure of a mere agent, employed for a pecuniary compensation, not being an attorney at law, to pay over money collected, is not "misconduct or neglect in a professional employment" within the meaning of this section. *Bronson v. Newberry*, 2 Doug. 38. See *Badger v. Reade*, 39 Mich. 772, 773, 775; *Wm. Barrie Dry Goods Co. v. Casler*, 131 Mich. 25, 29; *Id.* 138 Mich. 172; *Carnahan v. Carnahan*, 143 Mich. 398. See Compilers' Section (12965) as to imprisonment to enforce performance of a decree in equity.

#### (13632). Power of Plaintiff to Arrest Defendant.

**SEC. 3.** In all cases, where by the preceding provisions of this chapter a defendant cannot be arrested or imprisoned, it shall be lawful for the plaintiff who shall have commenced a suit against such defendant, or shall have obtained a judgment or decree against him in any court of record, or justice's court, to apply to any judge of the court in which such suit is brought, or to any circuit judge or circuit court commissioner, or to any justice of the peace before whom such suit is pending or judgment obtained, or before whom such proceedings shall have been transferred, for a warrant to arrest the defendant in such suit.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 141, being C. L. '57, (5389); C. L. '71, (7176); As Am. '73, p. 15, Act 18, Eff. July 31; How. 8752; C. L. '97, (9555). Unchanged.

**CONSTRUED:** These proceedings can be had only before the justice who has a civil action pending before him. *Stensrud v. Delamater*, 56 Mich. 147. When a justice is disqualified to act. *Clark v. Mikesell*, 81 Mich. 45. See *Bromley v. People*, 7 Mich. 475; *Badger v. Reade*, 39 Mich. 772; *Dummer v. Nungesser*, 107 Mich. 486, 7.

#### (13633). In What Cases Warrant May Issue.

**SEC. 4.** No such warrant shall issue unless satisfactory evidence shall be adduced to such officer, by the affidavit of the plaintiff, or of some other person or persons, that there is a debt or demand due to the plaintiff from the defendant, and specifying the nature and amount thereof as near as may be, for which the defendant, according to the provisions of this chapter, cannot be arrested or imprisoned, and establishing one or more of the following particulars:

1. That the defendant is about to remove any of his property out of the jurisdiction of the court in which the suit is brought with intent to defraud his creditor or creditors; or

2. That the defendant has property or rights in action, which he fraudulently conceals, or that he has rights in action, or some interest in any public or corporate stock, money, or evidence of debt which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him, belonging to the plaintiff; or

3. That he has assigned, removed or disposed of, or is about to dispose of any of his property, with the intent to defraud his creditor or creditors; or

4. That the defendant fraudulently contracted the debt, or incurred the obligation, respecting which such suit is brought.

**HISTORY:** Re-enacts Sec. 4, R. S. '46, Ch. 141, being C. L. '57, (5390); C. L. '71, (7177); How. 8753; C. L. '97, (9556), changing in the second subdivision "complainant" to "plaintiff." Unchanged.

**AFFIDAVIT:** The affidavit must allege that the demand is one upon which defendant cannot be arrested. *Willison v. Desenberg*, 41 Mich. 156.

As a matter of propriety and prudence all magistrates ought to require, in cases of this description, very clear and cogent evidence. *Johnson v. Maxon*, 23 Mich. 137. An application under this act must make out facts amounting to a prima facie case of fraud. *Matter of Teachout*, 15 Mich. 347. But when the evidence has a legal tendency to make out a proper case in all its parts for issuing the process though the proof is slight and inconclusive, yet the process will be valid until set aside by a direct proceeding for that purpose. *Johnson v. Maxon*, 23 Mich. 137. See *Supe v. Francis*, 49 Mich. 266. The affidavit should show upon its face, with reasonable certainty, that the affiant is personally cognizant of the facts set forth. *Proctor v. Proust*, 17 Mich. 475-6; *Brown v. Kelley*, 20 Mich. 33; *Badger v. Reade*, 39 Mich. 771; *Sheridan v. Briggs*, 53 Mich. 569; *Stensrud v. Delamater*, 56 Mich. 146; *Marble v. Curran*, 63 Mich. 283; *Paulus v. Grobben*, 104 Mich. 42. Where the claim for which a warrant is issued, is in judgment, the affidavit should set forth such a judgment as would authorize the proceeding, as well as such other facts as would convict the respondent of the conduct which the statute makes sufficient ground for a warrant. The date of the judgment and the form of the action in which it was rendered must appear. *Badger v. Reade*, 39 Mich. 774.

**FRAUDULENT ASSIGNMENT:** As to the showing in a case of an alleged fraudulent assignment. *Smith v. People*, 15 Mich. 497.

**WARRANT:** The fact that, when proceedings were begun, a writ of attachment in favor of the creditor had been levied upon sufficient of the goods and chattels of the debtor to satisfy the debt, will not avoid the warrant. *Johnson v. Maxon*, 23 Mich. 141-2.

**CREDITORS:** It is not necessary that the creditors taking action



under the first, third and fourth subdivisions, should be judgment creditors. *Johnson v. Maxon*, 23 Mich. 138-9.

**WHO CAN BE HELD:** No one can be held under this statute for any mere constructive fraud, or where he is guilty of no personal delinquency, and the act complained of is the immoral conduct of another. *Watson v. Hinchman*, 42 Mich. 29.

**CITED:** *Bromley v. People*, 7 Mich. 472; *Dummer v. Nungesser*, 107 Mich. 487. See *Crane v. Waldron*, 133 Mich. 73, also note to Sec. 1 of this chapter.

**(13634). Issue of Warrant.**

**SEC. 5.** Upon such proof being made to the satisfaction of the officer to whom the application shall be made, he shall issue a warrant under his hand, in behalf of the people of this state, directed to the sheriff or any constable of the county within which such officer shall reside, therein briefly setting forth the nature of the complaint, and commanding the officer to whom it shall be directed, to arrest the person named in such warrant, and bring him before such officer without delay; which warrant shall be accompanied by a copy of all affidavits presented to such officer, upon which the warrant issued; which shall be certified by such officer, and shall be delivered to the defendant at the time of serving the warrant by the officer serving the same.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 141, being C. L. '57, (5391); C. L. '71, (7178); How. 8754; C. L. '97, (9557). Unchanged.

**CONSTRUED:** *Paulus v. Grobben*, 104 Mich. 47. The "proof" or extent of the effect, or conclusiveness of the evidence, is to be such as to satisfy the officer. *Johnson v. Maxon*, 23 Mich. 136.

**(13635). How Warrant Executed.**

**SEC. 6.** The officer to whom such warrant shall be delivered shall execute the same by arresting the person named therein, and bringing him before the officer issuing such warrant; or in case of the absence or inability of such officer, before some other officer having jurisdiction in the case, and shall keep him in custody until he shall be duly discharged or committed as hereinafter provided.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 141, being C. L. '57, (5392); C. L. '71, (7179); How 8755; C. L. '97, (9558). Unchanged.

**(13636). Party May Controvert Facts on Which Warrant Issued.**

**SEC. 7.** On the person so arrested being brought before such officer, he may controvert any of the facts and circum-

stances on which such warrant issued, and may, at his option, verify his allegations by his own affidavit; and in case of his so verifying the same, the plaintiff may examine such defendant on oath, touching any fact or circumstance material to the inquiry, and the answers of the defendant on such examination shall be reduced to writing, and subscribed by him; and the officer conducting such inquiry shall also receive such other proofs as the parties may offer, either at the time of such first appearance, or at such other time as such hearing shall be adjourned to; and in case of an adjournment, such officer may take a recognizance, with surety, from the defendant, for his appearance at the adjourned meeting, and conditioned that said defendant will not meanwhile secrete, destroy, dispose of, or in any manner make way with, or put out of his possession, any of his property not exempt from sale on execution; and in case the said defendant shall refuse to enter into such recognizance, he shall be committed to the county jail, and there to remain until such time as the said hearing shall have been adjourned to, or until he shall give the bond hereinbefore provided.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 141, being C. L. '57, (5393); As Am. '65, p. 43, Act 35. Imd. Eff. Feb. 10; C. L. '71, (7180); How 8756; C. L. '97, (9559), changing "complainant" to "plaintiff." Substantially unchanged.

**EXAMINATION:** When the warrant issues and the respondent is brought in he may controvert the allegations and verify his denial by affidavit, in which case only a further examination is had on the facts. *Badger v. Reade*, 39 Mich. 773. When the complainant examines the defendant, the answers must be reduced to writing and signed, but not when defendant is sworn in his own behalf. *Willison v. Desenberg*, 41 Mich. 158-9.

**(13637). Power of Officer.**

**SEC. 8.** The officer conducting such inquiry shall have the same authority to issue subpoenas for witnesses and to enforce obedience to such subpoenas, and to punish witnesses refusing to testify, as are conferred by law upon such officers in cases of other proceedings before them, and the defendant shall be entitled to a jury of six jurors, if he demand one, to try the issue joined in the matters charged or alleged against him in the affidavit or affidavits exhibited to or before the said officer conducting such inquiry, which jury shall be selected and summoned in the same manner, as near as may be, as in the trial of criminal cases before justices of the

peace, and the said officer shall have the same power in relation to the selection, summoning and swearing such jury and conducting such jury trial, as near as may be, as is given to justices of the peace in the trial of criminal cases before them.

**HISTORY:** Re-enacts Sec. 8, R. S. '46, Ch. 141, being C. L. '57, (5394); C. L. '71, (7181); As Am. '81, p. 253, Act 209, Imd. Eff. June 3; How. 8757; C. L. '97, (9560). Unchanged.

**(13638). Commitment of Defendant.**

**SEC. 9.** If such officer is satisfied that the allegations of the plaintiff are substantiated, and that the defendant has done, or is about to do, any one of the acts specified in the fourth section of this chapter, upon which a warrant is authorized to be issued, he shall, by a commitment under his hand, direct that such defendant be committed to the jail of the county in which such hearing shall be had, to be there detained until he shall be discharged according to law; and such defendant shall be committed and detained accordingly.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 141, being C. L. '57, (5395); C. L. '71, (7182); How. 8758; C. L. '97, (9561); changing "complainant" to "plaintiff." Substantially unchanged.

**DETERMINATION:** The whole issue is upon the allegations of the complainant and the result depends upon those and their truth, which is held admitted if not denied. *Badger v. Reade*, 39 Mich. 773-4. It is competent for the officer and good practice to put his determination in writing and explain upon the record the way he found upon the facts. *Watson v. Hinchman*, 42 Mich. 28. Before the amendment of '81 to this act, the conclusions of the officer upon the sufficiency of evidence to sustain an affidavit for a warrant were not reviewable. *Willison v. Desenberg*, 41 Mich. 156.

**(13639). When Commitment Not Granted.**

**SEC. 10.** Such commitment shall not be granted, if the defendant shall either:

1. Pay the debt or demand claimed, with the costs of the suit and of the proceedings against him; or
2. Give security to the satisfaction of the officer before whom the hearing shall be had, that the debt or demand of the plaintiff, with the costs of the suit and proceedings aforesaid, shall be paid within ninety days, if a judgment shall have been recovered thereon; or within ninety days after such judgment shall be obtained, in case no judgment shall have been rendered thereon; or
3. Enter into a bond to the plaintiff in a penalty of not

less than twice the amount of the debt or demand claimed, giving such surety or sureties as shall be approved by such officer, conditioned that such defendant will, within thirty days thereafter, make a general assignment of all his property, for the benefit of his creditors, in accordance with the provisions of chapter forty-two of this act, or file a petition for adjudication in bankruptcy, under the federal bankruptcy law, and diligently prosecute the same until he obtains a discharge; and that he will not, before making such assignment, or filing the petition for such adjudication, in any way dispose of any money, property, or rights in action, or interest in any public or corporate stock, or evidence of debt, or anything valuable whatever, which he possessed at the time of such arrest, not exempt from execution.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 141, being C. L. '57, (5396); C. L. '71, (7183); How. 8759; C. L. '97, (9562); changing the phraseology of subdivision three and adding that part of the subdivision relating to the petition in bankruptcy. Modified, as regards bankruptcy proceedings.

**FRAUDULENT DEBTOR:** A slight change is made in the condition of the bond required to be given by a fraudulent debtor to prevent his commitment or to procure his release after commitment, the condition of such bond being, that the defendant will within 30 days make a general assignment of all his property for the benefit of his creditors or proceed in bankruptcy until he obtains a discharge from his debts, and that he will not before making such assignment or filing the petition in bankruptcy in any way dispose of any property, which he possessed at the time of his arrest, not exempt from execution.

**CONSTRUED:** Johnson v. Maxon, 23 Mich. 138-9; Marble v. Curran, 63 Mich. 287; Young v. Stephens, 9 Mich. 501.

#### (13640). Custody of Defendant Committed.

**SEC. 11.** Any defendant committed as above provided, shall remain in custody in the same manner as other prisoners, until a final judgment shall have been rendered in his favor, in the suit prosecuted by the creditor at whose instance such defendant shall have been committed, or until he shall have made an assignment, in accordance with the provisions of chapter forty-two of this act, or shall have been adjudicated a bankrupt, in accordance with the federal bankruptcy law; but such defendant may be discharged by the officer committing him, or any other person authorized to discharge the duties of such officer, on defendant paying the debt or demand claimed, or giving security for the payment thereof, as provided in the tenth section of this chapter, or on his

executing the bond mentioned in the third subdivision of said section; but any defendant so committed, or ordered to be committed, may, at any time within twenty-four hours after the making of such order, appeal therefrom to the circuit court of the county, provided said defendant shall enter into a bond to the plaintiff in not less than double the amount of plaintiff's demand, and not less than five hundred dollars, with one or more sufficient sureties, to be approved by such officer conditioned to appear before said court on the first day of the next term thereof, and prosecute his appeal to effect and abide the order and judgment of said court, and with like conditions as to the disposition of property and effects, pending such appeal as are contained in the third subdivision of section ten; and the officer from whose order or judgment an appeal is taken, shall thereupon discharge the said defendant from custody, or order his discharge, and shall make a special return of the proceedings had before him, and shall cause the affidavit or affidavits and warrant and the return, together with the bond, to be filed in the said circuit court on or before the first day of the next term thereof. The said circuit court shall thereupon have full jurisdiction of said case, the same as was had by the officer below, before whom such proceedings were commenced, and may conduct the same to a final hearing and determination in like manner with the same right to the defendant to demand and have a trial by jury.

**HISTORY:** Re-enacts in part and supersedes Sec. 11, R. S. '46, Ch. 141, being C. L. '57, (5397); C. L. '71, (7184); As Am. '81, p. 253, Act 209, Imd. Eff. June 3; How. 8760; C. L. '97, (9563), making, however, a number of changes in phraseology. Modified, as to phraseology.

See note to Section 10 under black letter title.

See *Bromley v. People*, 7 Mich. 481.

#### (13641). Fees and Compensation.

**SEC. 12.** The fees and compensation of all officers and witnesses, performing services under the provisions of this chapter, shall be the same as are or may be provided by law, and the same may be taxed in favor of the prevailing party as in other civil cases.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 141, being C. L. '57, (5399); C. L. '71, (7186); How. 8762; C. L. '97, (9565), changing "provided by law in criminal cases" to "provided by law," and adding the last clause as above. Modified, as to criminal cases and taxing costs.

**CONSTRUED:** Fees are not a charge upon the county. *Wayne Co. v. Randall*, 43 Mich. 137.

**(13642). Property Exempt from Execution.**

SEC. 13. Whenever in this chapter, the removal, concealment or disposal of any property, is declared to be the ground of any complaint or proceeding, it shall not be deemed to apply to any property which shall be expressly exempted by law from levy and sale under execution.

HISTORY: Re-enacts Sec. 15, R. S. '46, Ch. 141, being C. L. '57, (5401); C. L. '71, (7188); How. 8764; C. L. '97, (9567). Unchanged.

**(13643). Recovery on Bond.**

SEC. 14. Whenever a bond, given under the tenth section of this chapter, shall become forfeited by the non-performance of the condition thereof, the plaintiff shall be entitled to recover thereon the amount due to him on the judgment obtained in the original suit instituted against the defendant giving such bond.

HISTORY: Re-enacts Sec. 16, R. S. '46, Ch. 141, being C. L. '57, (5402); C. L. '71, (7189); How. 8765; C. L. '97, (9568). Unchanged.  
See *Young v. Stephens*, 9 Mich. 502.

**(13644). Removal Secretion of Property.**

SEC. 15. Any person who shall remove any of his property out of any county with intent to prevent the same from being levied upon by an execution, or who shall secrete, assign, convey, or otherwise dispose of any of his property, with intent to defraud any creditor, or to prevent such property from being made liable for the payment of his debts, and any person who shall receive such property with such intent, shall, on conviction thereof, be deemed guilty of a misdemeanor.

HISTORY: Re-enacts Sec. 17, R. S. '46, Ch. 141, being C. L. '57, (5403); C. L. '71, (7190); How. 8766; C. L. '97, (9569). Unchanged.

CONSTRUED: This section applies only to a disposal of such property as is capable of removal and concealment and not real estate. *Atty. Gen. v. Police Justice*, 41 Mich. 224.

**(13645). No Excuse from Answering Bill of Discovery.**

SEC. 16. No person shall be excused from answering any bill in equity, seeking a discovery in relation to any fraud prohibited by this chapter, or from answering as a witness in relation to any such fraud, but no such answer shall be used in evidence in any other suit or prosecution.

HISTORY: Re-enacts Sec. 19, R. S. '46, Ch. 141, being C. L. '57, (5405); C. L. '71, (7192); How. 8768; C. L. '97, (9571). Unchanged.

## CHAPTER XLV. OF ARBITRATIONS.

### (13646). Who May Agree to Arbitration.

SECTION 1. All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of one or more arbitrators, any controversy existing between them, which might be the subject of an action at law, or of a suit in chancery, except as herein otherwise provided; and may, in such submission, agree that a judgment of any circuit or superior court, to be designated in such instrument, shall be rendered upon the award made pursuant to such submission.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 129, being C. L. '57, (5154); C. L. '71, (6889); How. 8474; C. L. '97, (10924), omitting "a married woman" and "any county court or of" and inserting after "circuit" "or superior." Substantially unchanged.

ARBITRATION: The law favors the settlement of disputes in tribunals selected by the parties themselves. *Chicago & M. L. S. Railroad Co. v. Hughes*, 28 Mich. 189; *Alpena Lumb. Co. v. Fletcher*, 48 Mich. 555; *Cooper v. Andrews*, 44 Mich. 96. A submission to arbitration of the subject matter of a suit is a discontinuance and discharges the surety for costs. *Dunn v. Sutliff*, 1 Mich. 24. A partner cannot submit partnership matters to arbitration without a special authority from his co-partners. *Buchoz v. Grandjean*, 1 Mich. 367; *Backus v. Coyne*, 35 Mich. 9. The president and secretary of a corporation are proper officers to agree for it upon an arbitration. *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74. Or a duly appointed agent. *Detroit v. Jackson*, 1 Doug. 106.

One party to an award cannot profit by its execution by the other party and then repudiate it. *Taylor v. Smith*, 93 Mich. 163.

AGREEMENT TO ARBITRATE: Effect of agreement to arbitrate. *Norton v. Hayden*, 109 Mich. 682; *Clement v. Comstock*, 2 Mich. 362.

COMMON LAW ARBITRATION: An arbitration which does not conform to statutory requirements may nevertheless be good at common law. *Galloway v. Gibson*, 51 Mich. 135. A parol submission to arbitration is good at common law and is not forbidden by any statute. *Cady v. Walker*, 62 Mich. 159. An agreement to submit to arbitration, which contains no covenant or agreement not to sue, or that the awards shall be made the foundation of a judgment, is a mere common law arbitration. *McGunn v. Hanlin*, 29 Mich. 480.

A party to an arbitration who invokes the aid of a chancery court against the award, need not pursue the remedy of a motion to vacate the award, as allowed by C. L. '97 (10932) *supra*. *Early v. Ingham*

Cir. J., 166 Mich. 517. The fact that C. L. '97 (10935), *supra*, confers power on the court to set aside an award does not exclude the exercise of a like power by a court of equity in view of C. L. '97 (10945), *supra*. Kearney v. Fire Ins. Co., 126 Mich. 250. In Patrick v. Batten, 123 Mich. 206, the court says: "These arbitration tribunals are favored by the courts; they are chosen by the voluntary act of the parties; and he who seeks to annul an award must show, by clear and convincing proof, his right to have the same vacated for one of the four reasons fixed by the statute." C. L. '97 (10932), *supra*. In Phelps v. Wayne Cir. J., 117 Mich. 35, it was held that, under the arbitration statute, where the proceedings of the arbitrators are regular, and an award is duly and legally made, such award should be confirmed by the court; it having no power to examine the evidence, and to vacate the award because, on such examination, it reaches a different conclusion from that of the arbitrators.

### (13647). Claims to Real Estate.

SEC. 2. No such submission shall be made respecting the claim of any person to any estate, in fee, or for life, in real estate; but any claim to an interest for a term of years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower, may be so submitted to arbitration.

**HISTORY:** Re-enacts and supersedes Sec. 2, R. S. '46, Ch. 129, being C. L. '57, (5155); C. L. '71, (6890); How. 8475; C. L. '97, (10925), though such section was not expressly repealed by this act. Unchanged.

**JURISDICTION OF ARBITRATORS:** Any determination by arbitrators, as to the title in fee of lands, is beyond their jurisdiction. Gallagher v. Kern, 31 Mich. 138; Lang v. Salotte, 79 Mich. 508. But damages for a right of flowage are a proper subject of statutory arbitration. Fitch v. Constantine Hydraulic Co., 44 Mich. 74. A claim which is illegal and absolutely forbidden by statute cannot be made the subject of arbitration. Hall v. Kimmer, 61 Mich. 274.

### (13648). Submission to be Acknowledged.

SEC. 3. Every such submission shall be acknowledged by the parties signing the same, before some officer authorized to take the acknowledgment of deeds, who shall certify such acknowledgment thereon.

**HISTORY:** Re-enacts and supersedes Sec. 3, R. S. '46, Ch. 129, being C. L. '57, (5156); C. L. '71, (6891); How. 8476; C. L. '97, (10926), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** A submission under R. S. '38, was not required to be under seal. Detroit v. Jackson, 1 Doug. 106. Must be acknowl-



edged. *Gibson v. Burrows*, 41 Mich. 715; see *Clement v. Comstock*, 2 Mich. 362.

**(13649). Time and Place of Hearing.**

SEC. 4. The arbitrators so selected shall appoint a time and place for the hearing, and shall adjourn the same from time to time, as may be necessary; and on the application of either party, and for good cause, they may postpone such hearing to any time not extending beyond the day fixed in such submission for rendering their award.

**HISTORY:** Re-enacts and supersedes Sec. 4, R. S. '46, Ch. 129, being C. L. '57, (5157); C. L. '71, (6292); How. 8477; C. L. '97, (10927), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Competency of arbitrator. *Brush v. Fisher*, 70 Mich. 469. The adjournment of an arbitration is within the power of the arbitrators. *Abell v. Hubbell*, 52 Mich. 37. See *Flanders v. Chamberlain*, 24 Mich. 306. An award is in time, although not made and ready for delivery until a late hour in the evening of the day limited for its completion. *Clement v. Comstock*, 2 Mich. 359. Arbitrators may retain the award until paid for their services. *Id.* See, as to an award made after the time fixed, *Elliott v. Hanson*, 39 Mich. 157.

**(13650). Oath of Arbitrators.**

SEC. 5. Before proceeding to hear any testimony, the arbitrators shall be sworn faithfully and fairly to hear and examine the matters in controversy submitted to them, and to make a just award thereon according to the best of their understanding, and either of such arbitrators shall have power to administer all necessary oaths to witnesses examined before them.

**HISTORY:** Re-enacts and supersedes Sec. 5, R. S. '46, Ch. 129, being C. L. '57, (5158); C. L. '71, (6893); How. 8478; C. L. '97, (10928), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** The oath of arbitrators need not be in writing. *Davis v. Berger*, 54 Mich. 652.

**(13651). Witnesses.**

SEC. 6. Witnesses may be compelled to appear before such arbitrators by subpoenas, to be issued by any justice of the peace, in the same manner and with the like effect, and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before justices of the peace.

**HISTORY:** Re-enacts and supersedes Sec. 6, R. S. '46, Ch. 129, being C. L. '57, (5159); C. L. '71, (6894); How. 8479; C. L. '97, (10929), though such section was not expressly repealed by this act. Unchanged.

**(13652). Meeting of All Arbitrators But Awarding by Majority.**

**SEC. 7.** All the arbitrators must meet together, and hear the proofs and allegations of the parties; but an award by a majority of them shall be valid, unless the concurrence of all the arbitrators be expressly required in the submission.

**HISTORY:** Re-enacts and supersedes Sec. 7, R. S. '46, Ch. 129, being C. L. '57, (5160); C. L. '71, (6895); How. 8480; C. L. '97, (10930), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** An award must be executed by each arbitrator in the presence of all the others. *Daniels v. Ripley*, 10 Mich. 237; *French v. Butler*, 39 Mich. 79. When execution by a majority is sufficient. *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74. Arbitrators are expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law. *Port Huron & N. W. Railway Co. v. Callanan*, 61 Mich. 26; *Brush v. Fisher*, 70 Mich. 472. See *Lattin v. Gamble*, 154 Mich. 177.

**(13653). Confirmation of Award.**

**SEC. 8.** Upon such submission, and the award made in pursuance thereof, being filed with the clerk of the court designated in such submission, within one year after the making of the award, such court shall, by rule in open court, confirm such award, unless the same be vacated or modified, or a decision thereon be postponed, as herein provided.

**HISTORY:** Re-enacts and supersedes Sec. 8, R. S. '46, Ch. 129, being C. L. '57, (5161); C. L. '71, (6896); How. 8481; C. L. '97, (10931), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** An award by arbitrators, which in no manner conforms to the agreement of submission, will be disregarded. *Sawtells v. Howard*, 104 Mich. 54. The award, under the statute, is an official act and is the evidence and authority upon which judgment may be rendered. *Detroit v. Jackson*, 1 Doug. 106. Awards are to be liberally construed. *Bush v. Davis*, 34 Mich. 190. Everything is to be intended in favor of an award. *Clement v. Comstock*, 2 Mich. 363. And every presumption will be made in favor of fairness. *Brush v. Fisher*, 70 Mich. 478. The law favors and maintains these proceedings as far as possible. *Cooper v. Andrews*, 44 Mich. 96, citing *Beam v. Macomber*, 33 Mich. 127; *Detroit v. Jackson*, 1 Doug. 106; *Chicago & M. L. S. Railroad Co. v. Hughes*, 28 Mich. 186. Awards must be certain. *Clement v. Comstock*, 2 Mich. 362. An award that is so uncertain and ambiguous in some of its parts,

that it cannot be enforced, is void in toto, although sufficiently definite in other respects. *Mather v. Day*, 106 Mich. 371. But certainly to a common intent is all that is required. *Clement v. Comstock*, 2 Mich. 362-3; *Bush v. Davis*, 34 Mich. 196. If an award is sufficiently definite to be obligatory as a contract, it is sufficiently so as an award. *Bush v. Davis*, 34 Mich. 196.

**(13654). Vacating Award.**

SEC. 9. Any party complaining of such award, may move the court designated in such submission, to vacate the same, upon either of the following grounds:

1. That such award was procured by corruption, fraud, or other undue means;
2. That there was evident partiality or corruption in the arbitrators, or either of them;
3. That the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear any evidence, pertinent and material to the controversy; or any other misbehavior by which the rights of any party shall have been prejudiced;
4. That the arbitrators exceeded their powers, or that they so imperfectly executed them, that a mutual, final and definite award on the subject matter submitted, was not made.

**HISTORY:** Re-enacts and supersedes Sec. 9, R. S. '46, Ch. 129, being C. L. '57, (5162); C. L. '71, (6897); How. 8482; C. L. '97, (10932), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** The grounds on which complaint may be made are all set forth. *Cooper v. Andrews*, 44 Mich. 94. See *Taylor v. Smith*, 93 Mich. 163. And it is only on these grounds that a court can vacate an award. *Phelps v. Wayne Circuit Judge*, 117 Mich. 35. The commission of an error of law or of fact by the arbitrators, unless so gross as of itself to furnish clear proof of corruption and fraud, is no ground for setting aside an award. *Brush v. Fisher*, 70 Mich. 469. See *Chicago & M. L. S. Railroad Co. v. Hughes*, 28 Mich. 189-90. See further, as to vacating awards, *Davidson v. Gunsolly*, 1 Mich. 388; *Buys v. Eberhardt*, 3 Mich. 524; *Gallagher v. Kern*, 31 Mich. 138; *Beam v. Macomber*, 33 Mich. 127; *Port Huron & N. W. Railway Co. v. Callanan*, 61 Mich. 22; *James v. Schroeder*, 61 Mich. 28.

When the award is regularly made it should be confirmed by the court. *Phelps v. Wayne Circuit Judge*, 117 Mich. 36. The court has no power to vacate the award because it reaches a different conclusion from an examination of the evidence from that of the arbitrators. *Id.* See *Rawlinson v. Shaw*, 124 Mich. 340; *Patrick v. Batten*, 123 Mich. 206; *Lattin v. Gamble*, 154 Mich. 178.

**(13655). Correction of Award.**

SEC. 10. Any party to such submission, may also move the court designated therein to modify or correct such award, in the following cases:

1. Where there is an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in such award;

2. Where the arbitrators shall have awarded upon some matter not submitted to them, not affecting the merits of the decision upon the matter submitted;

3. When the award shall be imperfect in some matter of form, not affecting the merits of the controversy; and where, if it had been a verdict, such defect could have been amended or disregarded by the court, according to the provisions of law.

**HISTORY:** Re-enacts and supersedes Sec. 10, R. S. '46, Ch. 129, being C. L. '57, (5163); C. L. '71, (6898); How. 8483; C. L. '97, (10933), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Modifying or correcting award. *Taylor v. Smith*, 93 Mich. 163. See *Clement v. Comstock*, 2 Mich. 359; *Buys v. Eberhardt*, 3 Mich. 524; *Beam v. Macomber*, 35 Mich. 455; *Cooper v. Andrews*, 44 Mich. 95.

**(13656). Motions to Vacate or Modify Award.**

SEC. 11. Every such application to vacate or modify an award, shall be made to the court designated in the submission, at the next term after the publication of such award, upon due notice to the adverse party as in other cases of special motions, if there be time for that purpose; and if there be not time, such court, or any judge thereof, may, upon good cause shown, order a stay of proceedings on such award, either absolutely, or upon such terms as shall appear just, until the term of the court next after such first term.

**HISTORY:** Re-enacts and supersedes Sec. 11, R. S. '46, Ch. 129, being C. L. '57, (5164); C. L. '71, (6899); How. 8484; C. L. '97, (10934), though such section was not expressly repealed by this act. Unchanged.

See *Cooper v. Andrews*, 44 Mich. 95.

**(13657). Proceedings by Court Thereon.**

SEC. 12. On such application, the court may vacate such award in any of the cases hereinbefore specified, and may, in

their discretion, direct a re-hearing by the same arbitrators; and in the cases herein specified, the court may modify and correct such award, so as to effect the intent thereof, and to promote justice between the parties.

**HISTORY:** Re-enacts and supersedes Sec. 12, R. S. '46, Ch. 129, being C. L. '57, (5165); C. L. '71, (6900); How. 8485; C. L. '97, (10935), though such section was not expressly repealed by this act. Unchanged.

**(13658). Judgment.**

**SEC. 13.** Upon such award being confirmed or modified, the court shall render judgment in favor of the party to whom any sum of money or damages shall have been awarded, that he recover the same; and if the award shall have ordered any act to be done by either party, judgment shall be entered that such act be done according to such order.

**HISTORY:** Re-enacts and supersedes Sec. 13, R. S. '46, Ch. 129, being C. L. '57, (5166); C. L. '71, (6901); How. 8486; C. L. '97 (10936), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** An arbitration which does not in all respects conform to the statute must be enforced, if at all, by bill or action. No judgment can be rendered on it. *Gibson v. Burrows*, 41 Mich. 715; *Gallagher v. Kern*, 31 Mich. 138; *McGunn v. Hamlin*, 29 Mich. 476.

**(13659). Costs.**

**SEC. 14.** The costs of the proceedings shall be taxed as in suits, and if no provision for the fees and expenses of the arbitrators shall have been made in the award, the court shall make the same allowance as provided by law, in cases of references.

**HISTORY:** Re-enacts and supersedes Sec. 14, R. S. '46, Ch. 129, being C. L. '57, (5167); C. L. '71, (6902); How. 8487; C. L. '97, (10937), though such section was not expressly repealed by this act. Unchanged.

● **(13660). Record of Judgment.**

**SEC. 15.** A record of such judgment shall be made, commencing with a memorandum reciting the submission; then stating the hearing before the arbitrators; their award; the proceedings of the court thereupon, in modifying or confirming such award; and the judgment of the court for the recovery of the debt or damages awarded, and that the parties

performed the acts ordered by the award, and for the recovery of the costs allowed.

**HISTORY:** Re-enacts and supersedes Sec. 15, R. S. '46, Ch. 129, being C. L. '57 (5168); C. L. '71, (6903); How. 8488; C. L. '97, (10938); though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Judgment record. *Cooper v. Andrews*, 44 Mich. 95; *Chicago & M. L. S. Railroad Co. v. Hughes*, 28 Mich. 186.

**(13661). Effect of Judgment.**

**SEC. 16.** Such records shall be filed and docketed, as records of judgments in other cases; shall have the same force and effect in all respects; be subject to all the provisions of law in relation to judgments in actions; and may in like manner, be removed and reversed by writ of error; and execution shall issue thereupon against the property or person of any party against whom a recovery shall be had, in all respects as upon other judgments.

**HISTORY:** Re-enacts and supersedes Sec. 16, R. S. '46, Ch. 129, being C. L. '57, (5169); C. L. '71, (6904); How. 8489; C. L. '97, (10939), though such section was not expressly repealed by this act. Unchanged.

**(13662). Writ of Error.**

**SEC. 17.** When any writ of error shall be brought on any such judgment rendered in a circuit court, certified copies of the original affidavits upon which any application in relation to such award was founded, and of all other affidavits and papers relating to such application, shall be annexed to, form a part of, and be returned with the record of the judgment; and the court to which such writ shall be returned, shall reverse, modify or amend, or affirm such judgment, or any part thereof, according to justice.

**HISTORY:** Re-enacts and supersedes Sec. 17, R. S. '46, Ch. 129, being C. L. '57, (5170); C. L. '71, (6905); How. 8490; C. L. '97, (10940), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Error cannot be sustained on the record alone, if it shows what the statute requires. *Cooper v. Andrews*, 44 Mich. 96.

**(13663). Enforcement of Certain Judgments.**

**SEC. 18.** When by such judgment, any party shall be required to perform any act, other than the payment of money,

the court rendering such judgment shall enforce the same by rule; and the party refusing or neglecting to perform and execute such act, or any part thereof, shall be subject to all the penalties of, contemning an order of such court, and may be proceeded against in the manner provided by law in such cases.

**HISTORY:** Re-enacts and supersedes Sec. 18, R. S. 46, Ch. 129, being C. L. '57, (5171); C. L. '71, (6906); How. 8491; C. L. '97, (10941), though such section was not expressly repealed by this act. Unchanged.

**(13664). Costs.**

**SEC. 19.** If upon any application made pursuant to the foregoing provisions, the court shall vacate and set aside any award of arbitrators, costs may, in the discretion of the court, be awarded to the prevailing party; and the payment thereof may be enforced by rule of the court, as in other cases.

**HISTORY:** Re-enacts and supersedes Sec. 19, R. S. 46, Ch. 129, being C. L. '57, (5172); C. L. '71, (6907); How. 8492; C. L. '97, (10942), though such section was not expressly repealed by this act. Unchanged.

**(13665). Writ of Error on Order Vacating.**

**SEC. 20.** Upon every such order vacating an award, made by any circuit or superior court, the party aggrieved may bring a writ of error, as upon any other judgment of such court; to which writ shall be returned certified copies of such order, and of all affidavits and papers used on such application; and the court to which such writ shall be returned, shall proceed to confirm or reverse such order, as shall be just.

**HISTORY:** Re-enacts and supersedes Sec. 20, R. S. 46, Ch. 129, being C. L. '57, (5173); C. L. '71, (6908); How. 8493; C. L. '97, (10943), changing "any circuit court" to "any circuit or superior court," though such section was not expressly repealed by this act. Substantially unchanged.

**(13666). Proceedings on Reversal.**

**SEC. 21.** If such order be reversed, the proceedings shall be remitted to the court from which they were removed, to proceed thereon; or the court to which such proceedings shall have been returned, may proceed thereon to modify or confirm the award, and to render judgment thereon, in the same manner, and with the like effect, as if such court had been designated in the submission.

**HISTORY:** Re-enacts and supersedes Sec. 21, R. S. '46, Ch. 129, being C. L. '57, (5174); C. L. '71, (6909); How. 8494; C. L. '97, (10944), though such section was not expressly repealed by this act. Unchanged.

**(13667). Construction of this Chapter.**

**SEC. 22.** Nothing contained in this chapter shall be construed to impair, diminish, or in any manner to affect the power and authority of any court of chancery, over arbitrators, awards, or the parties thereto; nor to impair or affect any action upon any award, or upon any bond or other engagement to abide an award.

**HISTORY:** Re-enacts and supersedes Sec. 22, R. S. '46, Ch. 129, being C. L. '57, (5175); C. L. '71, (6910); How. 8495; C. L. '97, (10945), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Equity has jurisdiction to set aside an award. *Early v. Ingham* Circuit Judge, 166 Mich. 519; *Kearney v. Washtenaw Mutual Fire Insurance Co.*, 126 Mich. 250.

**(13668). Neither Party to Revoke Submission Without Consent.**

**SEC. 23.** Neither party shall have power to revoke any submission made as provided in this chapter, without the consent of the other party; and if either party shall neglect to appear before the arbitrators after due notice, the arbitrators may nevertheless proceed to hear and determine the matter submitted to them, upon the evidence produced by the other party.

**HISTORY:** Re-enacts and supersedes Sec. 23, R. S. '46, Ch. 129, being C. L. '57, (5176); C. L. '71, (6911); How. 8496; C. L. '97, (10946), though such section was not expressly repealed by this act. Unchanged.

**CONSTRUED:** Where a matter has once been referred to arbitration and an award has been rendered, a subsequent agreement for a re-arbitration must be treated as abrogating the previous award. *Rawlinson v. Shaw*, 117 Mich. 5. See *Id.* 124 Mich. 340.



**CHAPTER XLVI.**  
**OF THE FEES OF CERTAIN OFFICERS.**

**(13669). Fees Allowed.**

**SECTION 1.** For the services mentioned in this chapter, hereafter done or performed in the several courts in this state, by the officers thereof, or in any proceeding authorized by law, the fees hereinafter prescribed shall be allowed.

**HISTORY:** Re-enacts Sec. 1, R. S. '46, Ch. 150, being C. L. '57, (5637); C. L. '71, (7428); How. 9005; C. L. '97, (11214). Unchanged.

**(13670). Commencement of Suit.**

**SEC. 2.** Before any suit at law or in chancery shall be commenced in any circuit court or in the superior court of Grand Rapids or before the filing of any application for a writ of mandamus, prohibition, quo warranto, habeas corpus or other extraordinary writ, there shall be paid to the clerk of said court by the moving party the sum of three dollars.

**HISTORY:** Re-enacts Sec. 1 of Act 267 of '11, p. 456, Eff. Aug. 1, omitting "or register." Substantially unchanged.

**REPEAL OF LOCAL ACTS:** This act repeals by implication all local acts conflicting with it, including Act 259 of the Local Acts of '83, providing a larger fee in Wayne County. *Hopkins v. Sanders*, 172 Mich. 228.

**(13671). Filing Transcript.**

**SEC. 3.** Before the filing and entering of any transcript from justice's court, there shall be paid to said clerk the sum of one dollar.

**HISTORY:** New section. This section taken from a part of Sec. 2, R. S. '46, Ch. 150, being C. L. '97, (11215). Changed, in regard to fees.

See *Board of Auditors v. Reynolds*, 121 Mich. 102.

**(13672). Default.**

**SEC. 4.** Before the entry of any final judgment by default in an action at law or pro confesso decree in chancery, there shall be paid to said clerk the sum of two dollars.

**HISTORY:** Re-enacts Sec. 2 of Act 267 of '11, p. 456, Eff. Aug. 1, omitting "or register." Substantially unchanged.

**CITED:** Hopkins v. Sanders, 172 Mich. 227-234.

**(13673). Suit at Law.**

**SEC. 5.** Before the entry of any final judgment in a suit at law wherein a trial has been had, there shall be paid to said clerk the sum of four dollars.

**HISTORY:** Re-enacts and supersedes Sec. 3 of Act 267 of '11, p. 456, Eff. Aug. 1, though such section was not expressly repealed by this act. Unchanged.

**13674). Contested Chancery Cases.**

**SEC. 6.** Before the entry of any final decree in a contested chancery case, there shall be paid to said clerk the sum of three dollars.

**HISTORY:** Re-enacts Sec. 4 of Act 267 of '11, p. 456, Eff. Aug. 1. Unchanged.

**(13675). Ex Parte Chancery.**

**SEC. 7.** Before the filing of any ex parte petition in chancery, there shall be paid to said clerk the sum of two dollars which shall be in full of all fees for said proceeding.

**HISTORY:** Re-enacts Sec. 5 of Act 267 of '11, p. 456, Eff. Aug. 1. Unchanged.

**(13676). Ex Parte Petition at Law.**

**SEC. 8.** Before the filing of any ex parte petition at law, there shall be paid to said clerk the sum of four dollars which shall be in full of all fees for said proceeding.

**HISTORY:** Re-enacts and supersedes Sec. 6 of Act 267 of '11, p. 456, Eff. Aug. 1, though such section was not expressly repealed by this act. Unchanged.

**(13677). Services in Case of Money.**

**SEC. 9.** For any and all services relative to the receipt, safe-keeping, putting out money, or purchasing, taking or transferring any security therefor, or collecting interest thereon, under the direction of the court, not herein specifically provided for, such allowance and compensation, and from such of the parties as the court may consider just and shall direct,

by an order for that purpose, after notice to the parties to be charged therewith.

**HISTORY:** Re-enacts a part of Sec. 6, R. S. '46, Ch. 150, being C. L. '57, (5642); C. L. '71, (7433); How. 9009; C. L. '97, (11218), with a slight change in phraseology. Changed, in phraseology. The balance of the section was superseded by P. A. '11, Act No. 267.

**CITED:** Gardner v. Newaygo Supervisors, 110 Mich. 95.

**(13678). Certified Copies.**

**SEC. 10.** For all certified copies, and exemplifications of records, pleadings and proceedings furnished on request, where no special provision is otherwise made, eight cents for each folio.

**HISTORY:** New section.

**(13679). Writ of Error.**

**SEC. 11.** Upon appeal to supreme court on writ of error, and in chancery appeals, there shall be paid to said clerk the sum of five dollars and the appellant shall furnish copies of pleadings and exemplification of records or proceedings to be sent.

**HISTORY:** This section re-enacts and supersedes Sec. 7 of Act 267 of '11, p. 456, Eff. Aug 1, though such section was not expressly repealed by this act. The above section is made broader, however, so as to cover Chancery appeals. Unchanged.

**(13680). Payment in Full.**

**SEC. 12.** The sum or sums paid as aforesaid shall be held to be in full for all clerk, entry, judgment and decree fees in any suit from the commencement thereof to and including the issuance and return of the execution or other final process.

**HISTORY:** Re-enacts and supersedes Sec. 8 of Act 267 of '11, p. 456, Eff. Aug. 1, omitting "register." Such section was not, however, expressly repealed by this act. Unchanged.

**CITED:** Hopkins v. Sanders, 172 Mich. 227-234.

**(13681). Disposition of Money.**

**SEC. 13.** In counties where the county clerk receives the fees of his office, all or in part, in lieu of salary, all or in part, the said clerk shall pay over to the county treasurer the sum of two dollars on each and every suit at law that shall be

commenced in the circuit court; and in counties where the county clerk is paid a salary in lieu of fees collected by the county clerk, pursuant to this chapter, all fees shall be paid over to the county treasurer as required by law.

**HISTORY:** Re-enacts and supersedes Sec. 9 of Act 267 of '11, p. 456, Eff. Aug. 1, though such section was not expressly repealed by this act. Unchanged.

**CITED:** Hopkins v. Sanders, 172 Mich. 227-234.

**CHAPTER XLVII.**  
**OF COSTS AND THE TAXATION THEREOF.**

**(13682). Stenographer Fee.**

**SECTION 1.** In each and every issue of fact tried and contested before the court or jury in which the stenographer shall be employed, there shall be taxed three dollars, the same to be paid by the plaintiff in the suit, before the taking of testimony is commenced, into the hands of the clerk of the court, and by him into the county treasury, to apply to the credit of the general expense fund, and if the plaintiff shall prevail in the suit the amount so paid by him shall be taxed in his costs, as proper disbursements.

**HISTORY:** Re-enacts and supersedes Sec. 51 of Act 183 of '97, being C. L. '97, (413), though such section is not expressly repealed by this act. Unchanged.

**CONSTRUED:** Scott v. University of Mich. Athletic Association, 154 Mich. 328; Wheaton v. Atlantic Giant-Powder Co., 41 Mich. 718.

**(13683). Transcript of Stenographer's Notes.**

**SEC. 2.** Where a transcript of the stenographer's notes, taken in circuit court, is desired for the purpose of moving for a new trial, preparing a bill of exceptions, or removing the cause to the supreme court, the amount of stenographer's fees paid therefor shall be recovered as a part of the taxable costs by the prevailing party in such motion, or in the supreme court.

**HISTORY:** Re-enacts and supersedes Sec. 49 of Act 183 of '97, being C. L. '97, (411), though such section is not expressly repealed by this act. See Compilers' Section (14519).

See Gillies v. Kent Circuit Judge, 106 Mich. 637; Lyle v. Sherman, 147 Mich. 424.

**(13684). Secretary of State's Fee.**

**SEC. 3.** In actions against foreign corporations where the service of process is made upon the secretary of state, the fee paid to the secretary of state at the time of such service, may be taxed as costs to the plaintiff, in case he prevails in the proceedings.

**HISTORY:** New section. This section follows in phraseology the last clause of Sec. 10 of Act 206 of '01, As Added '07, (Ex. Sess.), p. 10, Act 3, Imd. Eff. Oct. 24, though such section was not expressly repealed by this act.

**(13685). Sundry Costs.**

**SEC. 4.** There shall be allowed to the prevailing parties costs in addition to the fees of officers, disbursements, and witnesses in suits at law, commenced or brought into the circuit court, by appeal or otherwise, as follows: For proceedings before trial, in all civil cases, fifteen dollars; for the trial of any case, fifteen dollars; in all actions where judgment is taken by default or upon cognovit, fifteen dollars; in all cases of special motions, such sum not exceeding fifteen dollars, as the court shall deem just; for every term at which a cause is regularly on the calendar and not reached, or is postponed, excluding that at which it is tried, five dollars: *Provided*, That no such term fee shall be allowed to any party for any term at which he was allowed a continuance fee; in all cases heard and determined on appeal, the costs, or such part thereof as to the court shall seem just, in view of the particular circumstances of each case, may be awarded to either party; in all cases of certiorari to a circuit court, to the prevailing party, fifteen dollars. If the judgment in certiorari be reversed in part, and affirmed as to the residue, costs shall be in the discretion of the court; in all cases, the party prevailing in the circuit court may tax in addition to the costs above allowed him, such costs as he would have been entitled to tax had he prevailed in the court below, and such costs as he paid on taking the appeal, if he was appellant in the cause.

**HISTORY:** New section. Re-enacts a part of and supersedes Sec. 1 of Act 58 of '67, As Am., '69, p. 32, Act. 28, Eff. July 5, being C. L. '71, (7427); How. 9004; C. L. '97, (11254). Unchanged.

**COSTS:** Trial fee for each trial. *Inkster v. Carver*, 17 Mich. 64. Costs of transcript of record for printer. *Id.* Costs where judgment is affirmed in part and reversed in part. *Wilcox v. Laffin & Rand Powder Co.*, 44 Mich. 35. C. L. '97, (11254), as originally passed in '67, construed. *Dewey v. Johnson*, 16 Mich. 490. See *Galbraith v. McCollum*, 98 Mich. 219; *Beem v. Palmer*, 97 Mich. 491.

**TERM FEES:** In the case of *Weber v. Wayne Circuit Judge*, 162 Mich. 35; in construing Compilers' Sections (14624)-14625), which except that they relate only to Wayne County, are practically identical with Compilers' Sections (12578)-(12579), the court held that those sections, so far as they apply are inconsistent with the allowance of term fees as provided in C. L. '97, (11254), which contained a provision as to term fees similar to this section. The right to a

term fee is not subject to an exception as to terms at which it was obviously improbable that the cause would be reached. *Martin v. Judge*, 111 Mich. 71. See *Inkster v. Carver*, 17 Mich. 64. See *Lehman v. Geer*, 180 Mich. 362 (agreement by attorney to advance costs); *In re Service's Estate*, 155 Mich. 179 (agreement for contingent fee); *McGilvray v. Manistee Cir. J.*, 146 Mich. 480 (taxation of attorney fee for first trial); and *Voight Brew. Co. v. Circuit Judge*, 108 Mich. 356 (costs in circuit court in appealed cases). *Baxter v. Oakland Circuit Judge*, 208 Mich. 601 (where a cause regularly on the calendar, not reached, continued by stipulation or lack of time, the fee is taxable).

**(13686). Defendant's Costs in Chancery.**

SEC. 5. If the plaintiff in chancery shall dismiss his bill or petition, or if the same shall be dismissed for want of prosecution, the defendant shall recover his costs, except in those cases where, according to the practice of the court, costs would not be awarded against such plaintiff upon a decree rendered on hearing the cause.

HISTORY: Re-enacts Sec. 1, R. S. '46, Ch. 149, being C. L. '57, (5595); C. L. '71, (7385); How. 8962; C. L. '97, (11255), changing "the complainant or petitioner" to "plaintiff." Substantially unchanged.

CONSTRUED: Costs are in consequence of some default and are not awarded by the common law, but depend entirely upon statutory provisions. *Booth v. McQueen*, 1 Doug. 41.

See *Hickey v. Baird*, 9 Mich. 38; *Daniels v. Eisenlord*, 10 Mich. 457; *Miller v. Maher*, 178 Mich. 571.

**(13687). Costs Directed by Court.**

SEC. 6. In all other cases where no special provision shall be made by law, the costs of all suits and proceedings in chancery, shall be paid by such party as the court shall direct.

HISTORY: Re-enacts Sec. 2, R. S. '46, Ch. 149, being C. L. '57, (5596); C. L. '71, (7386); How. 8963; C. L. '97, (11256). Unchanged.

CONSTRUED: See *Daniels v. Eisenlord*, 10 Mich. 457; *Van Wert v. Chidester*, 31 Mich. 209; *Avery v. Payne*, 12 Mich. 540; *Clark v. Raymond*, 27 Mich. 457; *Conway v. Waverly*, 15 Mich. 263; *Covell v. Moseley*, 15 Mich. 514; *Rogers v. Anderson*, 40 Mich. 290; *Lapham v. Lapham*, 40 Mich. 527; *Perkins v. Perkins*, 16 Mich. 163; *Summers v. Bromley*, 28 Mich. 126; *Woods v. Monroe*, 17 Mich. 244; *Comstock v. Comstock*, 24 Mich. 39; *Smith v. Rumsey*, 33 Mich. 199; *M. E. Church v. Clark*, 41 Mich. 731; *Salisbury v. Miller*, 14 Mich. 160; *Wilcox v. Hill*, 11 Mich. 262; *Pt. Huron v. Chadwick*, 52 Mich. 321; *Dutch Reformed Church Cases*, 52 Mich. 329; *Frederick v. Mecosta Circuit Judge*, 52 Mich. 529; *Smith v. Sherman*, 52 Mich. 637; *Stafford v. Stafford*, 53 Mich. 522; *Hickman v. Chaney*, 155 Mich. 227.

**(13688). Costs Recoverable by Plaintiff.**

SEC. 7. In the following cases, if the plaintiff recover judgment by default, upon confession, verdict, or otherwise in any action or proceeding at law, he shall recover his costs:

1. In all actions of ejectment, or for waste or private nuisance, and in all proceedings to recover the possession of land forcibly entered, or forcibly or otherwise unlawfully detained;

2. In all actions to which the title of lands or tenements, or right of way, or right by prescription or otherwise, to any easement in any land, or to overflow the same, or to do any other injury thereto, shall have been put in issue by the pleadings, or shall have come in question on the trial of the cause;

3. In suits and proceedings upon writs of prohibition, or information in the nature of a quo warranto;

4. In all actions of replevin, and in all actions for the recovery of any debt or damages, or for the recovery of penalties or forfeitures, in all cases where the court has exclusive or concurrent jurisdiction.

5. In all actions where the plaintiff shall recover less than one hundred dollars, if it appear that his claim, as established at the trial, exceeded one hundred dollars and the same was reduced by set-off; or if the suit was one which could not have been lawfully commenced in justice court;

6. In actions for trespass upon land, or for taking personal property, where the court before whom the same shall be tried shall certify in their minutes, or the jury by whom the damages shall be assessed shall find and return in their verdict, that such trespass was wilful and malicious;

7. In actions for a false return, or for any other malfeasance or misfeasance by any ministerial or judicial officer in such capacity or office, except such actions against constables or other ministerial officers, touching their duties upon process issued in civil actions brought in a justice's court.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 149, being C. L. '57, (5597); As Am. '71, p. 192, Act. 122, Imd. Eff. Apr. 15; C. L. '71, (7387); How. 8964; C. L. '97, (11257), omitting "demurrer." In the third subdivision omitting "scire facias, audita querela." In the fifth subdivision, adding all after the first semi-colon and in the sixth subdivision changing "Inquisition" to "verdict." Modified, only as above.

**DOUBLE DAMAGES—COSTS:** Where plaintiff recovered a judgment for damages to his sheep caused by defendant's dogs and the



damages so found were doubled and when so done the judgment exceeded \$100, it was held in such a case that the plaintiff was entitled to costs. *Reed v. Overlie*, 192 Mich. 445.

SUBDIVISION 1: *Dibel v. Brinkerhoff*, 22 Mich. 376. This subdivision applies to the case of obstructing a navigable stream. *Gifford v. McArthur*, 55 Mich. 535; *Black v. Carpenter*, 104 Mich. 287.

SUBDIVISION 2: *Druse v. Wheeler*, 22 Mich. 445; *Cuming v. Prang*, 24 Mich. 514; *Foster v. Hill*, 55 Mich. 540; *Walters v. Tefft*, 57 Mich. 391; *Jeffrey v. Hursh*, 58 Mich. 259; *Kooeingshof v. Spaulding*, 59 Mich. 245; *Labeau v. Labeau*, 61 Mich. 85; *Knoor v. Maccomb*, Circuit Judge, 78 Mich. 171; *Greusel v. Smith*, 85 Mich. 574; *Haney v. Muskegon Circuit Judge*, 101 Mich. 392; *Fisk v. Wabash Railroad Co.*, 114 Mich. 248; *Ostrom v. Potter*, 104 Mich. 115; *Haney v. Munger*, 104 Mich. 119.

SUBDIVISION 4: *Durfee v. Dean*, 52 Mich. 387; *Lewis v. Flint & P. M. Railway Co.*, 56 Mich. 638. When the amount of plaintiff's claim, as established on the trial, is less than \$100 defendant is entitled to costs. *Strong v. Daniels*, 3 Mich. 466; *Inkster v. Carver*, 16 Mich. 484; *Bollo v. French*, 21 Mich. 164; *Dikeman v. Harrison*, 38 Mich. 617; *Stortz v. Ingham Circuit Judge*, 38 Mich. 243; *Dikeman v. Harrison*, 38 Mich. 617; *Nelson v. People*, 38 Mich. 620. When the defendant is a municipal corporation, a justice has no jurisdiction, and plaintiff, if he prevails, is entitled to costs. *Gurney v. Mayor*, 11 Mich. 202. So also, in case of a foreign corporation defendant, no statutory method being provided for the service of a justice's summons upon such a corporation and the jurisdiction of the circuit court being therefore exclusive. *Reath v. W. U. Tel. Co.*, 89 Mich. 22. The plaintiff is entitled to costs, without reference to the value of the property, whenever he recovers judgment upon verdict in an action of replevin. *Merril v. Butler*, 18 Mich. 294. See *Caldwell v. Bowen*, 80 Mich. 388-9; *Berndt v. Ionia Circuit Judge*, 111 Mich. 360; *Mason v. City of Muskegon*, 109 Mich. 456; *Krzyszke v. Kamin*, 163 Mich. 301.

SUBDIVISION 5: Where a demand exceeding \$100. sued in the circuit court, is reduced below that amount in any other way than by set-offs, the judgment will not carry costs. *Ladd v. Duncan*, 23 Mich. 285. *Read v. Homer*, 90 Mich. 158. As by actual payments made to apply on it before suit commenced. *Mandigo v. Mandigo*, 26 Mich. 349; *Strong v. Kennedy*, 40 Mich. 327. And by settlement of part of the demands before suit brought. *Carter v. Snyder*, 27 Mich. 484. The voluntary surrender of property for which plaintiff brought trover. *Bollo v. French*, 21 Mich. 164. But where the claim was reduced below \$100 by tender and payment into court after suit brought, plaintiff will be entitled to costs if his judgment together with the amount paid in, exceeds \$100. *Thompson v. Townsend*, 41 Mich. 346. And Sec. (7282), C. L. '97, gives the receiver of a mutual fire insurance company costs in a suit brought in the circuit court to recover an assessment made by him, even though the judgment recovered be less than \$100. *Bacon v. Clyne*, 70 Mich. 183, citing *Russell v. Berry*, 51 Mich. 287, and overruling *Telford v. Church*, 66 Mich. 431, 442, to this extent. It is for the court to determine whether the plaintiff's claim was reduced by set-offs below \$100. *Davis v. Freeman*, 10 Mich. 188. See *Ramsay v. Kittridge*, 23 Mich.

488, and Compilers' Section (13717). Claim reduced by set-off. French v. Engle, 78 Mich. 216; Sparks v. Lord, 198 Mich. 419; Albright v. Stockhill, 208 Mich. 467.

SUBDIVISION 6: Strong v. Daniels, 3 Mich. 474-5; Haney v. Muskegon Circuit Judge, 101 Mich. 392.

**(13689). Costs No More Than Damages.**

SEC. 8. If the plaintiff in an action for assault and battery, or false imprisonment, or malicious prosecution, or for slanderous words, or for libel, recover less than fifty dollars, such plaintiff shall recover no more costs than damages.

HISTORY: Re-enacts and merges Sec. 4, R. S. '46, Ch. 149, being C. L. '57, (5598); C. L. '71, (7388); How. 8965; C. L. '97, (11258), and Sec. 1 of Act 53 of '97, being C. L. '97, (11299). Changed, as to damages and costs taxed.

CONSTRUED: This section, C. L. '97, (11258) (see history above) does not limit the costs on appeals from justices' courts. Evers v. Sager, 28 Mich. 52. No more costs than damages are recoverable in an action for slander. Dinger v. Miller, 39 Mich. 332. In an action for assault and battery. Johnson v. Detroit Y. & A. A. Railway, 130 Mich. 455; Cox v. Klein, 149 Mich. 166. See further, Meyer v. Wood, 38 Mich. 297; Dinger v. Miller, 39 Mich. 332; Johnson v. Disbrow, 47 Mich. 60; Steketee v. Kimm, 48 Mich. 323; Ford v. Bushor, 53 Mich. 589.

**(13690). Flowing of Lands.**

SEC. 9. If the plaintiff, in any action brought to recover damages, occasioned by the erection of any dam upon the lands of the defendant, for manufacturing or milling purposes, and the flowing of the lands of the plaintiff, recover less than fifty dollars, such plaintiff shall recover no more costs than damages.

HISTORY: Re-enacts Sec. 5 of R. S. '46, Ch. 149, As Added '47, p. 172, Act 105, Eff. May 16, being C. L. '57, (5599); C. L. '71, (7389); How. 8966; C. L. '97, (11259). Unchanged.

**(13691). Defendant to Recover Costs.**

SEC. 10. In all actions and proceedings in which the plaintiff would be entitled to costs, upon a judgment rendered in his favor, if, after the appearance of the defendant, such plaintiff be nonsuited, discontinue his suit, be non prossed or judgment pass against him on verdict, or otherwise; or in case a plaintiff recover judgment, but not enough to entitle him to costs; the defendant shall have judgment to recover against such

plaintiff his full costs, which shall have the like effect as all other judgments.

**HISTORY:** Re-enacts Sec. 5, R. S. '46, Ch. 149, being C. L. '57, (5600); C. L. '71, (7390); How. 8967; C. L. '97, (11260), omitting "demurrer." Substantially unchanged.

**CONSTRUED:** Bryan v. Smith, 10 Mich. 236; Thompson v. Townsend, 41 Mich. 347; Strong v. Daniels, 3 Mich. 474-5; Hickey v. Baird, 9 Mich. 38; Jeffrey v. Hursh, 58 Mich. 259; Labeau v. Labeau, 61 Mich. 85; Beem v. Newaygo Circuit Judge, 97 Mich. 491; Haney v. Muskegon Circuit Judge, 101 Mich. 392; Black v. Wayne Circuit Judge, 104 Mich. 286; Berndt v. Ionia Circuit Judge, 111 Mich. 359. Discontinuance. Sherman v. Washtenaw Circuit Judge, 52 Mich. 474. See this section and circuit court rule 43, Sec. 1, '16, (Former rule 26) construed together. Slocum v. Thatcher, 20 Mich. 52. See Gill v. Backus, 108 Mich. 418; Sands v. Manistee Circuit Judge, 116 Mich. 9; Reed v. Overlie, 192 Mich. 446; Albright v. Stockhill, 208 Mich. 467.

#### (13692). Defendant Acquitted.

**SEC. 11.** When several persons are made defendants in any suit or proceeding, or in any action in which the plaintiff, upon a recovery, would be entitled to costs, and one or more of them shall be acquitted by a verdict on the trial, or by judgment upon motion to dismiss, or by the plaintiff's discontinuing, as to such defendant, every person so acquitted shall recover his costs of suit, in like manner as if judgment had been rendered in favor of all the defendants.

**HISTORY:** Re-enacts Sec. 6, R. S. '46, Ch. 149, being C. L. '57, (5601); C. L. '71, (7391); How. 8968; C. L. '97, (11261), changing "plea in abatement or on demurrer" to "motion to dismiss." Substantially unchanged. See Black v. Wayne Circuit Judge, 104 Mich. 286.

#### (13693). Reasonable Cause of Action.

**SEC. 12.** But if such person be so acquitted in any action brought for the recovery of land, or the possession thereof, or for nuisance, waste, trespass, or trespass on the case for any nonfeasance or misfeasance, and if the judge or court before whom such trial shall be had, or such judgment shall be given, shall certify in the minutes of the court that there was reasonable cause for making the person so acquitted a defendant in such action, then such person shall not be entitled to recover such costs; and no costs shall be recovered against him.

**HISTORY:** Re-enacts Sec. 7, R. S. '46, Ch. 149, being C. L. '57,

(5602); C. L. '71, (7392); How. 8969; C. L. '97, (11262). Unchanged. See *Black v. Wayne Circuit Judge*.

**(13694). Judgment For One of Defendants.**

SEC. 13. If in any action founded upon a contract, the plaintiff fail to recover against one of several defendants on the trial, or if judgment on a motion to dismiss be rendered in favor of one of several defendants; or if, by the plaintiff's discontinuing as to such defendant, he be acquitted; such defendant shall not be entitled to recover costs, unless a certificate be given by the judge or court before whom the trial shall be had, or the judgment shall be given, and be entered in its minutes, that such defendant was unreasonably and unnecessarily made a party to such action.

HISTORY: Re-enacts Sec. 8, R. S. '46, Ch. 149, being C. L. '57, (5603); C. L. '71, (7393); How. 8970; C. L. '97, (11263), changing "plea in abatement or on demurrer" to "motion to dismiss." Substantially unchanged.

CONSTRUED: *Townsend v. Jackson Circuit Judge*, 157 Mich. 231. It was held that failure of the court to certify that the joinder of the defendant was unreasonable and unnecessary does not relieve the plaintiff, who moves for a discontinuance under Rule 27, subd. b, from liability for costs.

**(13695). Single Costs.**

SEC. 14. Whenever, by the provisions of any statute, a plaintiff shall be entitled to recover double or treble the damages assessed by a jury, if such damages so doubled or trebled, as the case may be, entitled him to recover costs, he shall recover single costs only in such suit, except in cases otherwise specially provided for by law.

HISTORY: Re-enacts Sec. 9, R. S. '46, Ch. 149, being C. L. '57, (5604); C. L. '71, (7394); How. 8971; C. L. '97, (11264). Unchanged. See *Gilbert v. Kennedy*, 22 Mich. 20.

**(13696). One and One-Half Costs for Defendants.**

SEC. 15. In the following actions, if judgment be rendered for the defendant upon verdict, motion to dismiss, nonsuit, non pros., discontinuance of the plaintiff or otherwise, in any action, certiorari, writ of error or other proceeding, such defendant shall recover the amount of his taxed costs, and one-half thereof in addition:

1. In actions against public officers appointed under the authority of this state, or elected by the people; or against

any person specially appointed according to law, to execute the duties of such public officer; for or concerning any act done by such officer or person, by virtue of his office, or for or concerning the omission, by such officer or person, to do any act, which it was his official duty to perform;

2. In actions against any other person, for doing any act by the commandment of such officers or persons; or in their aid or assistance, touching the duties of such office or appointment;

3. In actions against any person, for making any sale, or doing any other act by authority of any statute of this state.

**HISTORY:** Re-enacts Sec. 10, R. S. '46, Ch. 149, being C. L. '57, (5605); C. L. '71, (7395); How. 8972; C. L. '97, (11265), changing "demurrer" to "motion to dismiss." Substantially unchanged.

**CONSTRUED:** As to double costs, etc., see *Amperse v. Wayne Circuit Judge*, 14 Mich. 33; *Gilbert v. Kennedy*, 22 Mich. 5, 20.

**DOUBLE COSTS:** Where the jurisdiction of a justice of the peace to allow double costs is questioned, the same should be raised on the taxation of the costs, and not collaterally in an action on the bond. *Peterson v. Harrington*, 197 Mich. 612.

#### (13697). Double or Treble Costs for Defendant.

**SEC. 16.** When double or treble costs shall be awarded to any defendant, the same shall be deemed to belong to such defendant, and the officers who may have rendered any services in such action to such defendant, and the witnesses and jurors in such action, shall be entitled to receive and retain only the single costs allowed by law for their services respectively.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 149, being C. L. '57, (5606); C. L. '71, (7396); How. 8973; C. L. '97, (11266). Unchanged.

**CONSTRUED:** Double costs construed to be single costs and one-half thereof added. *Gilbert v. Kennedy*, 22 Mich. 19.

#### (13698). Costs of Awarding.

**SEC. 17.** When there shall be several issues in any case, and a verdict shall be rendered for the plaintiff on one or more of them, and for the defendant on another, if the plaintiff obtain judgment upon the whole record, costs shall be awarded as follows:

1. When the substantial cause of action was the same in each issue, the plaintiff shall recover costs on those issues which were found for him, and shall not be liable to the defendant for the costs of the issue which shall have been found for the defendant;

2. When there are two or more distinct causes of action in separate counts, the plaintiff shall recover costs on those issues which are found for him, and the defendant on those which are found in his favor.

**HISTORY:** Re-enacts Sec. 12, R. S. '46, Ch. 149, being C. L. '57, (5607); C. L. '71, (7397); How. 8974; C. L. '97, (11267). Unchanged.

**CONSTRUED:** In *Besser v. Alpena Cir. J.*, 155 Mich. 633, the court said: "This statute was copied verbatim from the statutes of New York." It was held to apply in an action of replevin for ties cut from separate descriptions of land where plaintiff failed to establish his title to one description, defendant being entitled to costs of the issue found in his favor. *Frank v. Speed*, 54 Mich. 241.

**(13699). Costs Not Allowed to Either Party.**

SEC. 18. If judgment be recovered for the defendant on the whole record, the costs of the issues which may be found for the plaintiff, shall not be allowed to either party.

**HISTORY:** Re-enacts Sec. 13, R. S. '46, Ch. 149, being C. L. '57, (5608); C. L. '71, (7398); How. 8975; C. L. '97, (11268). Unchanged.

**(13700). Defendant Allowed Costs on Motion to Dismiss.**

SEC. 19. When judgment shall be rendered in favor of a defendant, upon motion to dismiss one or more counts in a declaration, and the plaintiff shall have judgment on other counts on such motion, on verdict, or by default, the defendant shall be allowed his costs upon such judgment in his favor.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 149, being C. L. '57, (5609); C. L. '71, (7399); How. 8976; C. L. '97, (11269). Substantially unchanged.

**(13701). Discretionary Costs on Writ of Error.**

SEC. 20. If, upon a writ of error, the judgment be reversed, the appellant shall recover costs, unless in such judgment a new trial be ordered, in which case the costs on such reversal shall be in the discretion of the court; and if a judgment be reversed in part, and affirmed in part, costs shall be awarded to either party in the discretion of the court.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 149, being C. L. '57, (5611); C. L. '71, (7401); How. 8978; C. L. '97, (11271), changing "plaintiff in error" to "appellant." Substantially unchanged.

**CONSTRUED:** If a judgment is reversed on account of the iniquity of the transaction on which the action was founded, the party obtaining such reversal will not be allowed costs, "if he was a participant in the iniquity. *Williams v. Guard*, 34 Mich. 82. Nor will

costs be allowed when the suit is an amicable one to test the validity of a statute. *Smith v. First Nat. Bank*, 17 Mich. 479. Nor where a case made is sent back for a finding of facts. *Tuxbury v. French*, 39 Mich. 190. Nor when the findings are void. *Ells v. Rector*, 32 Mich. 379. Where a new trial is ordered costs are within the discretion of the court. *Jarralt v. Peters*, 151 Mich. 99.

See *Barnard v. Colwell*, 39 Mich. 215; *Abrams v. Abrams*, 38 Mich. 302; *Bagley v. Pridgeon*, 42 Mich. 550; *Lester v. Sutton*, 7 Mich. 329, 333; *Berry v. Lowe*, 10 Mich. 15; *Snell v. Race*, 78 Mich. 336; *Jeffrey v. Hursh*, 58 Mich. 259; *Robinson v. Batzer*, 195 Mich. 243.

### (13702). Damages for Delay.

SEC. 21. If, upon such writ, the judgment be affirmed, or the writ be discontinued or quashed, or the appellant be nonsuited, the appellee shall recover costs; and also damages for the delay and vexation, to be assessed in the discretion of the court before whom the writ was returnable.

HISTORY: Re-enacts Sec. 17, R. S. '46, Ch. 149, being C. L. '57, (5612); C. L. '71, (7402); How. 8979; C. L. '97, (11272), changing "plaintiff in error" to "appellant" and "defendant in error" to "appellee." Substantially unchanged.

CONSTRUED: When a judgment is affirmed by an equal division of the court, costs will not be allowed either party. *Whiting v. Butler*, 29 Mich. 145. Where the errors consisted of irregularities in entering up judgment by confession on a promissory note, damages for the delay were awarded as well as costs. *Waterman v. Toms*, 7 Mich. 78; *O'Connor v. Parker*, 23 Mich. 24; *Meyerfield v. Stettheimer*, 20 Mich. 418.

See *Storey v. Bird*, 8 Mich. 317; *Goodenow v. Curtis*, 33 Mich. 505; *Heath v. Waters*, 40 Mich. 473; *Jeffrey v. Hursh*, 58 Mich. 259.

### (13703). Twice Amount of Costs.

SEC. 22. If the judgment so affirmed was rendered after verdict, the appellee may recover twice the amount of his taxed bill of costs, in the discretion of the court.

HISTORY: Re-enacts Sec. 18, R. S. '46, Ch. 149, being C. L. '57, (5613); C. L. '71, (7403); How. 8980; C. L. '97, (11273), changing "defendant in error" to "appellee." Substantially unchanged.

### (13704). Neglect to Prosecute Writ of Error.

SEC. 23. The court to which any writ of error may be returnable or to which any appeal may be made, may award costs against the party neglecting to file such writ, or the transcript of the record intended to be removed thereby, or neglecting to file such appeal, and the pleadings and proceedings appealed from, according to law, and the rules of the

court; and may also award costs against either party for any discontinuance or default.

**HISTORY:** Re-enacts Sec. 19, R. S. '46, Ch. 149, being C. L. '57, (5614); C. L. '71, (7404); How. 8981; C. L. '97, (11274). Unchanged.

**(13705). On Appeals from Probate Court.**

**SEC. 24.** Upon appeals from probate courts to a circuit court, and from the circuit courts to the supreme court, costs shall be paid by the appellant or appellee, as shall be directed by the court to which the appeal is made; and upon affirming any sentence, determination or decree, or upon the appeal being discontinued or quashed, the court may, in its discretion, award damages for the delay and vexation caused by such appeal.

**HISTORY:** Re-enacts Sec. 20, R. S. '46, Ch. 149, being C. L. '57, (5615); C. L. '71, (7405); How. 8982; C. L. '97, (11275), changing "respondent" to "appellee." Substantially unchanged.

**CONSTRUED:** Damages for vexatious appeals, etc. *Kephart v. Farmers' & Mechanics' Bank*, 4 Mich. 606; *Campau v. Campau*, 25 Mich. 127; *Heath v. Waters*, 40 Mich. 472; *Fisher v. Hallcock*, 50 Mich. 463; *Hopkins v. Ruggles*, 51 Mich. 479; *Toles v. Meddaugh*, 106 Mich. 400; *Snow v. McCracken*, 107 Mich. 50; *Shepherd v. Shepherd's Estate*, 108 Mich. 91; *Wagar v. Bowley*, 109 Mich. 389; *Goff v. Cass Circuit Judge*, 152 Mich. 125. In proceedings to test the validity or determine the construction of a will. *Kempf's Appeal*, 53 Mich. 352; *Coneley v. McDonald*, 40 Mich. 150. The legislature by the provisions of C. L. '97, (9440), Compilers' Section (14115), relative to costs in suits by administrators or executors, did not intend to take from the courts the discretion as to costs conferred by this section. In *re Colburn's Estate*, 153 Mich. 216. Damages awarded for vexatious appeal. In *re Marx's Estate*, 201 Mich. 511.

**(13706). Liability of People for Costs.**

**SEC. 25.** In all civil suits and proceedings by or in the name of the people of this state, instituted by any officer duly authorized for that purpose, and not brought on the relation, or for the use of any citizen, or upon any penal statute, the people shall be liable for costs in the same cases, and to the same extent, as if such suit or proceeding were instituted by an individual.

**HISTORY:** Re-enacts Sec. 22, R. S. '46, Ch. 149, being C. L. '57, (5617); C. L. '71, (7407); How. 8984; C. L. '97, (11277). Unchanged.

**CONSTRUED:** This section and Compilers' Section (12747), clearly evidence an intention to subject the state to precisely the same liability for costs and for the incidents of a judgment, as an individual



is subject to, with the single exception relating to the method of collecting the demand, and require the payment of the same sum in discharge of a judgment for costs as would be required to be paid by an individual. *Flint & P. M. Railroad Co. v. State Auditors*, 102 Mich. 500. See *Atty. Gen. v. Soule*, 28 Mich. 154; *Metcalf v. Aud. Gen.*, 38 Mich. 94; *Courtwright v. Atty. Gen.*, 43 Mich. 411. Under C. L. '97, (11277), *supra*, an estate in process of probate is entitled to costs against the people on an appeal by the Auditor General from an order of the probate court refusing to require the payment of an inheritance tax in an excessive amount asked by the state. In *re Fox's Estate*, 162 Mich. 531. An action by the people against a foreign corporation to recover a penalty was held to be an action brought under a penalty statute, within the meaning of said section (11277) exempting the people from liability for costs in such actions. See *People v. Crucible Steel Co. of America*, 151 Mich. 618. As to C. L. '97 (11297), *supra*, see *Patterson v. Calhoun Cir. J.*, 144 Mich. 419.

**(13707). Costs as to Relators.**

SEC. 26. When a suit or proceeding shall be instituted in the name of the people of this state, on the relation of any citizen, such relator shall be entitled to and liable for costs, in the same cases, and to the same extent, as if such suit or proceeding had been instituted in his own name.

HISTORY: Re-enacts Sec. 23, R. S. '46, Ch. 149, being C. L. '57, (5618); C. L. '71, (7408); How. 8985; C. L. '97, (11278). Unchanged.

**(13708). Costs in Mandamus Discretionary.**

SEC. 27. In suits and proceedings upon writs of mandamus, the supreme court may, in its discretion, award or refuse costs to any party therein; and upon refusing an alternate or peremptory mandamus, the court may award costs to be paid by the party applying for such mandamus.

HISTORY: Re-enacts Sec. 24, R. S. '46, Ch. 149, being C. L. '57, (5619); C. L. '71, (7409); How. 8986; C. L. '97, (11279). Unchanged.

CONSTRUED: Costs are not allowed on issuing mandamus if no intentional wrong on respondent's part is charged or appears. *Mitchell v. Huron Circuit Judge*, 53 Mich. 541. But may be granted against a circuit judge on allowing a mandamus to compel him to vacate an illegal order. *Ellair v. Wayne Circuit Judge*, 46 Mich. 496. See *Barrett v. Bacon*, 18 Mich. 247. See further *Buchoz v. Pray*, 37 Mich. 512; *Barr v. Osborn*, 38 Mich. 313; *Ambler v. Aud. Gen.*, 38 Mich. 747; *McKenzie v. Baraga Twp. Treasurer*, 39 Mich. 554; *Clare Co. v. Aud. Gen.*, 41 Mich. 182; *Turnbull v. Alpena Township Board of Education*, 46 Mich. 497.

**(13709). Costs on Attachment.**

SEC. 28. In proceedings by attachment, to enforce or pro-

test the civil rights or remedies of parties, or for the non-payment of any sum of money, costs shall be awarded to be paid by the offending party.

**HISTORY:** Re-enacts Sec. 25, R. S. '46, Ch. 149, being C. L. '57, (5620); C. L. '71, (7410); How. 8987; C. L. '97, (11280). Unchanged.

**(13710). How Costs Taxed in Supreme Court.**

**SEC. 29.** Costs in the supreme court shall be taxed by one of the justices or the clerk thereof, and by such other officers as the supreme court shall, by general or special order, designate for that purpose; and upon such notice to the opposite party, as shall be prescribed by the general rules of the court.

**HISTORY:** Re-enacts Sec. 34, R. S. '46, Ch. 149, being C. L. '57, (5629); C. L. '71, (7419); How. 8996; C. L. '97, (11291). Unchanged.

**CONSTRUED:** Taxation of costs is ministerial, not judicial. *Abbott v. Matthews*, 26 Mich. 176; *Videto v. Jackson Supervisors*, 31 Mich. 116.

**(13711). How in Circuit Court.**

**SEC. 30.** Costs in the several circuit courts, and in municipal courts of record having civil jurisdiction, may be taxed by any officer authorized to tax costs in the supreme court, by circuit court commissioner, or the clerks of the said circuit and municipal courts respectively, and upon the like notice as shall be required in the supreme court.

**HISTORY:** Re-enacts Sec. 35, R. S. '46, Ch. 149, being C. L. '57, (5630); C. L. '71, (7420); As Am. '79, p. 44, Act 48, Imd. Eff. Apr. 28; How. 8997; C. L. '97, (11292). Unchanged.

**CONSTRUED:** Taxation of costs is no part of the record and will not be reviewed on error. *Abbott v. Matthews*, 26 Mich. 176; *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65. See note to last section and to Compilers' Section (13716).

**(13712). When Fees to be Taxed.**

**SEC. 31.** Upon the settlement of an execution by a defendant, or upon settling any suit or demand, the sheriff or attorney claiming any fees which shall not have been taxed, shall, upon being required by the defendant, and on his paying the expenses thereof, have his fees taxed by some proper officer authorized to tax costs in the court in which the suit may be pending; or from which the execution shall have been issued.

**HISTORY:** Re-enacts Sec. 36, R. S. '46, Ch. 149, being C. L. '57, (5631); C. L. '71, (7421); How. 8998; C. L. '97, (11293). Unchanged.

**(13713). Not to be Collected Until Taxed.**

**SEC. 32.** No sheriff or attorney shall collect any fees after having been required as aforesaid to have the same taxed, without such taxation having been made. .

**HISTORY:** Re-enacts Sec. 37, R. S. '46, Ch. 149, being C. L. '57, (5632); C. L. '71, (7422); How. 8999; C. L. '97, (11294). Unchanged.

**(13714). Taxing Costs of Foreclosure of Mortgage.**

**SEC. 33.** The cost and expenses of foreclosing any mortgage by advertisement, shall be taxed by some officer authorized to tax costs in the circuit court, upon the requisition of any party liable to pay the same, and upon such party paying the expense thereof.

**HISTORY:** Re-enacts Sec. 38, R. S. '46, Ch. 149, being C. L. '57, (5633); C. L. '71, (7423); How 9000; C. L. '97, (11295). Unchanged.

**(13715). Duties of Taxing Officers.**

**SEC. 34.** Every officer authorized to tax costs in any court for services rendered in any proceeding authorized by law, shall examine the bills presented to him for taxation, whether such taxation be opposed or not, and shall be satisfied that the items charged in such bill are correct and legal; and shall strike out all charges for services, which, in his judgment, were not necessary to be performed.

**HISTORY:** Re-enacts Sec. 39, R. S. '46, Ch. 149, being C. L. '57, (5634); C. L. '71, (7424); How 9001; C. L. '97, (11296). Unchanged.

**(13716). Affidavit.**

**SEC. 35.** When there shall be charges in a bill of costs for the attendance of any witness or for copies or exemplifications of documents or papers, or for any other disbursements, except to officers for services rendered, such charges for witnesses shall not be taxed without an affidavit stating the distance they respectively traveled and the days they actually attended; and such charges for copies shall not be taxed without an affidavit that such copies were actually and necessarily used or necessarily obtained for use; nor shall such disbursements be allowed without an affidavit specifying the items thereof particularly, nor unless they appear to have been

necessary and reasonable in amount, when in any case a party is entitled to charge witness fees, and his bill of costs shall contain an item or items for the attendance and travel of the party himself as a witness, such item or items shall be taxed upon affidavit that the party was in attendance upon the court for the time charged for the purpose of being sworn as a witness and not to assist in the management of the cause, and that the travel was for the purpose of giving his evidence.

**HISTORY:** Re-enacts Sec. 40, R. S. '46, Ch. 149, being C. L. '57, (5635); C. L. '71, (7425); As Am. '81, p. 394, Act 280, Eff. Sept. 10; How 9002; C. L. '97, (11297). Unchanged.

**WITNESSES:** Affidavit of attendance. *Sawyer v. Studley*, Walk, 154; *Jeffery v. Hursh*, 58 Mich. 260. Fees of witnesses, in attendance in good faith, but not sworn, may be taxed. *Gilbert v. Kennedy*, 22 Mich. 5. Witness fees must be taxed as costs in accordance with the showing made by the statutory affidavit attached to the bill of costs, unless there is a counter showing. *Sherman v. Washtenaw*. Circuit Judge, 52 Mich. 474.

**DISBURSEMENTS:** Requisites of affidavit of. *Maxwell v. Bay City Bridge Co.*, 42 Mich. 67. See *Patterson v. Calhoun* Circuit Judge, 144 Mich. 419.

**STENOGRAPHERS' FEES:** Costs for stenographers' fees cannot include anything for taking the testimony of the losing party. *Dickinson v. Seaver*, 44 Mich. 624. It being the stenographer's duty to file a copy of his notes on demand without charge, fees paid him for services are not taxable. *Bell v. Pate*, 48 Mich. 640. But the expense of obtaining a copy of the record for the printer is a proper item of costs. *Bottsford v. Murphy*, 48 Mich. 642.

### (13717). Evidence of Right to Costs.

**SEC. 36.** If upon the trial of any cause, the plaintiff's claim shall be reduced by set-off, or any other fact shall appear which will entitle either party to costs, or to double costs, the judge holding the court shall, on the application of either party, either before or after verdict rendered, cause an entry to be made in the minutes of the court, specifying that such fact appeared; and no evidence shall be received by any taxing officer of such matter, other than a certified copy of such minutes, or the certificate of the judge who tried the cause.

**HISTORY:** Re-enacts Sec. 41, R. S. '46, Ch. 149, being C. L. '57, (5636); C. L. '71, (7426); How. 9003; C. L. '97, (11298). Unchanged.

**CONSTRUED:** The entry provided for by this section must be applied for and made before judgment, and the judgment should be entered in conformity therewith, in reference to costs. *Ramsay v. Kittridge*, 23 Mich. 488. See *Thompson v. Townsend*, 41 Mich. 346.

## CHAPTER XLVIII.

### FEES OF SHERIFFS, WITNESSES, GRAND AND PETIT JURORS.

#### Fees of Sheriffs.

##### (13718). Traveling Fees.

SECTION 1. The sheriff or other officer, serving any process or paper, shall only be entitled to traveling fees for such service, from the county seat of the county in which service was made, to the place of service therein.

HISTORY: Re-enacts and supersedes a part of Sec. 40, R. S. '46. Ch. 90, As Am. '47, p. 169, Act 105, Eff. May 16, being C. L. '57, (3494); C. L. '71, (5076); How. 6630; As Am. '85, p. 92, Act 89, Eff. Sept. 19; C. L. '97, (452). Modified.

##### (13719). Sundry Fees.

SEC. 2. For serving a summons, writ of replevin or other processes by which a suit shall be commenced in a court of law, a writ of garnishment, or a summons to appear and answer in chancery, seventy-five cents when service is made on one defendant only, and for the service on each additional defendant, twenty-five cents; for traveling in making such service, on the usual traveled route, ten cents per mile for going only, to be computed in all cases from the court house of the county in which the service is made, or from the place where the court has usually been held therein; for taking a bond of a plaintiff in replevin, or taking a bond on the arrest of a defendant, or in other cases where he is authorized to take the same, fifty cents; for a certified copy of such bond when requested, twenty-five cents; for a note of every capias delivered to a defendant on request, six cents; for a copy of every summons or declaration served by him, when made by the sheriff, six cents for each folio; for a copy of every other writ, when demanded or required by law, twenty-five cents; for serving an attachment for the payment of money, or an execution for the payment of money, or a warrant issued for the same purpose and delivered to him by the county treas-

urer or any supervisor, for collecting the sum of two hundred fifty dollars or less, two and one-half per cent, and for any sum more than two hundred fifty dollars, one and one-quarter per cent; advertising goods or chattels, lands or tenements for sale, on any execution, if a sale be made, one dollar; and, if the execution be stayed or settled after advertising and before sale, fifty cents. The fees allowed by law and paid to any printer by such sheriff for publishing an advertisement of the sale of real estate for not more than six weeks, and for the publishing the postponement of any such sale, the expense shall be paid by the party requiring the same. The fees herein allowed for the service of an execution and for advertising therein shall be collected by virtue of such execution in the same manner as the sum therein directed to be levied; but when there shall be several executions against the defendant, at the time of advertising his property, in the hands of the same sheriff, there shall be but one advertising fee charged on the whole, and the sheriff shall elect upon which execution he will receive same. For every certificate on the sale of real estate, fifty cents, and for each copy thereof, twenty-five cents, which, together with the register's fees for filing the same, shall be collected as other fees on execution; for drawing and executing a deed pursuant to a sale of real estate, one dollar; serving a writ of possession or of restitution, putting any person into possession of the premises and removing the occupant, one dollar, and the same compensation for traveling as is herein allowed on other writs; taking a bond for the liberties of the jail, fifty cents; summoning a jury upon a writ of inquiry, attending such jury, and making and returning the inquisition, one dollar and fifty cents; summoning a special jury struck pursuant to an order of the court, and returning the panel, one dollar and fifty cents; summoning a jury pursuant to any precept or summons of any officer in any special proceeding, one dollar, and for attending such jury, when required, fifty cents; bringing up a prisoner upon habeas corpus, one dollar, and for traveling each mile from the jail, thirteen cents; for attending any court with such prisoner, one dollar per day, besides actual necessary expenses; attending before any officer with a prisoner for the purpose of having him surrendered in exoneration of his bail, or attending to receive a prisoner so surrendered, who was not committed at the time, and receiving such prisoner into his custody in either case, one dollar; attending a view, when ordered by the court, one

dollar and fifty cents per day, including the time occupied in going and returning; serving an attachment upon any ship, boat or vessel, in proceedings to enforce any lien thereon, created by law, seventy-five cents, with such additional compensation for his trouble and expenses in taking possession of and preserving the same as the officer issuing the warrant shall certify to be reasonable; for making and returning an inventory and appraisal to the appraisers, one dollar for each day actually employed, and fifty cents for each half day; and for drafting the inventory, twenty-five cents for each folio, and for copying the same, six cents for each folio; for selling any ship, boat or vessel, or the tackle, apparel or furniture thereof, so attached, and for advertising such sale, the same fees as for sales on executions; for giving notice for general or special election to the inspectors of the different townships and wards of his county, fifty cents for each township or ward, and the expenses of publishing such notices required by law, such fees and expenses to be paid by the county, as other contingent expenses thereof; for any services which may be rendered by a constable, the same fees as are allowed by law for such services to a constable; for attending the Supreme Court by the order of the court, two dollars and fifty cents for each day, to be allowed by the auditor general on the certificate of the clerks, and paid out of the state treasury; for attending a circuit court by the order of the court, two dollars for each day, except in \* \* \* \* \* the county of Wayne. \* \* \* \* \* In the county of Wayne, on and after the first day of January, eighteen hundred and ninety-seven, there shall be paid to the deputy sheriffs in actual attendance on the circuit court in the said county the sum of one thousand dollars per annum, to be allowed and paid as other contingent charges of the county are paid: *Provided*, the number of said deputies shall not exceed two for each judge of said circuit. For summoning grand or petit jurors to attend the circuit court, fifty cents for each juror summoned; serving a subpoena for witnesses, fifteen cents for each witness summoned and ten cents for each mile actually traveled in going only, but when two or more witnesses live in the same direction, traveling fees shall be charged only from the farthest; keeping and providing for debtor in jail in all cases where the debtor is unable to support himself, fifty cents for each day, to be paid by the creditor each week, in advance, and which sum the creditor shall be entitled to

recover from the debtor; for mileage on every execution collected, ten cents per mile, for going only, to be computed from the court house of his county; for selling lands on the foreclosure of a mortgage by advertisement and executing a deed to the purchaser and for all services required on such sale, three dollars. And any sheriff or other officer who shall demand or receive any greater fees or compensation for performing any of the services hereinbefore mentioned than is hereinbefore allowed, shall, in addition to all other liabilities now provided by law, be liable to the party injured, or paying such illegal fees, in three times the amount so demanded, received or paid, together with all costs of suit or prosecution; and any sheriff or other officer neglecting or refusing any of the services required by law, after the fees specified have been tendered, shall be liable to the party injured for all damages which he may sustain by reason of such neglect or refusal.

**HISTORY:** Re-enacts Sec. 11, R. S. '46, Ch. 150, being C. L. '57, (5647); As Am. '67, p. 181, Act 134, Eff. June 27; C. L. '71, (7443); As Am. '73, p. 474, Act 189, Imd. Eff. April 29; As Am. '77, p. 37, Act 50, Imd. Eff. Apr. 14; As Am. '81, p. 103, Act 115, Imd. Eff. May 5; How. 9017; As Am. '89, p. 90, Act 85, Imd. Eff. May 9; As Am. '95, p. 177, Act 77, Eff. Aug. 30; C. L. '97, (11222), As Am. '03, p. 254, Act 181, Eff. Sept. 17, As Am. P. A. '17, Act No. 73, p. 135, Eff. Aug. 12, making a number of slight changes in phraseology and omitting the particular reference to Kent County in place of the asterisks.

**SHERIFF'S FEES:** Where the law fixes the fees of the sheriff, it is not competent for him to make an agreement for additional compensation. *Burk v. Webb*, 32 Mich. 182. His right to fees is derived from the statute. *Fletcher v. Kalkaska Circuit Judge*, 81 Mich. 194; *Peck v. Fidelity Nat. Bank of Grand Rapids*, 51 Mich. 354; *Genesee County Sav. Bank v. Ottawa Circuit Judge*, 54 Mich. 306; *Burk v. Webb*, 32 Mich. 182; *Wilcoxson v. Andrews*, 66 Mich. 553. Board of civil prisoner. *Cicotte v. Wayne County*, 59 Mich. 514. Sheriff of Wayne County is not entitled as a matter of right to compensation for attending the circuit court. *Chipman v. Wayne County Auditors*, 127 Mich. 490. The following is also omitted: "In the county of Kent, for attendance on the said circuit court shall be two dollars and fifty cents for each day, to be allowed and paid by the county in the same manner as other contingent charges of the county," therefore changed to make the sundry fees applicable to all counties.

### Fees of Witnesses.

#### (13720). For Attendance and Travel.

SEC. 3. For attending in any suit or proceeding pending



in a court of record, one dollar for each day, and fifty cents for each half day. For traveling, at the rate of ten cents per mile in coming to the place of attendance, to be estimated from the residence of such witness, if within this state, or from the boundary line of this state, which such witness passed in coming, if his residence be out of the state.

**HISTORY:** Re-enacts and supersedes a part of Sec. 10, R. S. '46, Ch. 150, being C. L. '57, (5646); C. L. '71, (7442); As Am. '77, p. 32, Act 43, Eff. Aug. 21; How. 9016; C. L. '97, (11221), though such section was not expressly repealed by this act. Modified, as regards witness fees.

**WITNESS FEES:** As to the requisites of an affidavit for the taxation of witness fees as costs see *Jeffrey v. Hursh*, 58 Mich. 246, 260. When witnesses live at the place of holding court, their per diem should not be taxed for periods of adjournment. *Smith v. Smith*, 146 Mich. 686. Witness fees an important part of taxable costs. In re *Quinn's Estate*, 179 Mich. 61, 64. As to fees of certain public officers attending court as witnesses, see Compilers' Section (14603).

Witness fees may be taxed in each of two suits against different parties where the same party, having such witnesses in his behalf, prevails in each suit. *Chesbrough Lumber Co. v. Chippewa Circuit Judge*, 190 Mich. 539; *Id.* 192 Mich. 209; 157 N. W. 23, (in the last case mandamus was granted to vacate an order of retaxation of costs.)

#### (13721). Attorney Not Allowed Fee.

**SEC. 4.** No attorney or counsel in any cause in which he may be interested as attorney or counsel, shall be allowed any fee for attending as a witness in such cause.

**HISTORY:** Re-enacts Sec. 41, R. S. '46, Ch. 150, being C. L. '57, (5672); C. L. '71, (7468); How. 9043; C. L. '97, (11248). Modified, as to witness fees to attorney.

### Fees of Jurors.

#### (13722). Attendance and Travel.

**SEC. 5.** Each grand and petit juror and each talesman shall be entitled to receive three dollars for each day's attendance, and one dollar and fifty cents for each half day, upon any term of the circuit court, or before any court of record, and ten cents for each mile traveled in going and returning by the nearest traveled route, to be paid out of the county treasury of the county, on the certificate or order of the clerk or judge of such court.

**HISTORY:** Re-enacts Sec. 18, R. S. '46, Ch. 150, As Am. '47, p.

172, Act 105, Imd. Eff. Mar. 17; As Am. '57, p. 383, Act 138, Eff. May 19, being C. L. '57, (5654); As Am. '69, p. 66, Act 40, Eff. July 5; C. L. '71, (7450); As Am. '73, p. 462, Act 182, Eff. July 31; As Am. '79, p. 250, Act 247, Eff. Aug. 30; How. 9024; C. L. '97, (11229); As Am. '07, p. 305, Act 236, Eff. Sept. 28. Modified, as regards juror's fees.

**FEES OF JURORS:** Jurors entitled to fees for time actually in attendance, and not for a period during which they are excused. *Emmer v. Bostock*, 130 Mich. 341. Jurors in condemnation proceedings are to be paid by the city instituting the proceedings and not by the county, as provided above. *Rorabacher v. Nichols*, 165 Mich. 127.

CITED: *Cook v. Aud. Gen.*, 129 Mich. 51.

## CHAPTER XLIX.

### MISCELLANEOUS PROVISIONS RELATING TO FEES OF OFFICERS.

Fees of Circuit Court Commissioners and Other Officers and  
Persons Authorized to Perform the Services Herein  
Enumerated.

#### (13723). Sundry Fees.

SECTION 1. Circuit court commissioners shall be entitled to the following fees: For issuing a summons, warrant or attachment, for a party or witness to attend before him, fifty cents; for adjourning a cause or proceeding assigned for hearing, on request, fifty cents; for adjourning a cause or proceeding assigned for hearing, upon cause shown, one dollar; for attending and hearing a motion for an injunction, habeas corpus, special motion, or any other matter referred to him, and making his decision and order on the same, when contested, three dollars; if not contested, two dollars; for taking an account of what is due on every mortgage, and the security accompanying the same, if any, and making his report thereof to the court, when contested, six dollars; and when not contested, three dollars; for drawing every report, and all schedules to be thereto annexed, in pursuance of an order of reference to him (except in case of reference to compute amount due on mortgage), twenty cents for each folio; for copies of reports, and all other proceedings furnished on request ten cents for each folio; for examining into circumstances of sureties, and certifying his opinion to the court, two dollars; for appointing any person to appear as next friend for an infant, fifty cents; for inspecting and examining an infant or infants who want guardians appointed, inquiring who are willing to become guardians and into their competency, the proposed security, and the competency thereof, and certifying the facts to the court, three dollars—whether the same be for one or more infants in the same petition; for taking depositions of witnesses, ten cents for each folio; for drawing every advertisement of public notice of the sale

of property, to be sold by him, two dollars; for posting notices of the sale of real estate, one dollar, and in addition thereto ten cents a mile for traveling by the nearest traveled route; for attending at the time and place of sale, and adjourning the same, two dollars; and ten cents per mile, travel fees, both ways; for attending and making the sale, three dollars; and ten cents per mile travel fees, both ways; for executing the deed or deeds of real estate sold, two dollars for each deed necessarily executed; for making his report of such sale, when required to be made, and filing the same, fifteen cents for each folio; for settling the form of a deed to be executed under his direction by a third person, under a decree or order, one dollar; for superintending and certifying the payment of money, when paid under his direction by order, and having the same properly accepted, two dollars; but no fees to be allowed for the payment of money arising from sales to a party in the suit or into court; for examining into the circumstances and sufficiency of sureties, in every bond of recognizance entered into before him, and approving or rejecting the same, fifty cents; for taxing every bill of costs, including the bill of the officers of the court, and reporting the amount taxed, if approved, one dollar; if not approved, fifty cents; for every notice to any party, officer or person, required by law to be given, twenty-five cents; for administering an oath, twenty-five cents; for certifying each exhibit shown to a witness, twenty-five cents; for signing a judgment, twenty-five cents; for every precept for a jury, twenty-five cents; for taking and reducing to form every recognizance entered into before him, fifty cents; for drawing every complaint to obtain possession of premises, fifty cents; for every order for a commission to take testimony, fifty cents; for settling and certifying interrogatories to be annexed to a commission, one dollar; for every order for the examination of witnesses, conditionally or upon proceedings to perpetuate testimony, fifty cents; for each day's attendance in taking such testimony, three dollars, and for each folio, ten cents; for presiding and conducting any trial by jury, receiving and entering the verdict or discharging the jury, or trying any issue in special proceedings without a jury, three dollars for each day while necessarily engaged in such trial; for receiving and filing the petitions and accompanying papers of an insolvent debtor, fifty cents; for every order, certificate, warrant or appointment of assignees in such proceedings, one dollar; for decid-

ing on the propriety of directing the assignment of the estate of an insolvent debtor, three dollars; for taking the acknowledgment of any conveyance or mortgage of real estate or other instrument which may be recorded, twenty-five cents for the first person acknowledging, and ten cents for each additional person; and when the execution of any conveyance or mortgage of real estate or other instrument is proven by two witnesses fifty cents; for taking surrender of principal in any cause, fifty cents; for committing such principal, fifty cents; for warrant or restitution to put any person or persons in possession of land or premises, one dollar; for making any order in any cause not herein specified, fifty cents; for all internal revenue stamps necessarily used in any case he shall be allowed and paid the actual cost of such stamps; when a commissioner is authorized to advertise in a newspaper, property for sale, or for parties to appear before him to prove debts or exhibit claims, he shall be allowed therefor the legal rates of advertising in such papers, what he shall legally pay; and when money is ordered to be put out by a commissioner, and when an estate is sold by a commissioner, under an order on them, the commissioner shall be allowed all necessary disbursements actually paid by him, and such further allowance by way of commission as the court shall direct, after notice thereof to the party to be charged therewith but this shall not be construed to apply to sales of mortgaged premises; when a commissioner shall take an account of an estate, or of any administration thereof, or any account between parties in trade, or shall take any other account, (except upon mortgage) under decree or order not included in the foregoing provisions, or when extra services shall be rendered by a commissioner in taking or stating an account, the court may make such further allowance beyond the fees herein specified as under the circumstances may be just and reasonable, upon the notice of the party to be charged therewith; when any other person is authorized to perform any of the duties hereinbefore mentioned to be done or performed by a circuit court commissioner, such person shall be entitled to and receive the same fees as are hereinbefore allowed to circuit court commissioners for like services. Said commissioner shall have no fees for any services not herein specified.

HISTORY: Re-enacts and merges Sec. 7, R. S. '46, Ch. 150, being C. L. '57, (5643); As Am. '63, p. 408, Act 235, Eff. June 22; As Am. '67, p. 166, Act 126, Eff. June 27; C. L. '71, (7434); How. 9010;

C. L. '97, (11219), and Sec. 7 of Act 18 of '77, being How. 6763; C. L. '97, (9252), making some changes in the phraseology and changing "twenty cents" to "ten cents" in the clause relating to taking of depositions of witnesses. Modified, as regards officer's fees.

FEES: Township clerk fees prior to the amendment of '67. Sage v. Springwells Twp. Board, 13 Mich. 246-7; Master's or Commissioner's fees and expenses on foreclosure sales, etc. Hart v. Lindsay, Walk. 76. Commissioner's fees in forcible entry and detainer proceedings. Dibell v. Brinkerhoff, 22 Mich. 371, 376. Circuit Court Commissioner's fees for taking testimony, Foster v. Ingham Circuit Judge, 128 Mich. 377.

### Fees of Commissioners in Counties of Two Hundred Thousand Population.

#### (13724). In Certain Counties.

SEC. 2. Before any action or proceeding for the recovery of possession of lands and buildings shall be commenced before circuit court commissioners, in counties having a population of two hundred thousand or more people, there shall be paid to the clerk of said commissioners, by the party bringing the same the sum of one dollar and fifty cents: *Provided*, That there is only one defendant to said action or proceeding. Should there be more than one defendant to such action or proceeding, the party bringing the same shall pay to said clerk an additional sum of one dollar for each additional defendant. The constable serving the summons in said action or proceeding shall receive for his services the sum of one dollar for each defendant served by him. And before any affidavit on appeal or writ of certiorari shall be served on either of said commissioners, in addition to the costs now provided by law for making returns to appeals on certiorari, the further sum of four dollars shall be paid to said clerk by the appellant or plaintiff in error, and the clerk therewith shall pay the entry fee in the circuit court and at the same time file therein the return to the appeal or certiorari, as the case may be. The moneys so paid shall be for the use of the said county and shall be held in full of all fees now allowed by law to said commissioners, from the commencement of such proceeding to and including the issuing of such final process as may be necessary to give effect to an order or judgment of such commissioner. The sum or sums so paid, including jury fees, shall be taxed as costs of suit in favor of the party paying the same if he be the prevailing party in the action in addition to any other to which he may be entitled by law.

Any cause or proceeding pending before either of said commissioners in said county at the time this act goes into operation, shall be heard and disposed of according to the law and practice now in force.

**HISTORY:** Re-enacts and supersedes Sec. 1, of Act 245 of '09, p. 427, Imd. Eff. Sept 1, though such section was not expressly repealed by this act. Unchanged.

#### Fees of Appraisers, Commissioners and Others.

##### (13725). Appraisers and Commissioners.

**SEC. 3.** All appraisers of estates of deceased persons, commissioners to adjust claims against deceased persons, appraisers of property taken on any writ of attachment or replevin, persons appointed under any legal process or order for assigning dower or making partition of real estate, sheriffs' aids in criminal cases or in the execution of legal process, where no express provision is made for compensation therefor, shall be entitled to two dollars for each day and one dollar for each half day for their services, and six cents a mile for travel in going and returning: *Provided*, That appraisers of estates of deceased persons, commissioners appointed in probate court to set off dower or to make partition of the real estate, and commissioners appointed to adjust claims against deceased persons, shall have such further compensation as the probate court, after such notice as such court shall direct to the parties interested in the premises, shall deem proper and by an order shall allow.

**HISTORY:** Re-enacts Sec. 17, R. S. '46, Ch. 150, being C. L. '57, (5653); C. L. '71, (7449); As Am. '73, p. 183, Act 135, Imd. Eff. Apr. 22; How. 9023; As Am. '87, p. 174, Act 163, Eff. Sept. 28; C. L. '97, (11228). Unchanged.

**COMMISSIONERS ON CLAIMS:** When extra compensation will be granted to. In re McNamara's Estate, 166 Mich. 451. See also In re Pfeiffer's Estate, 117 Mich. 207.

#### Fees for Publishing Legal Notices.

##### (13726). Publication of Legal Notices.

**SEC. 4.** For publishing any legal notice or any order, citation, summons or any other proceedings or advertisement required by law to be published in any newspaper, the cost of publishing such advertisement shall not exceed the rate of

*one dollar and twenty cents per folio for the first insertion, and sixty cents per folio for each subsequent insertion.*

**HISTORY:** Re-enacts Sec. 1 of Act 150 of '57, being C. L. '57, (5658); As Am. '65, p. 54, Act 49, Eff. June 22; C. L. '71, (7454); How. 9030; C. L. '97, (11235), As Am. Unchanged.

P. A. '19, Act No. 95, p. 162, Eff. Aug. 16.

### General Provisions.

#### (13727). Special Provisions.

**SEC. 5.** The allowance of any fees by this chapter, shall not apply to any case where special provision is otherwise made by law for any particular service, but the fees for such service shall be such as are provided in the statute requiring the service, or providing the compensation therefor.

**HISTORY:** Re-enacts Sec. 30, R. S. '46, Ch. 150, being C. L. '57, (5661); C. L. '71, (7457); How. 9032; C. L. '97, (11237). Unchanged.

#### (13728). State Officers Not Required to Pay Fees.

**SEC. 6.** The secretary of state, auditor general, treasurer and attorney general, respectively, shall be authorized to require searches in the respective offices of each other, and in the offices of the clerks of the supreme court, of the several circuit courts, or of registers of deeds, for any papers, records or documents necessary to the discharge of the duties of their respective offices, and to require copies thereof, and extracts therefrom, without the payment of any fee or charge whatever.

**HISTORY:** Re-enacts Sec. 31, R. S. '46, Ch. 150, being C. L. '57, (5662); C. L. '71, (7458); How. 9033; C. L. '97, (11238); As Am., '05, p. 198, Act 144, Eff. Sept. 16, omitting "commissioner of the Land Office and Superintendent of Public Instruction," and clauses including "The Probate Court, Registers of the Probate Court, Register in Chancery and County Treasurer." Unchanged.

#### (13729). Folio Defined.

**SEC. 7.** The term "folio," when used as a measure for computing fees or compensation, shall be construed to mean one hundred words, counting every figure necessarily used, as a word; and any portion of a folio, when in the whole draft or paper there shall not be a complete folio and when there shall be any excess over the last folio, shall be computed as a folio.

**HISTORY:** Re-enacts Sec. 32, R. S. '46, Ch. 150, being C. L. '57,



(5663); C. L. '71, (7549); How. 9034; C. L. '97, (11239). Unchanged.  
FOLIO: What constitutes. Thornton v. Sturgis, 38 Mich. 639-42.

**(13730). Extortion Prohibited.**

SEC. 8. No judge of any court, justice, sheriff or other officer whatsoever, or other person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any other or greater fee or reward for such service, but such as is or shall be allowed by the laws of this state.

HISTORY: Re-enacts Sec. 33, R. S. '46, Ch. 150, being C. L. '57, (5664); C. L. '71, (7460); How. 9035; C. L. '97, (11240), inserting in the first line "of any court." Substantially unchanged.

EXCESSIVE FEES: Wilcoxson v. Andrews, 66 Mich. 553-555; Foley v. Platt, 105 Mich. 635; Vreeland v. Loeckner, 99 Mich. 93-95; Van Dusen v. King, 106 Mich. 133-5; Appleman v. Hahn, 149 Mich. 245-6; Edwards v. Aud. Gen., 161 Mich. 639-42.

CITED: People v. Lamb, 153 Mich. 684.

**(13731). When Fees Not to be Taken.**

SEC. 9. No fee or compensation allowed by law, shall be demanded or received by any officer or person for any service, unless such service was actually rendered by him; but this section shall not prevent any officer from demanding any fee herein allowed for any service of which he is entitled by law, to require the payment previous to rendering such service.

HISTORY: Re-enacts Sec. 34, R. S. '46, Ch. 150, being C. L. '57, (5665); C. L. '71, (7461); How. 9036; C. L. '97, (11241), omitting "except in the case of prospective costs hereinafter specified." Substantially unchanged.

CONSTRUED: Appleman v. Hahn, 149 Mich. 245.

CITED: People v. Lamb, 153 Mich. 684.

**(13732). Penalty for Violation.**

SEC. 10. A violation of either of the two last sections shall be deemed a misdemeanor; and the person guilty thereof shall be liable to the party aggrieved for treble the damages sustained by him, and such violation shall be a cause for forfeiture of office.

HISTORY: Re-enacts Sec. 35, R. S. '46, Ch. 150, being C. L. '57, (5666); C. L. '71, (7462); How. 9037; C. L. '97, (11242), adding the last clause as above in relation to the forfeiture of office. Modified, to include forfeiture of office.

CONSTRUED: Treble damages. Vreeland v. Loeckner, 99 Mich. 93-95. Excessive fee paid sheriff, Appleman v. Hahn, 149 Mich. 245-6.

CITED: People v. Lamb, 153 Mich. 684.

**(13733). No Fee for Services Not Rendered.**

SEC. 11. No fee shall be taxed for services as having been rendered by any attorney, clerk, sheriff, or other officer, in the progress of a cause, unless such service was actually rendered, except when otherwise expressly provided.

HISTORY: Re-enacts Sec. 36, R. S. '46, Ch. 150, being C. L. '57, (5667); C. L. '71, (7463); How. 9038; C. L. '97, (11243), omitting "solicitor." Substantially unchanged.

**(13734). Fees for Certified Copies.**

SEC. 12. The legal fees paid for certified copies of the depositions of witnesses, filed in any clerk's office, and of any documents or papers, recorded or filed in any public office, necessarily used on the trial of a cause, or on the assessment of damages, shall be allowed in the taxation of costs.

HISTORY: Re-enacts Sec. 40, R. S. '46, Ch. 150, being C. L. '57, (5671); C. L. '71, (7467); How. 9042; C. L. '97, (11247). Unchanged.

**(13735). Receipt to be Given for Fees.**

SEC. 13. Every officer, upon receiving any fees for any official duty or service, shall, if required by the person paying the same, make out in writing and deliver to such person, a particular account of such fees, specifying for what they respectively accrued and shall receipt the same and if he refuse or neglect to do so, he shall be liable to the party paying the same for three times the amount so paid.

HISTORY: Re-enacts Sec. 42, R. S. '46, Ch. 150, being C. L. '57, (5673); C. L. '71, (7469); How. 9044; C. L. '97, (11249). Unchanged.

CITED: Vreeland v. Loeckner, 99 Mich. 95.

## CHAPTER L.

### APPEALS TO THE SUPREME COURT IN ACTIONS AT LAW AND IN CHANCERY.

#### Writs of Error.

#### (13736). Writs of Error May Issue of Course.

SECTION 1. Writs of error, upon any final judgment or determination, may issue of course, out of the Supreme Court, in vacation as well as in term, and shall be returnable to the same court. \* \* \*

HISTORY: Re-enacts and supersedes a part of Sec. 1 of Ch. 138, R. S. '46, being C. L. '57, (5332); C. L. '71, (7119); How. 8678; C. L. '97, (10484), omitting "in civil and criminal cases." Such section as amended by P. A. '17, Act No. 172; p. 347, Eff. Aug. 12; as amended by P. A. '19, Act No. 14, p. 19, Eff. Aug. 16; omitting "in civil and criminal cases." Such section was not, however, expressly repealed by this act. See Compilers' (14587). Changed as above and by removing any limitations on the right to appeal.

CONSTRUED: The supreme court has jurisdiction of errors of fact as well as errors of law. It has been given all the common law means of executing its power to issue these writs. But the circuit courts have no power, in any case, to issue writs of error. *Teller v. Wetherell*, 6 Mich. 46. A writ of error is an original writ and, in England, issues out of the court of chancery and runs in the name of the king; but, with us, it issues only from the supreme court and can issue from no other. *Id.* 49. The writ of error should be considered as a continuation of the original suit. *Baumgarth v. Firemen's Fund Ins. Co.*, 159 Mich. 209. A writ of error is of right and its dismissal is equivalent to a non-suit and does not bar the issue of a new writ. *Beller v. Stevens*, 40 Mich. 168. Style and testing of writs. *Johnson v. Provincial Insurance Co.*, 12 Mich. 223-4. Parties to writ. *Jackson v. Hosmer*, 14 Mich. 88; *Taft v. Hosmer*, 14 Mich. 249; *Van Valkenburg v. Rogers*, 17 Mich. 322; *Cole v. Thayer*, 25 Mich. 212; *Mills v. Bunce*, 26 Mich. 101; *Spencer v. Fish*, 43 Mich. 226; *Campau v. Brown*, 48 Mich. 145; *Sick v. Mich. Aid Assn.*, 49 Mich. 50; *Stewart v. Ashley*, 34 Mich. 183. Authority of attorney to prosecute. *O'Flynn v. Eagle*, 7 Mich. 306. Amendment of writ. *Johnson v. Provincial Insurance Co.*, 12 Mich. 224; *Spencer v. Fish*, 43 Mich. 226. The proper jurisdiction of the supreme court on error cannot be abridged by any stipulation whereby the parties seek to limit the principle of decision and exclude legal considerations. *Watts v. Tittabawassee Boom Co.*, 47 Mich. 540. Writ of error in behalf of the people in criminal cases. *People*

v. Swift, 59 Mich. 529; People v. Conant, 59 Mich. 565; People v. Fairman, 59 Mich. 568. Compared with mandamus. Wiley v. Allegan Circuit Judge, 29 Mich. 487. The correction of a record judgment showing erroneously that plaintiff discontinued the case may be made on writ of error. Meyering v. Wayne Circuit Judge, 164 Mich. 604. A judgment at law may only be reviewed to ascertain whether the evidence supports the findings of the lower court. State v. Venice of America Land Co., 160 Mich. 680. A writ of error will be dismissed and payment of costs required of an appellant who withdraws the writ of error after having given notice of the settlement of his bill of exceptions. Ullman v. Sandall, 158 Mich. 396. Appellant may dismiss the writ of error upon payment of costs and upon such dismissal a new writ may at once issue, whether exceptions have been settled or not. Kaiser v. Detroit United Railway, 163 Mich. 110.

**COURSE OF COMMON LAW.** It has only to review proceedings

administrator cannot be said to be a proceeding of the common law. Wooley v. Crane, 86 Mich. 362. An order requiring an executor to furnish a new bond and to render an account is not according to the course of the common law and cannot be reviewed on writ of error. In re Sanborn's Appeal, 107 Mich. 189. Proceedings on habeas corpus before a circuit judge at chambers are not such proceedings. Faust v. Calhoun Circuit Judge, 30 Mich. 266.

**FINAL JUDGMENTS:** Its office is to review final judgments. Perry v. Church, 107 Mich. 480; Brady v. Toledo, A. A. & N. M. Railroad Co., 73 Mich. 457; Holbrook v. Cook, 5 Mich. 225; Chaffee v. Soldan, 5 Mich. 242; Conrad v. Freeland, 8 Mich. 255; Adams v. Church, 22 Mich. 79; Polhemus v. Ann Arbor Sav. Bank, 27 Mich. 44; Comstock v. Wayne Circuit Judge, 30 Mich. 98; Miller v. Rosier, 31 Mich. 475; Clark v. North Muskegon, 86 Mich. 29; Campbell v. Hudson, 106 Mich. 523; Matter of Hicks, 20 Mich. 129; First Nat.

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##### (13736). Writ of Error May Issue of Course.

Section 1. Writs of error upon any final judgment or determination, *where the judgment exceeds in amount five hundred dollars, or where judgment has been rendered upon a directed verdict for defendant in cases involving a claim of more than five hundred dollars*, may issue, of course, out of the Supreme Court, in vacation as well as in term, and shall be returnable to the same court; *and in all other cases such writ may issue in the discretion of the Supreme Court or any justice thereof upon proper application: Provided, however, That if said case involves a construction of the Constitution or of any statute of this State, or any matters of great public importance or involves the contest of a will, such application need only show such fact.*

HISTORY: As amended by P. A. '23, Act. No. 155. Approved May 10, 1923.

~~Writ of Error in Supreme Court.~~ Mich. 209. A writ of error is of right and its dismissal is equivalent to a non-suit and does not bar the issue of a new writ. *Beller v. Stevens*, 40 Mich. 168. Style and testing of writs. *Johnson v. Provincial Insurance Co.*, 12 Mich. 223-4. Parties to writ. *Jackson v. Hosmer*, 14 Mich. 88; *Taft v. Hosmer*, 14 Mich. 249; *Van Valkenburg v. Rogers*, 17 Mich. 322; *Cole v. Thayer*, 25 Mich. 212; *Mills v. Bunce*, 26 Mich. 101; *Spencer v. Fish*, 43 Mich. 226; *Campau v. Brown*, 48 Mich. 145; *Sick v. Mich. Aid Assn.*, 49 Mich. 50; *Stewart v. Ashley*, 34 Mich. 183. Authority of attorney to prosecute. *O'Flynn v. Eagle*, 7 Mich. 306. Amendment of writ. *Johnson v. Provincial Insurance Co.*, 12 Mich. 224; *Spencer v. Fish*, 43 Mich. 226. The proper jurisdiction of the supreme court on error cannot be abridged by any stipulation whereby the parties seek to limit the principle of decision and exclude legal considerations. *Watts v. Tittabawassee Boom Co.*, 47 Mich. 540. Writ of error in behalf of the people in criminal cases. *People*

v. Swift, 59 Mich. 529; People v. Conant, 59 Mich. 565; People v. Fairman, 59 Mich. 568. Compared with mandamus. Wiley v. Allegan Circuit Judge, 29 Mich. 487. The correction of a record judgment showing erroneously that plaintiff discontinued the case may be made on writ of error. Meyering v. Wayne Circuit Judge, 164 Mich. 604. A judgment at law may only be reviewed to ascertain whether the evidence supports the findings of the lower court. State v. Venice of America Land Co., 160 Mich. 680. A writ of error will be dismissed and payment of costs required of an appellant who withdraws the writ of error after having given notice of the settlement of his bill of exceptions. Ullman v. Sandall, 158 Mich. 396. Appellant may dismiss the writ of error upon payment of costs and upon such dismissal a new writ may at once issue, whether exceptions have been settled or not. Kaiser v. Detroit United Railway, 163 Mich. 110.

**COURSE OF COMMON LAW:** It lies only to review proceedings according to the course of the common law. In re Sanborn's Appeal, 107 Mich. 189; Brinsmade's Appeal, 52 Mich. 538; Fletcher v. Clark, 39 Mich. 374; Knorr v. Millard, 52 Mich. 542; Wooley v. Crane, 86 Mich. 360; Conrad v. Button, 28 Mich. 365; Cameron v. Bentley, 28 Mich. 520; Mower's Appeal, 48 Mich. 448; Cross v. People, 8 Mich. 114; Churchill v. Burt, 32 Mich. 490; Faust v. Calhoun Circuit Judge, 30 Mich. 266; Smith v. Poor Superintendents, 34 Mich. 58; Gore v. Ray, 69 Mich. 114. Or proceedings substantially analogous. Fletcher v. Clark, 39 Mich. 374; Labar v. Nichols, 22 Mich. 200. Will not lie to review proceedings which are purely statutory. Hartz v. Wayne Circuit Judge, 164 Mich. 233. And it is not enough that the proceedings are had in a court which ordinarily and primarily exercises common law jurisdiction. Holbrook v. Cook, 5 Mich. 225. But if, on appeal to the circuit court the trial assumes substantially the nature of common law proceedings, a writ of error will lie. Baptist Miss. Union v. Peck, 9 Mich. 446; Parker v. Copland, 4 Mich. 528. A proceeding to recover summary possession of land, though unknown to the common law, when appealed to the circuit court becomes a proceeding according to the course of the common law, and the judgment of the circuit court is reviewable on error. Parker v. Copland, 4 Mich. 528. Proceedings for the appointment of an administrator cannot be said to be a proceeding according to the course of the common law. Wooley v. Crane, 86 Mich. 362. An order requiring an executor to furnish a new bond and to render an account is not according to the course of the common law and cannot be reviewed on writ of error. In re Sanborn's Appeal, 107 Mich. 189. Proceedings on habeas corpus before a circuit judge at chambers are not such proceedings. Faust v. Calhoun Circuit Judge, 30 Mich. 266.

**FINAL JUDGMENTS:** Its office is to review final judgments. Perry v. Church, 107 Mich. 480; Brady v. Toledo, A. A. & N. M. Railroad Co., 73 Mich. 457; Holbrook v. Cook, 5 Mich. 225; Chaffee v. Soldan, 5 Mich. 242; Conrad v. Freeland, 8 Mich. 255; Adams v. Church, 22 Mich. 79; Polhemus v. Ann Arbor Sav. Bank, 27 Mich. 44; Comstock v. Wayne Circuit Judge, 30 Mich. 98; Miller v. Rosler, 31 Mich. 475; Clark v. North Muskegon, 86 Mich. 29; Campbell v. Hudson, 106 Mich. 523; Matter of Hicks, 20 Mich. 129; First Nat.

*Bank v. Mellen*, 45 Mich. 413. It is not necessary that a judgment should be a final determination of the rights of the parties to authorize a writ of error; it is enough if it determine the particular suit. *Matter of Hicks*, 20 Mich. 134. A writ of error does not lie in any case before final judgment. *People v. Brannen*, 173 Mich. 411. An order which puts an end to a suit is a final judgment reviewable by writ of error. *City of Flint v. Genesee Circuit Judge*, 146 Mich. 440. A final determination on a writ of habeas corpus may be reviewed by writ of error. *Matter of Hicks*, 20 Mich. 129; *People v. Stimer*, 82 Mich. 21. A judgment or order for the removal of a nuisance is such a final judgment or determination as error will lie upon. *Crippen v. People*, 8 Mich. 124. A judgment in the circuit court upon an appeal from an administrator's accounting is sufficiently final to authorize a writ of error. *Hall v. Grovier*, 25 Mich. 438. An order denying a motion by plaintiff for judgment in his favor, on the ground that the suit had been discontinued by stipulation, is in effect a final judgment and may be reviewed on error. *Carpenter v. Myers*, 90 Mich. 209. An order granting costs to defendant in an action for trespass to lands, on the recovery by the plaintiff of judgment for less than \$100, is a final judgment and the remedy is by writ of error. *Haney v. Muskegon Circuit Judge*, 101 Mich. 392. Where respondent, with the consent of the prosecutor, asked the court to direct a verdict of guilty for the purpose of having the case reviewed on error, it constituted a mistrial and could not be reviewed upon error. *People v. Angle*, 170 Mich. 367. And an order overruling a demurrer to a plea in abatement is in effect a final determination, and error will lie thereon. *Campbell v. Hudson*, 106 Mich. 523. An order sustaining a demurrer as to certain counts of a declaration and overruling it as to others is not reviewable by writ of error prior to the entry of final judgment. *Perry v. Church*, 107 Mich. 480; *In re Stroebel*, 194 Mich. 637.

**INTERLOCUTORY DECISIONS:** This writ does not lie to review interlocutory decisions. *People v. Stimer*, 82 Mich. 21; *In re Apsey's Estate*, 173 Mich. 426. Or questions addressed to the discretion of the court below. *Detroit v. Jackson*, 1 Doug. 110; *Bourke v. James*, 4 Mich. 339; *Cuddy v. Major*, 12 Mich. 368; *Penn. Mining Co. v. Brady*, 14 Mich. 260. On these points see, further: *Lee v. Hardgrave*, 3 Mich. 83-4; *Holbrook v. Cook*, 5 Mich. 231; *Chaffee v. Soldan*, 5 Mich. 243; *Tefft v. McNoah*, 9 Mich. 206; *Van Renselaer v. Whiting*, 12 Mich. 451; *Ripley v. Davis*, 15 Mich. 82; *Pearsons v. Eaton*, 18 Mich. 81; *Final v. Backus*, 18 Mich. 233; *Conrad v. Free-land*, 18 Mich. 255; *Adams v. Church*, 22 Mich. 79; *Tupper v. Kilduff*, 26 Mich. 394; *Johr v. People*, 26 Mich. 428; *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 51; *Mahoney v. People*, 43 Mich. 40. Unless there has been an abuse of discretion. *Browne v. Moore*, 32 Mich. 256; citing *Ripley v. Davis*, 15 Mich. 75; *Final v. Backus*, 18 Mich. 218; *Tupper v. Kilduff*, 26 Mich. 394; *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44; *Altman v. Young*, 38 Mich. 410. Compare *Willis v. Gimbert*, 27 Mich. 91. Such questions, though copied into the return, are not brought up by the writ of error. *Millerd v. Reeves*, 1 Mich. 108. Nor the affidavits upon which a motion for a new trial was made. *Crippen v. People*, 8 Mich. 125-6.

**WHERE ERROR LIES:** Besides the cases mentioned in the fore-

going notes, the writ of error has been held to lie in the following cases: Where appeal is taken to the circuit court from the decree of the probate court allowing or disallowing a will and a trial is had, error lies to remove the judgment to the supreme court. *Baptist Miss. Union v. Peck*, 9 Mich. 445. Propriety of this remedy in case of appeals from probate court. *Peckham v. Hoag*, 92 Mich. 426; *Labar v. Nichols*, 22 Mich. 200; *Hall v. Grovier*, 25 Mich. 437; *Brown v. Forsche*, 43 Mich. 495; *Mower's Appeal*, 48 Mich. 441; *Moore's Appeal*, 84 Mich. 474; *Cook v. Willett*, 93 Mich. 304. Review by writ of error of circuit judge's judgment on referee's findings of facts. *Near v. Mitchell*, 23 Mich. 382. The determination of the circuit court in dismissing an appeal from justice's court may be reviewed on error. *Willis v. Gimbert*, 27 Mich. 91; *McCombs v. Johnson*, 47 Mich. 592. Error is the proper remedy to review a joint judgment against a principal and his sureties on an appeal bond. *Evers v. Sager*, 28 Mich. 47. A case involving an abuse of discretion is reviewable on error. *Lyle v. Cass Circuit Judge*, 157 Mich. 42.

Writ of error is the proper remedy to review the decision of a circuit judge dismissing a writ of replevin and quashing proceedings with costs on motion. *Jewell v. Lamoreaux*, 30 Mich. 155. Error lies rather than mandamus where the error is disclosed on the record, as where the grounds for dismissing an appeal are stated in the order. *Stall v. Diamond*, 37 Mich. 429. Error is the proper remedy to review a judgment and sentence in a common law criminal proceeding. *Coffeen's Case*, 38 Mich. 311. Compare also, *Roben's v. Videto*, 33 Mich. 240; *Crane v. Reeder*, 28 Mich. 527; *Emerson, Talcott & Co. v. McCormick Harvesting Mach. Co.*, 51 Mich. 5; *Vrooman v. Mitchie*, 69 Mich. 42; *Pierce v. Johnson*, 93 Mich. 125. Denial of a motion to require a more specific bill of particulars is reviewable by writ of error. *Olds Motor Works v. Wayne Circuit Judge*, 164 Mich. 470.

If the court attempts to entertain jurisdiction where it has none, the aggrieved party has a remedy by writ of error. *Michigan Mut. Fire Ins. Co. v. Wayne Circuit Judge*, 112 Mich. 272; *Mikola v. Houghton Circuit Judge*, 166 Mich. 583. An order discharging a defendant taken upon a *capias* is reviewable only upon error. *Kingsley v. Perkins Circuit Judge*, 171 Mich. 305. Denial of a motion to set aside a default can be reviewed on error. *Carton v. Day*, 157 Mich. 43. See *People v. James*, 155 Mich. 548.

**ERROR DOES NOT LIE:** To review proceedings not according to the course of common law. See note, "Course of common law." Nor to review interlocutory decisions, etc. See note, "Interlocutory decisions." Proceedings in the circuit court under the bastardy act will not be removed by writ of error. *Cross v. People*, 8 Mich. 113. It does not run to probate courts. *Holbrook v. Cook*, 5 Mich. 228; *Conrad v. Button*, 28 Mich. 365; *Cameron v. Mandelbaum*, 28 Mich. 520. Questions relative to the taxation of costs in the court below are not brought up for review by writ of error. *Lorman v. Phoenix Insurance Co.*, 33 Mich. 65. *Stebbins v. Field*, 43 Mich. 333; *Moore v. Daiber*, 92 Mich. 405-6. A writ of error will not lie to review the refusal of the trial court to grant a new trial where the case had previously been reviewed by the supreme court on error. *Minkinen v. Quincy Mining Co.*, 174 Mich. 404.



Proceedings under the statute of '72, p. 89, on an appeal to the circuit court from an assessment of taxes by the auditor general, are not judicial, in the proper sense of the term, and cannot be reviewed on writ of error. *Aud. Gen. v. Pullman Palace Car Co.*, 34 Mich. 59; *Ambler v. Aud. Gen.*, 38 Mich. 746. Entry of judgment on a transcript, from a justice is not so reviewable. *Townsend v. Tudor*, 41 Mich. 263. The question of the validity of a notice of trial will not be so reviewed. *Worth v. Hand*, 30 Mich. 264. Error does not lie to review bastardy proceedings. *People v. Brannen*, 173 Mich. 411. The supreme court will not review on writ of error a determination of the trial court sustaining a demurrer to a plea in abatement. *Wanner v. Martin*, 173 Mich. 503. Stipulations regulating the mode of trial cannot be set aside on error. *Harris v. Sweetland*, 48 Mich. 110. Error does not lie to review the discretion of the circuit judge in denying application for leave to appeal. *Vincent v. Bowes*, 78 Mich. 315. See, also, *Gray v. York*, 44 Mich. 415; *Cooper v. Andrews*, 44 Mich. 94; *Gore v. Ray*, 69 Mich. 114; *Craig v. Ingham Circuit Judge*, 171 Mich. 34. See *City of Flint v. Genesee Circuit Judge*, 146 Mich. 440.

**JUDGMENT EXCEEDING \$500:** The circuit court on appeal reversed an order of the Probate Court, in directing the distribution of a fund of \$3000 to persons other than the one mentioned in the order, was a final determination of an amount exceeding \$500, under Act No. 172 P. A. '17, and the Circuit Judge had the right to grant an extension of time in which to settle a bill of exceptions, although no writ of error had been applied for or other proceedings taken under said Act. *Maushaeur v. Kent Circuit Judge*, 204 Mich. 429. Jurisdiction cannot be conferred by consent or inadvertence and although a judgment was rendered before an act was passed, but appellate proceedings had not been instituted before it went into effect, its restrictions were in force and applicable, *J. F. Hartz Co. v. Lukaszewski*, 200 Mich. 232; *People's State Bank v. Frisbee*, 205 Mich. 67; *Albrecht v. St. Hedwig's R. C. Ben. Society*, 205 Mich. 395.

**AMENDMENTS REQUESTED:** Where none are made to the trial judge, and no exceptions were made, taken or filed to the findings and judgment filed by the Court in compliance with Circuit Court Rule No. 26, defendant and appellant are not properly before the appellate Court, and the judgment is affirmed, *Cascarelli v. New York Central railroad Co.*, 202 Mich. 306.

### (13737). Not to Stay Proceedings Without Bond.

**SEC. 2.** No writ of error shall operate to stay or supersede the execution in any civil action, unless the appellant with two sufficient sureties, shall give bond to the appellee with condition that the appellant shall prosecute his writ to effect, and shall pay and satisfy such judgment as shall be rendered against him thereon: And *Provided*, That where such judgment is rendered in an action to recover the possession of lands, brought under the provisions of chapter thirty of this act, if the writ of error be sued out by the defendant in said

action, said bond shall be in a penalty of not less than twice the amount of the annual rental value of the premises in dispute, and shall also in addition to the foregoing conditions contain a further condition, that if the plaintiff obtain restitution of said premises in said suit, the said defendant will forthwith pay all rent due or to become due, or the rental value thereof during the time the same has been detained by the defendant to the plaintiff for the premises described in the complaint, up to the time said plaintiff shall obtain possession thereof, together with the costs of suit in prosecuting said complaint and obtaining restitution of said premises; and if the plaintiff obtain restitution of said premises, he may, at his election, sue and recover on said bond, or bring his action against the defendant, under section twenty-three of chapter thirty of this act: *Provided*, That in case the bond provided for in section twenty-three of chapter twenty-two of this act has been given, the bond provided for in this section need not be given.

**HISTORY:** Re-enacts Sec. 2, R. S. '46, Ch. 138, being C. L. '57, (5333); C. L. '71, (7120); How. 8679; As Am. '95, p. 194, Act 86, Imd. Eff. Apr. 22; C. L. '97, (10485), changing "plaintiff in error" to "appellant" and "defendant in error" to "appellee," "complainant" to "plaintiff," omitting "or three sufficient sureties without the plaintiff in error" and making necessary changes in phraseology by referring to other sections and chapters. Modified as to phraseology, title of parties and sureties.

**BOND:** A right of action on a bond under this section accrues upon the rendition of a judgment of affirmance in the appellate court, or, at the latest, upon the earliest date at which costs may be taxed. *Busch v. Willcox*, 106 Mich. 514.

A writ of error does not stay proceedings unless a bond be given. *Watson v. Kane*, 31 Mich. 59; *Douglass v. Manistee Circuit Judge*, 42 Mich. 496.

**CITED:** *People v. Hobson*, 48 Mich. 30; *Healy v. Newton*, 96 Mich. 231; *People v. Stephenson*, 98 Mich. 218; *Ten Hopen v. Taylor*, 103 Mich. 178; *Ismond v. Scougale*, 119 Mich. 504; *Markham v. Kent Circuit Judge*, 121 Mich. 576; *Hogle v. Wayne Circuit Judge*, 160 Mich. 574.

See *Coeling v. Barnard*, 159 Mich. 634.

### (13738). Sufficiency of Sureties.

**SEC. 3.** The sufficiency of the sureties and the sum for which said bond shall be given shall be determined in each case by any justice of the supreme court or by the judge of the circuit court for the county in which the judgment in the case was rendered, or by a circuit court commissioner for

said county, but the penalty of such bond shall not be less than double the amount of the judgment upon which the writ of error is brought, if such judgment be against the appellant, nor in any case less than one hundred dollars: *Provided*, That the supreme court, or the circuit judge of the county where the cause was tried, shall on special motion, have power to order an additional bond and fix the penalty thereof, and approve the sureties thereto, or to refer such approval to a circuit court commissioner of the county in which the cause shall have been pending.

**HISTORY:** Re-enacts Sec. 3, R. S. '46, Ch. 138, being C. L. '57, (5334); C. L. '71, (7121); As Am. '79, p. 163, Act 172, Eff. Aug. 30; How. 8680; C. L. '97, (10486), changing "plaintiff in error" to appellant. Substantially unchanged.

**CITED:** Markham v. Kent Circuit Judge, 121 Mich. 576; Hogle v. Wayne Circuit Judge, 160 Mich. 574; Ismond v. Scougale, 119 Mich. 504.

**(13739). Bond to be Filed and Notice Given.**

**SEC. 4.** The bond, if any be given, shall be filed in the office of the clerk of the court in which the judgment was rendered, at the time of serving the writ on such clerk, and notice thereof shall be given to the appellee, or his attorney, and no execution shall thereafter be issued upon the judgment complained of, during the pendency of the writ of error; and if any execution shall have been issued, all further proceedings thereon shall be stayed, upon the officer holding such execution being served with a certificate of the service of such writ, and the filing of such bond, signed by the clerk with whom such bond shall be filed.

**HISTORY:** Re-enacts Sec. 4, R. S. '46, Ch. 138, being C. L. '57, (5335); C. L. '71, (7122); How. 8681; C. L. '97, (10487), changing "defendant in error" to "appellee." Substantially unchanged.

**CONSTRUED:** This section only provides for filing a supersedeas bond when the writ of error is served on the clerk; and while, possibly, the clerk might, on receiving the writ, file such a bond previously left with him for that purpose, he could not do so otherwise. Howard v. Hess, 63 Mich. 726. After return made of writ of error, the circuit court has no authority, when no bond has been filed to stay execution, to allow a bond to be filed nunc pro tunc and operate as a supersedeas. That can be done only in the supreme court. Worden v. Manistee Circuit Judge, 33 Mich. 111. See People v. Stephenson, 98 Mich. 218.

**CITED:** Boyer v. Sowles, 109 Mich. 484; Ismond v. Scougale, 119 Mich. 504.

## (13740). Proceedings on Writ of Error.

SEC. 5. The proceedings upon writs of error, as to the assignment of errors, and as to the appearance of the appellee, and the pleadings, judgment, and all other matters not herein provided for, shall be according to the course of the common law, as modified by the practice and usage in this state, and such general rules as shall be made by the supreme court.

HISTORY: Re-enacts Sec. 5, R. S. '46, Ch. 138, being C. L. '57, (5336); C. L. '71, (7123); How. 8682; C. L. '97, (10488), changing "defendant in error" to "appellee." Substantially unchanged.

ASSIGNMENTS OF ERRORS: The practice of needlessly multiplying assignments of error criticised. *Fowler v. Gilbert*, 38 Mich. 292; *Burt v. Long*, 106 Mich. 210. Special assignments must be made or they will not be considered. *Webster v. Fisk*, 9 Mich. 251; *Weich v. Bagg*, 12 Mich. 43; *Altman v. Wheeler*, 18 Mich. 240; *Green v. Brookins*, 23 Mich. 48; *Peabody v. McAvoy*, 23 Mich. 526; *Johnson v. Ballou*, 25 Mich. 460; *Tupper v. Kilduff*, 26 Mich. 394; *Burt v. Olcott*, 33 Mich. 178; *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44; *Bissell v. Collins*, 28 Mich. 277; *Fowler v. Gilbert*, 38 Mich. 292; *Wheeler & Wilson Mfg. Co. v. Walker*, 41 Mich. 239; *Bayles v. Stout*, 49 Mich. 215; *People v. De Fore*, 64 Mich. 693; *Behler v. Drury*, 51 Mich. 111; *Lickly v. Bishopp*, 150 Mich. 256. Or they will be deemed waived. *Lang v. People*, 14 Mich. 442. Nor will they be considered, if unsupported by exceptions. *Hill v. Robinson*, 23 Mich. 24; *Green v. Bennett*, 23 Mich. 464; *Peabody v. McAvoy*, 23 Mich. 526; *McMillan v. Gilt Edge Cheese Factory*, 23 Mich. 544; *Roberts v. Fitzgerald*, 33 Mich. 4; *Hall v. People*, 39 Mich. 717; *Hogelskamp v. Weeks*, 37 Mich. 422; *Larkin v. Lumber Co.*, 42 Mich. 296; *Hotchkiss v. Weinmann*, 175 Mich. 652. The rulings, on which the assignments of error are based, ought to be specifically pointed out. *Fowler v. Gilbert*, 38 Mich. 292. An assignment of error founded upon a general objection to the admission of testimony will not be considered. Counsel must state the reasons for their objections and will be limited to those reasons. *Mahiat v. Codde*, 106 Mich. 387, citing *Abbott v. Chaffer*, 83 Mich. 256; *Merkle v. Bennington*, 68 Mich. 133. See, also, *Marvin v. Ruhmorh*, 115 Mich. 687; *Jennison v. Haire*, 29 Mich. 207; *Detroit H. & I. Railroad Co. v. Forbes*, 30 Mich. 165; *Gold v. Detroit United Railway*, 169 Mich. 178. An objection, a ruling by the court, and exception in behalf of appellant, are necessary to review improper arguments of counsel. *Wiers v. Shaw-Walker Co.*, 171 Mich. 325; but see *Compilers' Section* (12632.) Points not raised upon the trial and to which the attention of the court was not called cannot be considered. *Mahiat v. Codde*, 106 Mich. 389; citing *Waterman v. Waterman*, 34 Mich. 490; *Lane v. Pere Marquette Boom Co.*, 62 Mich. 63; *Wicks v. Ross*, 37 Mich. 464; *Franklin Mining Co. v. Harris*, 24 Mich. 115. See, also, *Howry v. Eppinger*, 34 Mich. 30; *Campbell v. People*, 34 Mich. 351; *Lobdell v. Merchants' & Manufacturers' Bank*, 33 Mich. 408; *Gilbert v. Kennedy*, 22 Mich. 116; *Turner v. People*, 33 Mich. 363; *Wheaton v. Beecher*, 49 Mich. 348; *Rodgers v. Wells*, 44 Mich. 411; *Tupper v. Kilduff*, 26 Mich. 394; *Phippen v. Morehouse*, 50 Mich. 537; *Ives v. Williams*, 50 Mich. 100; *O'Neill v. Detroit*, 50 Mich. 133;

Hogelskamp v. Weeks, 37 Mich. 422; Wicks v. Ross, 37 Mich. 464. After a witness has interjected improper matter, a motion to strike out is necessary to review the point. Bowen v. Chandler, 172 Mich. 678.

The record must affirmatively show error; facts cannot be presumed to make it out. Greenlee v. Lowing, 35 Mich. 63; State Insurance Co. v. Reynolds, 35 Mich. 304; Broug v. Brown, 42 Mich. 119; Maillet v. People, 42 Mich. 262; Howard v. Patrick, 43 Mich. 121; Wilcox v. Laffin & Raud Powder Co., 44 Mich. 35; Brown v. Haak, 48 Mich. 229; Hurd v. Newton, 36 Mich. 35; Turner v. People, 33 Mich. 363; Gilbert v. Am. Ins. Co., 30 Mich. 400; Peabody v. McAvoy, 23 Mich. 526; Kermott v. Ayer, 11 Mich. 181; Morissey v. People, 11 Mich. 327; Maynard v. Penniman, 10 Mich. 153; Farmers' & Merchants' Bank v. Troy City Bank, 1 Doug. 457. Errors of fact may be assigned on the common writ of error. Teller v. Wetherell, 6 Mich. 46. Amendment of assignment. Parsons v. Copland, 5 Mich. 143; Trudo v. Anderson, 10 Mich. 357; Johnson v. Provincial Insurance Co., 12 Mich. 216. Assignments; joint or several. Fisher v. Thirkell, 21 Mich. 1.

WHAT WILL BE CONSIDERED: See preceding note. Only questions duly raised by assignments of error will be considered upon review. Monroe v. Fort Wayne, J. & S. Railroad Co., 28 Mich. 272; Jennison v. Haire, 29 Mich. 207; Andre v. Hardin, 32 Mich. 324; Waterman v. Waterman, 34 Mich. 490; Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296; Gager v. Chippewa Co., Supervisors 47 Mich. 167; Supe v. Francis, 49 Mich. 266; Lymburner v. Jenkinson, 50 Mich. 488. Facts will not be considered, nor conclusions drawn, nor law cases reviewed upon questions of fact. Ortman v. Wilson, 23 Mich. 269; Peabody v. McAvoy, 23 Mich. 526; Compton v. Blair, 27 Mich. 397; Elliott v. VanBuren, 33 Mich. 49; Webber v. Donnelly, 33 Mich. 469; Grand Rapids & I. Railroad Co. v. Judson, 34 Mich. 506; Young v. Taylor, 36 Mich. 25; Gano v. Heath, 36 Mich. 441; Thatcher v. St. Andrew's Church, 37 Mich. 264; Bodine v. Simmons, 38 Mich. 682; Payment v. Church, 38 Mich. 776; Tuxbury v. French, 39 Mich. 190; Welrich v. Cook, 39 Mich. 134; Ellis v. Spaulding, 39 Mich. 366; Miller v. Petrie, 40 Mich. 657; Underhill v. Muskegon Boom Co., 40 Mich. 660; Locke v. Tuttle, 41 Mich. 407; Ortman v. Merchants Bank of Canada, 41 Mich. 482; Stockle v. Silsbee, 41 Mich. 615; Johnson v. Crispell, 43 Mich. 261; Demill v. Moffat, 45 Mich. 410; Gates v. Fisk, 45 Mich. 522; Kent Furniture Manufacturing Co. v. Ransom, 46 Mich. 416; Chatterton v. Parrott, 46 Mich. 432; Rider v. Kern, 46 Mich. 455; Hicks v. Lyle, 46 Mich. 488; Cuddy v. Horn, 46 Mich. 596; Marcott v. Railroad Co., 47 Mich. 1; Green v. Gill, 47 Mich. 86; Kane v. Stowe, 50 Mich. 317; Peoples v. Evening News, 51 Mich. 11; McGraw v. Germania Fire Insurance Co., 54 Mich. 145; Parsons v. Clark, 59 Mich. 414; Beal v. Polhemus, 67 Mich. 130; Robinson v. Smith, 63 Mich. 350; Kroluk v. Graham, 64 Mich. 226; Nelson v. Lumbering & Mining Co., 65 Mich. 288; Kryger v. Andrews, 65 Mich. 405; Witheral v. Muskegon Booming Co., 68 Mich. 48; Burch v. Woodworth, 68 Mich. 519. Errors that do not prejudice, either in the admission or rejection of evidence or in the charge of the court, will not be considered. Minnesota Mining Co. v. National Mining Co., 11 Mich. 186; Maxon v. Perrott, 17 Mich. 332; Comstock v. Smith, 20 Mich. 338; Hammond v. Hannin, 21 Mich. 374; Threadgool v. Litogot, 22 Mich.

271; *Burden v. People*, 26 Mich. 162; *Richards v. Tozer*, 27 Mich. 451; *Beebe v. Knapp*, 28 Mich. 53; *Insurance Co. v. Horton*, 28 Mich. 173; *Davis v. Bush*, 28 Mich. 432; *Jennison v. Haire*, 29 Mich. 220; *Booming Co. v. Jarvis*, 30 Mich. 308; *English v. Caldwell*, 30 Mich. 362; *Harvey v. McAdams*, 32 Mich. 472; *McDonough v. Sutton*, 35 Mich. 1; *Eberstein v. Camp*, 37 Mich. 176; *Lenox v. Fuller*, 39 Mich. 268; *Kelso v. Saxton*, 40 Mich. 666; *Shipman v. Seymour*, 40 Mich. 274; *Reading v. Beardsley*, 41 Mich. 123; *Clark v. Field*, 42 Mich. 342; *Fraser v. Jennison*, 42 Mich. 206; *Swart v. Kimball*, 43 Mich. 443; *Barton v. Gray*, 57 Mich. 622; *Finan v. Babcock*, 58 Mich. 301; *Mathews v. Phelps*, 61 Mich. 327; *Lane v. Pere Marquette Boom Co.*, 62 Mich. 63; *Landon v. Cowet*, 62 Mich. 80.

Where there is evidence to support the verdict, questions of excessiveness cannot be considered. *Westcott v. Wade*, 153 Mich. 340. In a case tried without a jury an opinion filed but not excepted to, appellant having failed to request findings, is not reviewable on error. *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400. The court will not consider a question not raised in the lower court. *Foster v. Watson*, 153 Mich. 400; *Selling v. Berger*, 161 Mich. 526; *Richards v. Church*, 166 Mich. 465. Where both parties bring error from a judgment, the appeal should be heard as one case. *In re Saler's Estate*, 158 Mich. 170. Where appellant wants the case either dismissed without a new trial or affirmed, unless the case is unusual it will be affirmed. *Daniels v. Bay City Traction & Electric Co.*, 153 Mich. 97.

**DISMISSING THE WRIT:** Uncertainty and informality in the assignments are no ground for quashing the assignment or dismissing the writ. *Teller v. Wetherell*, 6 Mich. 46. Any case not settled in accordance with circuit court rule 47 (e) will be dismissed by the supreme court. *Roush v. Darmstaetter*, 113 Mich. 535.

Plaintiff in error will be allowed to dismiss his writ of error on motion, on payment of costs. *Birch v. Brown*, 5 Mich. 31. Will be set aside for want of a proper return, after the lapse of several years. *Wattles v. Warren*, 7 Mich. 309. A motion to dismiss is the proper form of objection to a writ of error in the supreme court, supposed to be barred by lapse of time. *Teller v. Willis*, 12 Mich. 268. A writ of error will not be dismissed for delay in filing the return, if it is filed before the hearing of the motion. *Woodmansie v. Hollon*, 16 Mich. 379. A motion to dismiss for various informalities and irregularities comes too late after judgment in the supreme court. *Powers v. Irish*, 23 Mich. 429. The dismissal is equivalent to a nonsuit and does not bar the issue of a new writ. *Beller v. Stevens*, 40 Mich. 168.

Dates of judgments, without certified copies of them, are sufficient in affidavits to dismiss writs of error. *Bliss v. Cattle Bros Co.*, 157 Mich. 253. Where no exception is taken at the time charge is made to jury, no assignment of error that charge was based on wrong theory will stand. *Putnam v. Phoenix Preferred Acc. Insurance Co.*, 155 Mich. 134. Sufficiency of assignment of error, see *Lickly v. Bishopp*, 150 Mich. 256. In a trial without a jury the conclusions of court are not open to review, where there is no request for written findings and no exceptions are filed. *Rice v. Muskegon*, 150 Mich. 679.

For other lately decided points on Appeal and Error, see *Good Roads Construction Co. v. Pte. Huron, St. Clair & M. C. R. Co.*, 173 Mich. 1; 138 N. W. 320 19 D. L. N. 986 *Pruner v. Detroit U. R. Co.*, 173

Mich. 146; Bowen v. Chandler, 172 Mich. 678; Minkkinnen v. Quincy Mining Co., 172 Mich. 404; Lubbers v. Twp. of Manlius, 172 Mich. 387; Carver v. Sherman, 172 Mich. 264; Yanelli v. Littlejohn, 172 Mich. 91; Wolverton v. Saranac, 171 Mich. 419; Leary v. Houghton County Co., 171 Mich. 365; Wiers v. Shaw-Walker Co., 171 Mich. 324; Gates v. Beebe, 170 Mich. 107; Hennes v. Hebard, 170 Mich. 81; Habitz v. R. R. Co., 170 Mich. 71; Scendar v. Winona Copper Co., 169 Mich. 665; Silfver v. Daenzer, 167 Mich. 362; Bates v. Kitchel, 166 Mich. 695; Stuart v. Holt, 166 Mich. 549; Eitzen v. Hilbert, 165 Mich. 650; Riley v. Detroit U. R., 163 Mich. 327; Coeling v. Barnard, 159 Mich. 634; Ullman v. Sandell, 158 Mich. 396; 170; Bernstein v. Thayer, 157 Mich. 625; In re Thorington's Estate, 157 Mich. 513; Clark v. Bay Circuit Judge, 154 Mich. 483; Cascarella v. National Grocery Co., 151 Mich. 15.

### (13741). Writs.

SEC. 6. All writs of error upon any judgment or final determination, rendered in any cause, in any court of law and of record in this state, shall issue within one year after the rendering of such judgment or final determination made and not after, except in cases specified in the next two sections: *Provided*, That in all cases where a bill of exceptions has been settled and signed by the circuit judge, such writ of error shall be taken out within ten days after such bill of exceptions shall have been signed: And *Provided further*, The time in which writs of error may be taken out may be extended not exceeding six months by the supreme court or by one of the supreme court justices at chambers, when any party has been prevented from taking out the same by circumstances not under his control. Such extension shall only be made on special motion and after a proper showing.

**HISTORY:** Re-enacts Sec. 9, R. S. '46, Ch. 138, being C. L. '57, (5340); C. L. '71, (7127); How. 8686; As Am. '89, p. 170, Act 151, Eff. Oct. 2; C. L. '97, (10492), inserting the first proviso and changing "shall be brought" to "shall issue." Substantially unchanged.

**WRITS OF ERROR:** An important change has been made in the law with reference to the time within which writs of error may issue, in that in all cases when a bill of exceptions has been signed, a writ of error must be taken out within ten days after such signing.

**CONSTRUED:** The time limited for suing out a writ of error, in this section, is not extended by the provisions of Compilers' Section (12635). *Hill v. Hill*, 114 Mich. 599. This limit is applied to certiorari by Compilers' Section, (13748). See *Crittenden v. Macomb Circuit Judge*, 97 Mich. 637. One cannot gain time for suing out a writ of error by moving to vacate judgment. *Buckley v. Sutton*, 38 Mich. 1. The statute limiting the time for bringing a writ of error commences to run from rendition of judgment. *Borden v. Peoria Marine & Fire Insurance Co.*, 14 Mich. 232; *Teller v. Willis*, 12 Mich. 384. A

party is not obliged to wait until his exceptions are settled before suing out his writ of error. *Teller v. Willis*, 12 Mich. 384.

On motion to dismiss a writ of error for the reason that it was not sued out in proper season, affidavits showing date of judgment are sufficient, if undisputed. *Bliss v. Caille Bros.* 157 Mich. 258. And no plea of the statute of limitations is necessary. *Id.* What deemed a proper showing. *Belmer v. Boyne City Tanning Co.*, 158 Mich. 399. The supreme court acquires no jurisdiction of a cause in which a writ of error issues more than 18 months after judgment. *Riley v. Detroit United Railway*, 163 Mich. 327.

Under this section and Sec. (10504), error does not lie to review a determination of the trial judge in denying a new trial on the merits after the affirmance by the Supreme Court of an adverse judgment. *Minkinnen v. Quincy Mining Co.*, 172 Mich. 404. The fact that a motion for a new trial is pending does not extend the time during which a writ of error may issue, but a would-be appellant will be entitled to further time when it is through the fault of his attorney only, that such writ has not been sued out within the year. Although there has been no return to the writ of error and no certified copy of the judgment entry is attached to the undisputed affidavit, the court, on a motion to dismiss the writ on the ground of limitations, may accept the date in the affidavit as proof of the date when the judgment was rendered. *Bliss v. Caille Bros. Co.*, 157 Mich. 258. *Ismond v. Scougale*, 119 Mich. 503; *Hill v. Hill*, 114 Mich. 600. In construing this section in *Rasor v. Mott*, 194 Mich. 311; 160 N. W., 549, the court said: "The motion involves a construction of Section 6. Chapter 50, of the new Judicature Act. The showing made indicates very clearly that the delay in suing out the writ of error beyond ten days is a delay for which the appellant is in no wise responsible. The act authorizes this court, upon a proper showing made, to extend the time beyond ten days after the bill of exceptions has been signed. On the 10th of April, 1916, we construed this act in the unreported case of *Blake v. Insurance Co.*, in a similar case, and granted an extension of the time beyond the ten days. In the instant case the bill of exceptions has been signed and the writ of error has been sued out. If the showing upon the motion had been made to this court before the writ of error was sued out, we should have felt bound to extend the time in which to make out the writ of error. Inasmuch as the writ of error has been taken out, it may stand the same as though an extension of time had been granted upon a proper showing."

**DISMISSAL:** Where no writ of error was taken out until after the expiration of a year from the rendition of judgment, and no motion made, nor extension of time was granted by the Supreme Court, nor one of its justices, the Supreme Court should of its own motion dismiss the case for want of jurisdiction. *Balton v. Cummings*, 200 Mich. 234.

### (13742). Disability.

**SEC. 7.** If any person against whom any such judgment shall be rendered, or final determination made, shall be at the time, either:

1. Within the age of twenty-one years; or



2. Insane; or

3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offense, for any term less than for life; the time during which such disability shall continue, shall not be deemed any portion of the time above limited for bringing a writ of error; but such person may bring such writ after the time so limited, and within two years after such disability shall have been removed.

HISTORY: Re-enacts Sec. 10, R. S. '46, Ch. 138, being C. L. '57, (5341); C. L. '71, (7128); How. 8687; C. L. '97, (10493), omitting "4. A married woman." Modified, by omitting, a married woman.

**(13743). Death of Party.**

SEC. 8. If the person entitled to bring such writ shall die, during the continuance of any disability specified in the preceding section, his heirs, devisees, executors or administrators entitled to bring such writ, may bring the same after the time herein limited for that purpose, and within two years after such death.

HISTORY: Re-enacts Sec. 11, R. S. '46, Ch. 138, being C. L. '57, (5342); C. L. '71, (7129); How. 8688; C. L. '97, (10494). Unchanged.

**(13744). Writ Not to Issue After Five Years.**

SEC. 9. But the existence of any disability specified in the preceding sections, shall not authorize the bringing of a writ of error upon any judgment after the expiration of five years from the time of rendering the same.

HISTORY: Re-enacts Sec. 12, R. S. '46, Ch. 138, being C. L. '57, (5343); C. L. '71, (7130); How. 8689; C. L. '97, (10495). Unchanged.

CONSTRUED: Writs of error and of certiorari are barred after five years from judgment and, if sued out, will be dismissed. *People v. Van Wagner*, 51 Mich. 171.

**(13745). Computation of Time on Writ of Error.**

SEC. 10. The time prescribed by law within which a writ of error or appeal is to be taken, shall, when the judgment or decree is rendered in vacation, be computed from the day when such judgment or decree shall be actually entered by the clerk.

HISTORY: Re-enacts Sec. 8 of Act '91, '53, being C. L. '57, (3442); C. L. '71, (4968); How. 6492; C. L. '97, (10266), omitting "or register." Substantially unchanged.

**CONSTRUED:** This and the preceding section make notice an essential accompaniment of the entry of judgment in vacation. And the time for appealing begins to run from such notice. *McClung v. McClung*, 39 Mich. 55.

**CITED:** *Hoffman v. Flint Land Co.*, 144 Mich. 567.

### Writs of Certiorari.

#### (13746). How Issued and Made Returnable.

**SEC. 11.** All writs of certiorari to correct errors in proceedings that are not according to the course of common law, shall be issued out of and be made returnable to the supreme court, according to the practice heretofore established, and subject to such regulations as shall from time to time be made by the general rules of the supreme court.

**HISTORY:** Re-enacts Sec. 14, R. S. '46, Ch. 138, being C. L. '57, (5345); C. L. '71, (7132); How. 8691; C. L. '97, (10497). Unchanged.

**WRIT OF CERTIORARI:** The writ of certiorari out of the supreme court is a constitutional writ and the authority to issue it cannot be taken away by the legislature. *Specht v. Detroit*, 20 Mich. 168; *Detroit v. Wabash, St. L. & P. Railway Co.*, 63 Mich. 712. A certiorari lies in all judicial proceedings in which a writ of error does not lie, and does not lie to remove any other than judicial acts. *Root v. Barnes*, 1 Mich. 39; *Parker v. Copland*, 4 Mich. 528. At common law the writ of certiorari is not one of right and should not be granted after any considerable delay, unless the court is satisfied that it is not due to the petitioner's negligence. *Detroit v. Murphy*, 95 Mich. 639. Not of right, but rests in the sound discretion of the court. *Matter of Lantis*, 9 Mich. 324; *Farrell v. Taylor*, 12 Mich. 114; *Specht v. Detroit*, 20 Mich. 171; *Gager v. Chippewa Supervisors*, 47 Mich. 167; *Detroit River Transit Co. v. Union Trust Co.*, 152 Mich. 92. And should not be allowed where the equities are against it. *Roediger v. Drain Com'r.*, 40 Mich. 746.

The power of reviewing by certiorari the judicial proceedings of inferior tribunals and bodies which are not according to the course of the common law has long been exercised. *Hartz v. Wayne Circuit Judge*, 164 Mich. 234. Certiorari is not the proper remedy to review acts of a ministerial, executive or legislative character not done in the exercise of judicial power. *Greenville Gas Co. v. City of Greenville*, 165 Mich. 135. Certiorari is the proper proceeding where the relief sought is the revision of a final judgment of matters of record and where everything necessary to a determination may be returned. *Hartz v. Wayne Circuit Judge*, 164 Mich. 35. Where parties have stood by and seen public improvements made, and money expended upon the faith of the validity of the proceedings, they cannot make use of discretionary writs to enforce their legal remedies. *Bandistel v. City of Jackson*, 110 Mich. 362. Certiorari is the proper remedy to review disbarment proceedings. *In re Radford*, 168 Mich. 474. To review bastardy proceedings. *People v. Brannen*, 173 Mich. 411. The proper remedy to review mandamus. *Chicago, D. & C. G. T. R. Co.*

v. St. Clair Circuit Judge, 156 Mich. 573. See *Detroit & Mackinaw R. Co. v. Alpena Circuit Judge*, 152 Mich. 201; *Stevens v. Ottawa Probate Judge*, 154 Mich. 509.

The office of a certiorari is not to review questions of fact, but of law. In examining into the evidence, the appellate court does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding; and the correctness of the rulings of law, upon the admission or exclusion of evidence, may be reviewed. *Jackson v. People*, 9 Mich. 111; *Hyde v. Nelson*, 11 Mich. 353; *Linn v. Roberts*, 15 Mich. 443; *McGraw v. Schwab*, 23 Mich. 13; *Brown v. Blanchard*, 39 Mich. 790; *Macumber v. Beam*, 22 Mich. 395; *Smoke v. Jones*, 35 Mich. 409; *Cicotte v. Morse*, 8 Mich. 424; *Berry v. Lowe*, 10 Mich. 9; *Welch v. Bagg*, 12 Mich. 41; *Overpack v. Ruggles*, 27 Mich. 65. See, also, *Higley v. Lant*, 3 Mich. 612; *Parsons v. Dickinson*, 23 Mich. 56; *State Bank of Fenton v. Whittle*, 41 Mich. 365; *Schall v. Bly*, 43 Mich. 401; *Collier v. Twp. of St. Charles*, 147 Mich. 688; *In re Phillips*, 154 Mich. 139; *Booker v. Grand Rapids Medical College*, 156 Mich. 95. But the practice of resorting to certiorari as a remedy for errors occurring in the rejection or admission of testimony is discouraged, and when resorted to nothing will be taken by intendment in favor of errors thus assigned. *O'Hara v. Merriam*, 79 Mich. 226; *Howell v. Shepard*, 48 Mich. 226. Certiorari issues from the supreme court only where that process is necessary to prevent a failure of justice. *Adams v. Abrams*, 38 Mich. 302. Will not lie where there is another adequate remedy. *People v. James*, 155 Mich. 548; *Detroit Lumber Co. v. Yacht "Petrel"*, 155 Mich. 350. The power to issue this writ is one that should be exercised sparingly in cases where other adequate remedies can be had. *Specht v. Detroit*, 20 Mich. 171; *Farrell v. Taylor* 12 Mich. 113; *Smith v. Reed*, 24 Mich. 240; *Ishpeming v. Maroney*, 49 Mich. 226; *Tucker v. Drain Com'r.*, 50 Mich. 5; *Detroit v. Wabash, St. L. & P. Railway Co.*, 63 Mich. 712; *Mathias v. Drain Com'r.*, 66 Mich. 524. Certiorari does not lie where it does not appear that the plaintiff has some substantial interest and will suffer some injury if the court does not interfere. *People v. Leavitt*, 41 Mich. 470. See *Dunning v. Drain Com'r.*, 44 Mich. 518; *Cheney v. Russell*, 44 Mich. 620. And relief will not be granted to plaintiff in certiorari, unless it appears that the proceedings may, at least, affect him injuriously. *Davison v. Otis*, 24 Mich. 23. But one who is not formally an original party may prosecute the writ, if his rights are injuriously affected. *Campau v. Button*, 33 Mich. 525. No reversal can be had, except for matters affecting the merits. *Hinman v. Eakins*, 26 Mich. 80; *Davison v. Otis*, 24 Mich. 23; *Burnham v. Van-Gilder*, 34 Mich. 246, where there was evidence of defendant's misconduct, the Supreme Court will not decide as a question of law, that the evidence was not clear and convincing, that question being clearly within the province of the trial court. *In re Coburn and Glocheski*, 207 Mich. 350.

**PRACTICE:** Proceedings taken in accordance with the provisions of law for removing causes from justices' courts are sufficient. *Thompson v. Crockery School District*, No. 6, 25 Mich. 486. The writ must be directed to the officers before whom the proceedings sought to be questioned remain. *Goodrich v. Lima Twp. Highway Com'rs.*, 1 Mich. 387. See *French v. Springwells Highway Com'rs.*,

12 Mich. 267; Crawford v. Scio and Webster Twp. Boards, 22 Mich. 405; Roberts v. Cottrellville Highway Com'rs., 24 Mich. 182; Whistler v. Wilson, 39 Mich. 121. Dismissal of a writ of certiorari improperly addressed, was denied, where the accompanying affidavit described the respondents properly. Wilson v. Gifford, 41 Mich. 417. A writ of certiorari improperly allowed may be regarded as an application for a writ. People v. Chamblin, 149 Mich. 655. The legal organization and existence of a school district cannot be tested by certiorari addressed to the assessor. Jaquith v. Hale, 31 Mich. 430. See Comfort v. Stockbridge, 37 Mich. 472. Affidavit for certiorari. Davison v. Otis, 24 Mich. 23. The court cannot take notice of errors not assigned in the affidavit. Witherspoon v. Clegg, 42 Mich. 485; Booker v. Grand Rapids Medical College, 156 Mich. 95. See Parsons v. Dickinson, 23 Mich. 56; Case v. Frey, 24 Mich. 251; Hinkley v. Weatherwax, 35 Mich. 510; Fowler v. Detroit & M. Railway Co., 7 Mich. 79. Assignments of error are not necessary on common law certioraris. Stokes v. Jacobs, 10 Mich. 290. A certiorari is, under the regular common law practice, not entitled in the cause which it brings up, or between the parties litigant, but it is like the writ of mandamus, a writ of the people directed to the judges. People v. Bacon, 18 Mich. 254. It seems that only such questions as are ruled upon by the court below will be considered on certiorari. Hinman v. Eakins, 26 Mich. 80; Patterson v. Goodrich, 31 Mich. 225; Certiorari is the proper proceeding to get rid of a void judgment. Harbour v. Eldred, 107 Mich. 95.

Certiorari has been held to be the proper remedy to review convictions for violations of city ordinances. Grand Rapids v. Braudy, 105 Mich. 657, citing Swift v. Wayne Circuit Judges, 64 Mich. 487; People v. White, 53 Mich. 537. But the people have no such remedy after an acquittal on the merits. City of Muskegon v. Brenan, 156 Mich. 41. Certiorari will not lie to review the proceedings of the board of supervisors organizing a township, after officers have been elected and property assessed for taxation therein. Atlee v. Wexford County Supervisors, 94 Mich. 562; Owosso Fractional Sch. Dist. No. 1 v. Owosso, Sciota, Bennington and Middlebury Joint Board of School Inspectors, 27 Mich. 3. Proceedings for the organization of a school district cannot be reviewed by certiorari after the district has assumed the functions of a corporation. Perrizo v. Kesler, 93 Mich. 280; Owosso Fractional School Dist. No. 1 v. Inspectors, 27 Mich. 3; Parman v. Board of School Inspectors, 49 Mich. 63. Irregularities in the proceedings of a board of school inspectors which do not affect property rights or jurisdiction cannot be reviewed on certiorari. Donough v. Dewey, 82 Mich. 309. No one but the trial judge who pronounced sentence can make return to a writ of certiorari as to a compliance with the requirements of Compilers' Section (15830,) before pronouncing sentence upon a plea of guilty. People v. Brennan, 79 Mich. 363.

As to dismissal of the writ, see Ullman v. Sandell, 158 Mich. 396. Ordinarily, certiorari will only lie upon the final determination of the matter, to be reviewed by the lower court. Palms v. Campau, 11 Mich. 109. But see Compilers' Sec. (13749).

**CIRCUIT COURT JURISDICTION:** The constitution confers the power to issue a common law writ of certiorari upon the circuit courts, and this section does not deprive them of such jurisdiction.

Merrick v. Arbela Twp. Board, 41 Mich. 630; McBride v. Grand Rapids Com. Council, 32 Mich. 360; Zook v. Blough, 42 Mich. 488; Wilson v. Bartholomew, 45 Mich. 42-3. But in the exercise of this power the circuit courts are subject to the supervisory control of the supreme court. Thompson v. Crockery School District, No. 6, 25 Mich. 483. On certiorari from justice court questions of evidence cannot be considered. Forbes Lithograph Co., v. Winter, 107 Mich. 117. People v. Turja, 157 Mich. 530; Board of Supervisors v. Munson, 157 Mich. 505.

**TO JUSTICES OF THE PEACE:** The allowance of a writ of certiorari from the supreme court to a justice of the peace is exceptional and favored only when necessary to prevent a failure of justice. White v. Boyce, 88 Mich. 349; Adams v. Abram, 38 Mich. 302; Withington v. Southworth, 26 Mich. 381; People v. Turja, 157 Mich. 530. See Warner v. Porter, 2 Doug. 358.

#### (13747). How Allowed.

**SEC. 12.** Writs of certiorari to review in the supreme court any judgment, order, determination or proceeding may be allowed by any justice of the supreme court.

**HISTORY:** New section. Supersedes Sec. 15, R. S. '46, Ch. 138, being C. L. '57, (5346); As Am. '58, p. 12, Act 4, Eff. May 6; C. L. '71, (7133); How. 8692; C. L. '97, (10498). Modified, limiting power to Supt. or one of the Justices.

**WRITS OF CERTIORARI:** Heretofore writs of certiorari from the supreme court could be allowed by a circuit court commissioner or circuit judge, as well as by a justice of the supreme court and the authority of a circuit court commissioner was not even limited to cases arising within his own county. This has been changed so that the power to allow writs of certiorari returnable to the supreme court may be exercised only by a justice of the supreme court.

**CIRCUIT COURT COMMISSIONER:** Power of to allow writ under provisions of superseded section. Zook v. Blough, 42 Mich. 487. His power is statutory, and does not belong to his ordinary chamber duties in matters within the county. He may allow the writ in proceedings occurring out of his county. Loder v. Littlefield, 39 Mich. 374.

**CITED:** Atty. Gen. v. Montcalm County Supervisors, 141 Mich. 604.

#### (13748). Within What Time to be Issued.

**SEC. 13.** No such writ of certiorari shall be issued, to correct any proceedings, unless such writ be brought within the same time after such proceedings shall have been had, as is limited by this chapter for bringing a writ of error upon a judgment.

**HISTORY:** Re-enacts Sec. 16, R. S. '46, Ch. 138, being C. L. '57, (5347); C. L. '71, (7134); How. 8693; C. L. '97, (10499). Unchanged.

**CONSTRUED:** See notes to Compilers' Sections (13741) and (13744). Before the amendment of '89 to Compilers' Section (13741),

the time allowed was two years. See *Wilson v. Gifford*, 42 Mich. 456; *Matter of Lantis*, 9 Mich. 324.

**(13749). Motions.**

SEC. 14. Whenever in any action at law in a circuit court a motion to dismiss or quash the writ or declaration upon jurisdictional grounds, or issues which under the former practice would have been raised by demurrer, plea to the jurisdiction or other dilatory plea shall be decided adversely to the party filing such motion, the decision may be reviewed by writ of certiorari forthwith. Upon the issue of such writ the supreme court may, upon proper cause shown, stay the proceedings in the circuit court pending their decision on such writ. Or such decision may be reviewed by assignment of error under a writ of error sued out to review the final judgment in the cause in case such party shall plead over and a final judgment upon the merits shall be rendered against him.

**HISTORY:** Re-enacts Sec. 1 of Act 310 of '05, p. 484, Imd. Eff. June 17; with such necessary changes in phraseology as would make the sections conform to the abolishment of pleas in abatement and demurrers. Modified only as above.

**CERTIORARI TO REVIEW DECISION ON DILATORY MOTIONS:** Act 310 of the Public Acts 1905 provided that orders overruling demurrers, pleas to the jurisdiction, etc., might be reviewed by certiorari. This practice is preserved with reference to motions to dismiss based upon grounds, which, under the former practice, would have been urged by demurrer, plea to the jurisdiction, etc., with this addition that the writ shall be allowed unless the justice or justices considering the application shall affirmatively determine, from a consideration of the petition for such writ and the brief accompanying the same, that such petition does not present a meritorious question. That is to say, if there is a real question as to whether the court has jurisdiction or whether the facts alleged constitute a cause of action that question may and should be settled before the parties are put to the expense of a trial. But, on the other hand, the court should have the power to protect itself and litigants against appeals that are without merit and interposed solely for delay.

Of course, questions so arising may also be reviewed by writ of error after final judgment and this would be true even if a writ of certiorari had been denied.

**DISCRETION OF COURT:** An allowance of a writ of certiorari under this act is discretionary with the supreme court. *Detroit River Transit Co. v. Union Trust Co.*, 152 Mich. 92. A circuit court commissioner has no authority to issue a writ of certiorari under this act. *People v. Chamblin*, 149 Mich. 653.

**CONSTRUED:** This act does not apply to contempt proceedings. In re *Smith*, 144 Mich. 39. Nor to proceedings to disbar an attorney. In re *Radford*, 159 Mich. 92. Does not relate to chancery proceedings. *Warran v. Lenawee Circuit Judge*, 160 Mich. 572; *Brooks v.*

Hargrove, 162 Mich. 599. Certiorari will not lie where an appeal can be taken. *Detroit Lumber Co. v. Yacht "Petrel,"* 155 Mich. 350. Defendant loses no rights by pleading over after demurrer to plea has been over-ruled. *Matthews v. Montreal Mining Co.,* 183 Mich. 541. Governs practice in appealing from order sustaining demurrer to plea. *Wanner v. Martin,* 173 Mich. 503; *Clute v. Everhart,* 137 Mich. 5, note. It would appear to be the better practice to review an order overruling a plea in abatement by certiorari. *City of Sault Ste. Marie v. Minneapolis, St. Paul & S. S. M. R. R. Co.* 184 Mich., 681; 22 D. L. N., 21; 151 N. W., 649. If a defendant except to the overruling of a plea in abatement, he loses no rights by later pleading the general issue, as Act No 310, Public Acts '05, permits an assignment of error upon the overruling of a plea. *Matthews v. Montreal Mining Co.,* 185 Mich., 541; 21 D. L. N., 1212; 150 N. W., 127.

CITED: *Moinet v. Burnham Stoepel & Co.,* 143 Mich. 489; *Hopkins v. Michigan Traction Co.,* 144 Mich. 361; *Morning Telegraph Co. v. S. B. Hutchinson Co.,* 146 Mich. 40; *Clement v. Crosby & Co.,* 148 Mich. 295; *Cristanelli v. Saginaw Mining Co.,* 154 Mich. 428; *Boughner v. Bay City,* 156 Mich. 193; *Orband v. Kalamazoo Telegraph Co.,* 170 Mich. 393; *Gustin v. Evening Press Co.,* 172 Mich. 312; *Forest Township v. American Bonding Co.,* 180 Mich. 91; *Eberts v. Mt. Clemens Sugar Co.,* 182 Mich. 457.

**(13750). Writ of Certiorari Allowed.**

SEC. 15. Upon the filing of a petition for a writ of certiorari in such case, the same shall be allowed and the writ issued, unless the justice or justices considering the application shall affirmatively determine from a consideration of the petition for such writ, and the brief accompanying the same, that such petition does not present a meritorious question.

HISTORY: New section.

See note to preceding section under black letter title.

**(13751). Costs.**

SEC. 16. The party prevailing on a writ of certiorari in any proceeding of a civil nature, shall be entitled to his costs against the adverse party in all cases; and in case such writ shall appear to have been brought for the purpose of delay or vexation, the court may award double costs to the prevailing party.

HISTORY: Re-enacts Sec. 18, R. S. '46, Ch. 138, being C. L. '57, (5349); C. L. '71, (7136); How. 8695; C. L. '97, (10501). Unchanged.

**(13752). Removal to Supreme Court of Case Made.**

SEC. 17. If either party shall wish to have any cause, which has been submitted to the court upon a case made, removed to the supreme court, the clerk of the circuit court

shall, after judgment thereon, certify such case agreed upon, and the judgment thereon, to the supreme court, and the supreme court shall thereupon be possessed of the cause, and may give such judgment and award such costs as justice may require; and any case made after judgment in any circuit court, and agreed upon by the parties, or settled by the court, may be removed to the supreme court in like manner without a bill of exceptions or writ of error.

**HISTORY:** Re-enacts a part of Sec. 11 of Act 157 of '51, being C. L. '57, (3421); C. L. '71, (4947); How. 6469; C. L. '97, (310). Modified, as regards removal of case.

**CASE MADE:** See Compilers' Section (12299), Subdivision 7. Also Compilers' Section (12754).

**CASE MADE BEFORE TRIAL:** Must be signed by the parties or their attorneys and filed with the clerk, that it may be certified by him. *Farrand v. Bentley*, 6 Mich. 283. It is not a mere stipulation as to evidence, but is equivalent to a finding of facts by a court, or the special verdict of a jury, and must contain every fact necessary to a recovery. The court can make no inferences of fact nor consider anything not set forth. *Goodrich v. Detroit*, 12 Mich. 288; *Cofrode v. Wayne Circuit Judge*, 79 Mich. 348.

**CASE MADE AFTER JUDGMENT:** The sole object of this statute is to do away with the necessity of a bill of exceptions and writ of error, by permitting the parties to bring before the supreme court, in a case to be made after trial, all the questions arising thereon that could properly be embodied in the bill of exceptions. *Beeson v. Hollister*, 11 Mich. 193, 195. The practice is quite as appropriate as by writ of error. *Wheeler v. Wilkins*, 19 Mich. 78, 80; *Soper v. Fry*, 37 Mich. 237. Its office is no broader than that of a writ of error and bill of exceptions. *Earle v. Westchester Ins. Co.*, 29 Mich. 417. A party may proceed by bill of exceptions or by case made; but if he elects the former and files the same, he is not entitled thereafter to make and settle a case. *Richardson v. Yawkey*, 9 Mich. 139, 141; *Near v. Mitchell*, 23 Mich. 382. And by suing out a writ of error a party waives a case previously made. *Hatch v. White*, 5 Mich. 194. As in case of a writ of error, a case made must be returned to the supreme court within two years or it will be deemed abandoned. *Van-Blarcom v. Aetna Ins. Co.*, 6 Mich. 300; *Ackley v. Sagar*, 30 Mich. 264.

On a case made, after verdict of a jury, the supreme court cannot review the facts, but only the rulings and decisions of the circuit court. *Peck v. Snyder*, 13 Mich. 21. See further, *Clark v. Dorr*, 5 Mich. 143. When a case is made after judgment for review by the supreme court upon the whole facts, it should embody all the evidence given on the trial. *King v. Moore*, 10 Mich. 544; *Gray v. Howard*, 12 Mich. 171. On the decision of a case made after judgment for review upon the facts, a new trial cannot be awarded. *Barman v. Carhartt*, 10 Mich. 341.

**SETTLING EXCEPTIONS:** See Circuit Court Rule 67, '16; Compilers' Section (12029).

**CERTIFICATION:** Cases made must be certified to the supreme



court by the clerk of the circuit court. Such certification is jurisdictional and the want of it cannot be supplied by stipulation. *Farrand v. Bentley*, 6 Mich. 281; *Grand Rapids v. Whittlesey*, 32 Mich. 192. But less strictness is required in the form of certifying them since they have been confined to questions of law, than, when they could also be used for the review of facts. *Wheeler v. Wilkins*, 19 Mich. 80. (See notes under "What May Be Reviewed" below). After a case has been settled and filed, either party may have it certified up. *Van Blarcom v. Aetna Ins. Co.*, 6 Mich. 299; *Robertson v. Little*, 10 Mich. 371. When duly signed by the circuit judge and filed in the supreme court, a case will, in the absence of any showing to the contrary, be deemed to have been regularly settled. *Sallee v. Ireland*, 9 Mich. 156. The supreme court will not dismiss a case made before it has been certified up. *Robertson v. Little*, 10 Mich. 371.

**WHAT TO CONTAIN:** A case made ought to point out the errors relied upon for a reversal as distinctly as a bill of exceptions is expected to do. *Tuxbury v. French*, 39 Mich. 190; *Probasco v. Cook*, 39 Mich. 714. All the material facts established should appear in the finding, and in a shape to enable the court to award the judgment required to be given in the case. *Adams v. Champion*, 31 Mich. 233. In case of the confirmation of a justice's judgment on certiorari, the case made must include the justice's return. *Zeller v. Harris*, 23 Mich. 286. The case made must show that it was settled and signed by the circuit judge for review by the supreme court. *Farrand v. Bentley*, 6 Mich. 281; *Gard v. Stevens*, 12 Mich. 9; *Wheeler v. Wilkins*, 19 Mich. 78. A case defectively made will be sent back for correction. *Farrand v. Bentley*, 6 Mich. 280; *Lee v. Lake*, 13 Mich. 220.

**WHAT MAY BE REVIEWED:** By the provisions of the law as it existed prior to '67, questions of fact as well as law were reviewable by the supreme court on case made. See C. L. '57, (3438); *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *Barman v. Carharrrt*, 10 Mich. 338; *Rose v. Lewis*, 10 Mich. 483; *King v. Moore*, 10 Mich. 538; *Brown v. Cady*, 11 Mich. 535; *Gray v. Howard*, 12 Mich. 171; *Bouillon v. Litchfield*, 14 Mich. 299. In the last case *Martin, C. J.*, dissenting, took a decided stand against a review of the facts in the supreme court, having protested against it in a former case. *Peck v. Snyder*, 13 Mich. 21. The amendment of March 27, '67, to C. L. '57, (3438), C. L. '71, (4964); How. 6488; C. L. '97, (10262), Compilers Section (12633), deprived the supreme court of the power of reviewing questions of fact and confined it to questions of law only, in cases made. *Heimbach v. Weinberg*, 18 Mich. 48; *Estate of Wisner*, 20 Mich. 128; *Schmidt v. Miller*, 22 Mich. 278; *Walrath v. Campbell*, 28 Mich. 123; *Earle v. Westchester Ins. Co.*, 29 Mich. 414; *Peabody v. McAvoy*, 23 Mich. 526; *Tuxbury v. French*, 39 Mich. 190; *Chatterton v. Parrott*, 46 Mich. 432; *Hedges v. Hibbard*, 46 Mich. 551; *Wertin v. Crocker*, 47 Mich. 642.

The power to review questions of fact cannot be given to the supreme court by stipulation. *Schmidt v. Miller*, 22 Mich. 278. The evidence can be considered only for the purpose of reviewing some question of law. *Peabody v. McAvoy*, 23 Mich. 529; *Tuxbury v. French*, 39 Mich. 190. And can be reviewed only when it is claimed that the judge has reached some conclusion without any evidence to warrant it. *Schmidt v. Miller*, 22 Mich. 278; *Compton v. Blair*, 27 Mich. 397; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 164; *Todd v.*

Davis, 32 Mich. 160; Tuxbury v. French, 39 Mich. 190. The review is not confined to questions of law arising upon the evidence, but any question arising upon the record is properly subject to adjudication in the supreme court. Sallee v. Ireland, 9 Mich. 156. But only such questions as were passed upon by the court below will be reviewed. Vankleek v. Eggleston, 7 Mich. 511; Chatterton v. Parrott, 46 Mich. 435.

As to other questions that may be reviewed on case made, see Heimbach v. Weinberg, 18 Mich. 49; Wheeler v. Wilkins, 19 Mich. 78; Beeson v. Hollister, 11 Mich. 193; Wells v. Booth, 35 Mich. 424; Soper v. Fry, 37 Mich. 236; Watson v. Watson, 47 Mich. 427. A review can be had only upon exceptions to rulings upon law points or findings of facts claimed to be unsupported by evidence. Wertin v. Crocker, 47 Mich. 642; Earle v. Westchester Ins. Co., 29 Mich. 417.

**EXCEPTIONS:** In order to review, upon case made, of any question of law, an exception must have been taken the same as in case of a bill of exceptions and writ of error. Trudo v. Anderson, 10 Mich. 357; Thomas v. Sprague, 12 Mich. 120; Tillman v. Fuller, 13 Mich. 113; Wright v. Wilson, 17 Mich. 204; Turner v. Grand Rapids, 20 Mich. 395; Peabody v. McAvoy, 23 Mich. 527; Tuxbury v. French, 39 Mich. 190; Wilson v. Earle, 39 Mich. 626. A general exception not sufficient. Schmidt v. Miller, 22 Mich. 278; Chatterton v. Parrott, 46 Mich. 432; Hedges v. Hibbard, 46 Mich. 551; Wertin v. Crocker, 47 Mich. 642. But, to raise the question that the facts do not support the judgment, a special exception to the conclusions of law is sufficient where the judge makes a special finding. Perkins v. Nugent, 45 Mich. 156. And where that is the only question raised, no exceptions are necessary. Trudo v. Anderson, 10 Mich. 365; Amboy, Lansing & T. B. R. R. Co. v. Byerly, 13 Mich. 442.

**REVERSAL OF JUDGMENT:** If there is no evidence tending to support any particular point essential to sustain a judgment, such judgment will be reversed. Walrath v. Campbell, 28 Mich. 123. Also where evidence is improperly admitted, adapted to influence the findings in respect to a vital part. Earle v. Westchester Ins. Co., 29 Mich. 416.

### Of Chancery Appeals.

#### (13753). When Appeal May be Made.

SEC. 18. Any plaintiff or defendant, who may consider himself aggrieved by an order sustaining or overruling any motion to dismiss, based on jurisdictional grounds, or issues which under the former practice would have been raised by demurrer, plea to the jurisdiction or other dilatory plea, or by the decree or final order of the circuit court in chancery in any cause, may appeal therefrom to the supreme court: *Provided*, That when an appeal is taken from an order sustaining or overruling a motion to dismiss, the case shall, upon decision thereof by the supreme court, be remanded to the circuit court in chancery, and the plaintiff may amend his

bill of complaint or the defendant may file his answer, as the case may be, within such time as the supreme court may prescribe, and the cause shall then be disposed of as though no appeal had been taken: *Provided further*, That where there are two or more defendants a portion of whom only moved to dismiss, all proceedings shall be stayed as to the other defendants, except filing and serving pleadings, until such motion is finally disposed of: *Provided further*, That no such appeal may be taken from an order denying a motion to dismiss, except upon an order signed by a justice of the supreme court allowing such appeal; but such appeal shall be allowed in all cases unless the justice or justices considering the application shall affirmatively determine that the petition for the allowance of such appeal does not present a meritorious question.

**HISTORY:** Re-enacts Sec. 1 of Act 299 of '09, p. 701, Eff. Sept. 1, adding the last proviso and changing the phraseology of the rest of the section so that the sections would comply with the change brought about by the abolishing of demurrers and dilatory pleas. Act 299 of '09, superseded and repealed Act. 340 of '07, which superseded Secs. 143-146, R. S. '46, Ch. 90, being C. L. '57, (3596), (3597); As Am. '58, p. 5, Act 4, Eff. May 6, (3598), (3599); As Am. '58, p. 5, Act 4, Eff. May 6; As Am. '71, p. 76, Act 62, Imd. Eff. Mar. 29; C. L. '71, 5179; As Am. '83, p. 47, Act 58, Eff. Sept. 8, 5180; As Am. '77, p. 7, Act. 13, Eff. Aug. 21, (5181); As Am. '77, p. 7, Act 13, Eff. Aug. 14, (5182); As Am. '79, p. 25, Act 30, Imd. Eff. Apr. 3; How. 6737, 6738, 6739, 6740; C. L. '97, (549), (552); As Am. '99, p. 380, Act 243, Eff. Sept. 23; As Am. '03, p. 23, Act 15, Imd. Eff. Mar. 10. Secs. (549), (553), C. L. '97, were expressly repealed '15, p. 406, Act 240, Aug. 24; See Compilers' Section (69). Changed.

**APPEAL IN CERTAIN CHANCERY CASES:** In chancery cases an absolute right to an appeal from an order overruling a demurrer or plea to the jurisdiction has heretofore been given, resulting frequently in appeals which appeared to be made solely for delay. The practice has now been made similar, in such cases, to that at law by providing that no appeal may be taken from an order denying a motion to dismiss, except upon an order signed by a justice of the supreme court, allowing such appeal. But the same provision is made as in cases at law that the appeal shall be allowed in all cases, unless the justice or justices considering the application shall affirmatively determine that the petition for the allowance of such appeal does not present a meritorious question.

**APPELLATE JURISDICTION:** The supreme court has no original equity jurisdiction, but appellate jurisdiction only. *Bank of Michigan v. Niles*, Walk. 399; *King v. Carpenter*, 37 Mich. 365. The right of appeal is a statutory right. *Weed v. Lyon*, Walk. 77; *Demaray v. Little*, 17 Mich. 387; *Cady v. Centreville Knit Goods Mfg. Co.*, 48 Mich. 137; *Sullivan v. Haug*, 82 Mich. 555-6. And the supreme court will not assume to exercise jurisdiction, where the statute has not

given it, even by consent of parties. *Demaray v. Little*, 17 Mich. 387. The constitution, after vesting in the supreme court a general superintending control over all inferior courts, provides that "in all other cases it shall have appellate jurisdiction only." Among the "other cases" are those which arise in equity and are tried upon the chancery side of the circuit courts. But the supreme court obtains no jurisdiction of this class of cases, except by this act of the legislature allowing appeals. *Sullivan v. Haug*, 82 Mich. 555-6. Nor does the right to appeal depend upon the merits of the case. *Mich. Ins. Co. v. Whittemore*, 12 Mich. 311. The right of appeal in chancery is an absolute one, and the appellate court acts upon the case by what is equivalent to a rehearing. If in the appellate tribunal the bill is regarded as a proper one, the parties are entitled to have a decree passed upon the merits. *Hewlett v. Shaw*, 9 Mich. 347.

**ORDER OVERRULING MOTION TO DISMISS:** See *Compilers' Section* (12456.) An order overruling a demurrer is not a decree and is not in any sense final. Prior to the amendment of '83 no appeal was allowed from such an order. *Bennett v. Nichols*, 12 Mich. 25; *Kirchner v. Wood*, 48 Mich. 199; *Taylor v. Taylor*, 87 Mich. 67. But this amendment was not intended to allow appeals from such orders unless the demurrer is general. *Taylor v. Taylor*, 87 Mich. 67; *Shaw v. Chase*, 77 Mich. 436; *Babcock v. McJury*, 76 Mich. 316; *Turck v. Soule*, 55 Mich. 128. See *Greenley v. Hovey*, 115 Mich. 504; *Hagar v. Schliess*, 183 Mich. 618. Nor is an order allowing a general demurrer, but not in terms dismissing the bill or awarding costs, a final order from which an appeal may be taken. *Blackwood v. Van-Vleet*, 10 Mich. 398; *Kingsbury v. Kingsbury*, 20 Mich. 215. See *Compo v. Jackson Iron Co.* 49 Mich. 39.

No appeal will lie from an order overruling a special demurrer. *Robinson v. Kunkleman*, 117 Mich. 193. But see *Daschke v. Schellenberg*, 124 Mich. 16; *Ideal Clothing Co. v. Hazle*, 126 Mich. 262; *Smith v. Boyd*, 127 Mich. 417, 418. An order overruling a general demurrer to a cross bill is appealable. *Flynn v. Holmes*, 142 Mich. 373. But a demurrer to a bill for multifariousness is special, and no appeal lies. *Kerr v. Rupp*, 144 Mich. 269; *Case v. Longyear*, 168 Mich. 434; See also as to what constitutes a special demurrer. *People v. Detroit G. H. & M. Railway Co.*, 169 Mich. 72; *Graham v. Graham*, 171 Mich. 307.

**APPEALS FROM DECREES:** The right of appeal from decrees is confined to those which are final in their action upon the rights of the parties and ready to be definitely enforced. *Patterson v. Hopkins*, 23 Mich. 543; *Lewis v. Campau*, 14 Mich. 460; *Demaray v. Little*, 17 Mich. 387; *Caswell v. Comstock*, 6 Mich. 395; *Kingsbury v. Kingsbury*, 20 Mich. 215; *Barry v. Briggs*, 22 Mich. 201. The settled meaning of the word "decree," as affecting the right of appeal, is determined to embrace only such decrees as are not interlocutory. In an interlocutory decree some further steps are required to be taken to enable the court to adjudicate and settle the rights of the parties, while, under a final decree, the party obtains his rights without any further adjudication on the merits. But it is not necessary that a decree should dispose of all the merits. *Lewis v. Campau*, 14 Mich. 460. Decrees are final when they are the final determination on the rights of the parties; interlocutory when they are auxiliary only to the final determination. *Caswell v. Comstock*, 6 Mich. 395. The

term decree is not applicable to the interlocutory orders made for the furtherance of suits, but belongs to such adjudications as settle some right or liability pertaining to the substance of the controversy. *Haines v. Haines*, 35 Mich. 145. See the distinction between final and interlocutory orders in the next note. Whenever the court finally adjudicates any of the merits of the case, though not all of them, the decree is *quoad hoc* final and appealable. *Lewis v. Campau*, 14 Mich. 460; *Taylor v. Sweet*, 40 Mich. 739. It is not the stage of the case in which the order or decree is made that determines its appealability, but its effect on the rights of the parties. *Taylor v. Sweet*, 40 Mich. 739-40. See *McCombs v. Merryhew*, 40 Mich. 721; *Barry v. Briggs*, 22 Mich. 204-5. As to decrees deemed appealable, although there were other proceedings required to be taken in the cause, see *Shaw v. Shaw*, 9 Mich. 164; *Barry v. Briggs*, 22 Mich. 201; *Damouth v. Klock*, 28 Mich. 163; *Brown v. Bronson*, 35 Mich. 415. A decree which, in a suit for a partnership accounting, places the date, at which the firm dissolved, later than is claimed by either party, is not final as disposing of the case, but is final and appealable as settling the basis for accounting. *Candler v. Stange*, 53 Mich. 479. The policy of the statute in allowing appeals from final decrees is that the whole case shall be reviewed at one time and not in detached parts at different times, thereby lengthening litigation. *Enos v. Sutherland*, 9 Mich. 149. An appeal lies from a decree dismissing a cross-bill on demurrer, before the final determination of the original bill. *Clutton v. Clutton*, 106 Mich. 690. The proper remedy in a case of an erroneous overruling of a demurrer is by an appeal from the order, and not by appeal from the final decree. *Babcock v. Babcock*, 150 Mich. 558. As to the method of raising objections to the correctness and sufficiency of a case, see *Hamilton v. Wilcox*, 167 Mich. 551. Mandamus will not issue to compel a circuit judge to extend the time for relator to settle a case more than a year subsequent to the entry of the decree, upon a petition that fails to show any merit in relator's case. *Stockwell v. Smith* Eaton Circuit Judge, 172 Mich. 166.

**APPEALS FROM ORDERS:** There can be no appeal from an order that is merely interlocutory. *Mich. Ins. Co. v. Whittemore*, 12 Mich. 311; *Duncan v. Campau*, 15 Mich. 415; *Romeyn v. Hale*, 1 Mich. 93; Nor from an order entered by consent. *Chapin v. Perrin*, 46 Mich. 130; *Cameron v. Smith*, 171 Mich. 333. Nor from rulings in matters of practice which do not affect the merits. *Hess v. Final*, 32 Mich. 515; Nor from any order or matter resting in the discretion of the court. *Benedict v. Thompson*, 2 Doug. 305; *Baker v. Pierson*, 5 Mich. 460; *Demaray v. Little*, 17 Mich. 388; *Boinay v. Coats*, 17 Mich. 411; *Duncan v. Campau*, 15 Mich. 415; See *Mich. Ins. Co. v. Whittemore*, 12 Mich. 311. But the discretion, in all such cases, is a legal discretion, to be exercised in doubtful cases only, and not where the case is clear and free from doubt. *Baker v. Pierson*, 5 Mich. 460. What are known as final orders are adjudications upon motions or other applications, not involving a hearing upon pleadings and proofs, but upon other issues interlocutory or collateral, whereby some supposed right of a party is definitely cut off, or some liability fixed upon him. If the decision of a motion opens a case, it is not generally final, unless it cuts off some acquired right under a decree. If it closes the matter and precludes any further hearing or investigation, it is final. *Kingsbury v. Kingsbury*, 20 Mich. 215. For further definition of final

and interlocutory orders, see *Wing v. Warner*, 2 Doug. 288; *Webster v. Hitchcock*, 11 Mich. 59; *Mich. Ins. Co. v. Whittemore*, 12 Mich. 311; *Romeyn v. Caplis*, 17 Mich. 454. Any order in equity, which gives all the relief the bill prays for, must always in the legal sense be a final order. *Witbeck v. Chittenden*, 50 Mich. 426. The effect produced by the order upon the rights and interests of the parties, and not the stage of the case when it is made, determines whether it is final or not. *Barry v. Briggs*, 22 Mich. 204; *Lewis v. Campau*, 14 Mich. 460; *Taylor v. Sweet*, 40 Mich. 739. If it is conclusive upon any right it is final. *Baker v. Pierson*, 5 Mich. 460; *Bullard v. Green*, 9 Mich. 222; *McCombs v. Merryhew*, 40 Mich. 721; *Arnold v. Bright*, 41 Mich. 210; *Tawas & B. C. R. R. Co. v. Iosco Circuit Judge*, 44 Mich. 482; *Barry v. Briggs*, 22 Mich. 201; *Maxfield v. Freeman*, 39 Mich. 64. In the following cases orders have been held as final and appealable; *Benedict v. Thompson*, 2 Doug. 299; *Webster v. Hitchcock*, 11 Mich. 56; *Bullard v. Green*, 9 Mich. 222; *People v. Simonson*, 9 Mich. 492; *Mich. Ins. Co. v. Whittemore*, 12 Mich. 311; *Romeyn v. Caplis*, 17 Mich. 449; *Barry v. Briggs*, 22 Mich. 201; *Haines v. Haines*, 35 Mich. 138; *In re Bissell*, 40 Mich. 63; *Ross v. Ross*, 47 Mich. 185. In the following cases orders have been held not final; *Prentiss v. Rice*, 2 Doug. 296; *Wing v. Warner*, 2 Doug. 288; *Romeyn v. Hale*, 1 Mich. 93; *Caswell v. Comstock*, 6 Mich. 391; *Enos v. Sutherland*, 9 Mich. 148; *Bennett v. Nichols*, 12 Mich. 22; *Perkins v. Perkins*, 10 Mich. 425; *Newbould v. Stewart*, 15 Mich. 155; *Duncan v. Campau*, 15 Mich. 415; *Demaray v. Little*, 17 Mich. 386; *Boinay v. Coats*, 17 Mich. 411; *Lapham v. Lapham*, 40 Mich. 527; *Cooper v. Mayhew*, 40 Mich. 528; *Ross v. Ross*, 47 Mich. 185; *Turck v. Soule*, 55 Mich. 128; *Babcock v. McJury*, 76 Mich. 316; *Shaw v. Chase*, 77 Mich. 436; *Taylor v. Taylor*, 87 Mich. 67. An order denying a motion to strike a bill from files is not a final order, and is not appealable. *Williams v. Olson*, 151 Mich. 265. As to the right to appeal from a preliminary injunction. *Harbauer-Marleau Co. v. Thwing*, 165 Mich. 42.

**RIGHT TO AMEND:** Where a demurrer is sustained on appeal this section does not confer an absolute right to amend. *Macomber v. Cottrell*, 162 Mich. 718; 173 Mich. 352.

**VEXATIOUS APPEALS:** In such cases damages may be awarded to the appellee. *Campau v. Campau*, 25 Mich. 131; *Goodenough v. Curtis*, 33 Mich. 511; *Heath v. Waters*, 40 Mich. 457; See *Compilers' Section* (13702).

**RIGHTS OF PARTIES:** A party who has not appealed from a decree in his favor will not be afforded additional relief upon an appeal taken by the other party. *Bowman v. Gork*, 106 Mich. 163. If appeal bond be not filed proceedings are not stayed. *Pinel v. Pinel*, 172 Mich. 611; 19 D. L. N. 974, 138 N. W. 219; Failure to comply herewith within time herein prescribed is fatal to right to appeal. *Perkins v. Perkins*, 173 Mich. 690; 19 D. L. N. 1315, 140 N. W. 161. *Winegar v. Fritz*, 164 Mich. 427; *Commercial National Bank v. Gaukler*, 164 Mich. 215; *Hulan v. Wayne Circuit Judge*, 159 Mich. 608. A party has forty days after settlement of the case in which to file his claim of appeal from a chancery decree. *McDonald v. McDonald*, 190 Mich. 649; 23 D. L. N. 250; 157 N. W. 429; See *Carpenter v. Dennison*, 208 Mich. 441; *Misner v. Stange*, 208 Mich. 680.

**MOTION TO DISMISS:** Defendants were not premature in making their motion to dismiss the bill on their appearing in the case,

instead of waiting to raise the question until the contract was offered in evidence on the trial. *Nelson v. Breitenwisher*, 194 Mich. 32.

**(13754). Claim of Appeal.**

SEC. 19. Any party desiring to appeal from the order or decree of the circuit court in chancery shall, within twenty days after the entry of such order or decree, file or cause to be filed a claim of appeal in writing with the clerk of the court where such decree or order was entered, and shall also within the said twenty days pay a fee of five dollars to the clerk: *Provided*, That when any order or decree is entered in vacation, the time for taking an appeal shall be computed from the time of the service of notice of such decree as provided by law.

HISTORY: Re-enacts Sec. 2 of Act 299 of '09 p. 701, Eff. Sept. 1. changing "forty days" to "twenty days," "register" to "clerk," and omitting the first proviso in the old section relating to an appeal from orders sustaining or overruling demurrers, and also that part of the section beginning with "or in cases where the cause is heard..... etc..... upon such appeal." Modified, only as above.

CHANCERY APPEALS: Heretofore a claim of appeal in chancery could be made at any time within forty days after the settlement of a case. Under the new practice no change is made as to the time within which a case may be settled. But this change should be carefully noted, namely, that an appeal must be claimed and the fee for making the return paid to the clerk within twenty days after the entry of the order or decree. In cases where it is not necessary to settle a case, the clerk shall make return to the appeal within fifteen days after the claim of appeal is filed and the fee paid. In cases where it is necessary to settle a case, the return shall be made within fifteen days after the case is settled and signed.

TWENTY DAYS: The party desiring to appeal was formerly allowed forty days. Sec. 2, Act 299 of '09. If the necessary steps are taken at any time within the forty days, it is immaterial in what order they are taken. *Emerson v. Atwater*, 5 Mich. 35. Where the fortieth day was Sunday, held that the appeal could not be taken on the following Monday. *Drake v. Andrews*, 2 Mich. 203. An appeal taken within forty days from the time the decree is drawn up and left with the register to be entered is in time, though more than forty days from the time when the circuit judge announced orally what the decree would be. *Sellers v. Botsford*, 9 Mich. 490. For, although a decision is announced, there is no legal determination of the cause until the decree is actually drawn up and filed. *Newbound v. Stewart*, 15 Mich. 155. When a decree is entered in vacation, notice must be given to the opposite party, and the forty days run from the date of the notice. *McClung v. McClung*, 39 Mich. 55. When testimony is taken in open court, the time runs from the date of the settlement of the case. *Gale v. Gould*, 40 Mich. 62. But it is not necessarily ground for dismissal of the appeal that it was taken before the case was settled. *Simons v. Simons*, 47 Mich. 645. The right of appeal

being statutory, the appeal must be taken within the time prescribed or the right will be lost. *Weed v. Lyon*, Walk. 77. See *Waterman v. Bailey*, 111 Mich. 571; *McDonald v. McDonald*, 190 Mich. 652; *Munroe, Boyce & Co. v. Ward*, 207 Mich. 369; *Misner v. Stange*, 208 Mich. 680; *Gundrick v. Gundrick*, 208 Mich. 38.

An order allowing compensation to counsel for complainant, entered before a final decree, is a final order, necessitating taking of an appeal therefrom within forty days. *Hopkins v. Crossly*, 138 Mich. 561. Where a claim of appeal was filed nearly a year before the settlement of the case on appeal, it is not fatal that another claim was not filed within forty days after the settlement of the case. *Patterson v. Hynes*, 148 Mich. 581. The provisions of the statute, (referring to Act 340 of '07, Section 2), that appeals in chancery should be taken within forty days after filing of the decree, is applicable to an order overruling a demurrer. *Bliss v. Tyler*, 156 Mich. 640. As to the allowance of solicitors' fees by the supreme court before the case is settled on the return made, see *Breen v. Breen*, 159 Mich. 389, 390.

**NOTICE OF APPEAL:** Supreme Court Rule 14. Failure to give, may be excused. *Garratt v. Litchfield*, 10 Mich. 451. It does not entitle the appellee to a dismissal as a matter of right. *Simpson v. Mansfield, C. & L. M. R. R. Co.*, 38 Mich. 629; *Shook v. Proctor*, 26 Mich. 283; *Garratt v. Litchfield*, 10 Mich. 629. Service of notice. *McCurdy v. Bowman*, 27 Mich. 214. Waiver of notice. *Durfee v. McClurg*, 5 Mich. 532; *Cameron v. Adams*, 31 Mich. 71.

*Winegar v. Fritz*, 164 Mich. 427; *Commercial National Bank v. Gaukler*, 164 Mich. 215; *Macomber v. Cottrell*, 162 Mich. 720; *Hulan v. Wayne Circuit Judge*, 159 Mich. 608.

**REGISTER'S FEE:** See also Compilers' Section (13759), as to the neglecting to pay the fee amounting to a waiver of appeal, see *Bennett v. Hickey*, 110 Mich. 628. Actual payment of the fee to the register is unnecessary if the register treats it as paid within forty days after settling the testimony. *Baldwin v. Liquor Dealers' Association*, 162 Mich. 703. Only one fee on appeal is required to be paid the register, and after this payment by either party the opposite party may claim the benefit of an appeal. *Mack v. Engel*, 165 Mich. 540. See also as to the payment of register's fee, *Lum v. Fairbanks*, 155 Mich. 23.

**CITED:** Section 2 of Act 340 of '07, cited in *Moody v. Macomber*, 156 Mich. 77.

**CLAIM OF APPEAL:** Prior to the amendment of '77 it was not necessary that any written claim of appeal should be filed. *Warner v. Whittaker*, 5 Mich. 241; *Emerson v. Atwater*, 5 Mich. 34. And the claim of appeal was held to form no necessary part of an appeal, the filing of a bond, properly approved, being the only condition required by law. *Covell v. Mosley*, 15 Mich. 515.

The failure of the appellants to file a claim of appeal after the settlement of the record in chancery, is not fatal where the claim was actually filed prior to the settlement of the case. *Baldwin v. Liquor Dealers' Association*, 162 Mich. 703.

**PERFECTING RECORD:** The payment of the appeal fee to the clerk of the Circuit Court in chancery within the 20 days after filing of the decree, is mandatory, and a condition precedent to the extension of time to settle a case for appeal. *Guthrie v. Leelanaw Circuit Judge*, 197 Mich. 325.



**(13755). Extension of Time for Appeal.**

SEC. 20. The circuit court in which such decree or order was rendered or the judge of such court at chambers, or any justice of the supreme court may, upon cause shown and notice to the opposite party, extend the time for taking or perfecting any appeal: *Provided*, That the time for perfecting an appeal shall not be extended for more than one year from the entry of the order or decree appealed from: *Provided further*, That the time in which appeals may be taken and perfected may be extended, not exceeding six months from the expiration of the time herein specified, by the supreme court or one of the supreme court justices at chambers, when any party has been prevented from taking or perfecting such appeal by circumstances beyond his control. Such extension shall only be made on special motion and after a proper showing.

HISTORY: Re-enacts and supersedes Sec. 3 of Act 299 of '09, p. 702, Eff. Sept. 1, though such section was omitted from the repeal of Act 299 of '09 by this act, changing "prevented from taking such appeal" to "prevented from taking or perfecting such appeal." Modified as to phraseology.

See note to preceding section under black letter title.

Winegar v. Fritz, 164 Mich. 427; Commercial National Bank v. Gaukler, 164 Mich. 215; Macomber v. Cottrell, 162 Mich. 720; Hulan v. Wayne Circuit Judge, 159 Mich. 608; Guthrie v. Leelanau Circuit Judge, 197 Mich. 325; Puffer v. Clark, 202 Mich. 186.

Where a claim of appeal was not filed within 20 days after the entry of decree, the court has no jurisdiction to entertain the appeal, Munroe, Boyce & Co. v. Ward, 207 Mich. 369; Gundick v. Gundick, 208 Mich. 38, but, see Misner v. Stange, 208 Mich. 680.

**(13756). Bond to Stay Proceedings.**

SEC. 21. No appeal shall operate to stay proceedings in said cause, unless the party taking such appeal shall, within the time allowed for perfecting such appeal, file with the clerk of said court a bond to the appellee or appellees with sufficient surety or sureties to be approved by the circuit judge or a circuit court commissioner of said county or a justice of the supreme court, and with such penalty as such judge or commissioner shall approve, conditioned for the performance or satisfaction of the decree or final order of the supreme court in the cause, and payment of all costs of the appellee or appellees in the matter of the appeal. When the appeal is taken from a decree of foreclosure of a mortgage or land contract, the further condition of the bond shall be to pay to the appel-

lee the damages which may result to the appellee from the stay of proceedings, in which damages the appellant shall be held to have contemplated the fair rental value of the premises affected, which damages in the case of foreclosure of land contract shall be computed as starting within six weeks from the date of the decree which may be appealed from, and in foreclosure of mortgages, as starting seven months and two weeks from the date of said decree: *Provided, however*, That in no event shall such damages be awarded the appellee in said cause under such a bond in a greater amount than the amount of the deficiency reported by the circuit court commissioner on the final sale of said premises, if the order of sale be affirmed by the supreme court. Notice of the application for the approval of such bond shall be given to the appellee or appellees as on other motions, which notice shall contain the penalty and the names of the sureties of the proposed bond, and upon the hearing of said application such appellee or appellees shall be heard as to the sufficiency of the penalty named in and the responsibility of the sureties proposed to such bond: *Provided*, That in case such bond be approved by a circuit court commissioner, the circuit court in which such decree or final order was rendered or the judge of such court at chambers may on motion order an additional bond and fix the penalty therein and approve the sureties thereto: *Provided further*, That the supreme court or any justice thereof may on special motion and proper showing after such appeal has been perfected, order an additional bond and fix the penalty thereof and approve the sureties thereto.

**HISTORY:** Re-enacts Sec. 4 of Act 299 of '09, p. 702, Eff. Sept. 1, As Am. '11, p. 257, Act 160, Eff. Aug. 1. Modified as to time and bond. See note to section 19 under black letter title.

**BOND:** Purpose of the bond. *Richardson v. Richardson*, 82 Mich. 305. It must be filed within the time prescribed to confer jurisdiction. *Weed v. Lyon*, Walk. 77; *Moore v. Elms*, 18 Mich. 77. If not so filed the right to appeal will be lost. *Covell v. Mosely*, 15 Mich. 514. If filed in due time, it is no objection to the proceedings that a claim of appeal is not made until after the filing and approval of the bond. *Emerson v. Atwater*, 5 Mich. 34. Where several appeal, the execution of the bond by one in behalf of all is sufficient. *Warner v. Whittaker*, 5 Mich. 241. The bond may be good, though purporting to be signed in the surety's name by his attorney. *Woods v. Wayne Circuit Judges*, 48 Mich. 641. At least two sureties are necessary. *Beebe v. Young*, 13 Mich. 221. Indorsement of approval. *Maynard v. Hoskins*, 8 Mich. 260. The act of approval of the bond is so connected with it, and the giving of it, as for some purposes to be fairly considered a part of it. *McClintock v. Laing*, 19 Mich. 305. In case of a de-

fective approval. *Id.* Prior to the amendment of '77, in case of a defective bond filed, the remedy was by amendment or the substitution of a new bond, under Compilers' Section (12487-8). *Beebe v. Young*, 13 Mich. 221; *McClintock v. Laing*, 19 Mich. 300; *Torrent v. Booming Co.*, 21 Mich. 159; *Cameron v. Adams*, 31 Mich. 71. See *Moore v. Olin*, 6 Mich. 329. As to the practice since the amendment of '77, see next note, relative to "Additional Bonds."

Under Act 243 of '99, amending Section (550), C. L. '97, an appeal bond is necessary only in case a stay of proceedings is sought. *Daschke v. Schellenberg*, 124 Mich. 16. In an appeal of a foreclosure case where no bond to stay proceedings has been filed before enrollment of the decree, the papers which have been removed to the supreme court will be, on motion, remanded to the circuit court for enrollment, to allow complainant to complete a sale of the premises. *Harmon v. Metcalfe*, 134 Mich. 643. As to the modification of the order appealed from without a supersedeas bond, under the amendatory act 243 of '99, see *Weber v. Costigan*, 139 Mich. 146. See also on the necessity of a bond to stay proceedings, under section (550), C. L. '97, as amended by Act 243 of '99, *Wilkinson v. Dunkley-Williams Co.*, 141 Mich. 409; *Hayward v. O'Connor*, 142 Mich. 230. After return is made to a writ of error the supreme court has exclusive jurisdiction to entertain a motion to file an appeal bond *nunc pro tunc* to stay proceedings on execution. *Coeling v. Barnard*, 159 Mich. 634. See also *Com. National Bank v. Gaulker*, 164 Mich. 215-216. Unless an appealing defendant furnishes a bond as required by this act, the decree in favor of complainant is not stayed, but may be enforced at complainant's peril pending the decision on appeal. *Pinel v. Pinel*, 172 Mich. 611.

**ADDITIONAL BONDS:** Before the amendment of '77 the approval of the bond, including the amount of the penalty and the sufficiency of the sureties, was exclusively for the circuit judge or circuit court commissioner, and the supreme court had no power to review their action or to order an additional bond. *Richardson v. Richardson*, 82 Mich. 308; *Moore v. Olin*, 6 Mich. 329. But by that amendment power was conferred upon the supreme court, upon a proper showing after the appeal was perfected, to order an additional bond and to fix the penalty thereof and approve the sureties thereto; and the supreme court will look to the decree of the court below for a criterion to enable it to fix the penalty of the bond. *Richardson v. Richardson*, 82 Mich. 308. The second proviso applies to cases in which the appeal is not yet perfected, and the third to cases at a later stage. *Perrin v. Kellogg*, 37 Mich. 318. Where the bond is defective or insufficient, the remedy is by motion in the supreme court for leave to amend or file a new bond. *Pulte v. Wayne Circuit Judge*, 47 Mich. 646.

The requiring of an additional bond by the circuit judge, to protect defendant for the rental value of the premises in litigation, is a matter of discretion which will not be reversed on mandamus. *Hulan v. Wayne Circuit Judge*, 159 Mich. 605. Appellate courts have power to amend an original appeal bond, or require a new one. *Coeling v. Barnard*, 159 Mich. 634.

*Winegar v. Fritz*, 164 Mich. 427; *Macomber v. Cottrell*, 162 Mich. 720.

**LIABILITY ON BOND:** *Kephart v. Farmers' & Mechanics' Bank*, 4 Mich. 602; *Daly v. Litchfield*, 11 Mich. 497; *Connorton v. Miller*, 41 Mich. 1; *Prosser v. Whitney*, 46 Mich. 405; *Kennedy v. Nims*, 52

Mich. 153; *Michie v. Ellair*, 60 Mich. 75. No appeal in equity can be taken unless some one appears on the record as responsible to the adverse party for costs. *Atty. Gen. v. Hane*, 50 Mich. 447. See also as to liability on an appeal bond, *Kelly v. Gaulker*, 164 Mich. 519.

CITED: *Hamilton v. Wilcox*, 167 Mich. 553.

(13757). Evidence How Settled.

SEC. 22. The evidence, if any, taken on the hearing on said cause in open court or before a circuit court commissioner or by deposition or in any other manner, shall be settled for review in the same manner and within the same time as is provided by law or the rules of court for the settlement of bills of exceptions.

HISTORY: Re-enacts Sec. 5 of Act 299 of '09, p. 702. Eff. Sept. 1, changing the phraseology of the last clause of such section. Modified in phraseology.

See note to section 19 under black letter title.

CONSTRUED: This section is similar in terms to a part of C. L. '97, (10188), for a history of which see notes to Compilers' Section (12489). As to whether testimony taken before a circuit court commissioner must be settled by the judge, see *Hughes v. Love*, 136 Mich. 171; Circuit Court Rule 66, Section 11, '16.

SETTLING A CASE: See Circuit Court Rule 66, '16. The proper course is to make a case setting forth the testimony, present it to the circuit judge and procure his order fixing the time and place when and where it shall be settled, and for notice to the opposite party, that he may attend and propose amendments. The practice should be assimilated, as nearly as may be to that of making cases for review at law. *Wright v. Dudley*, 8 Mich. 76-7. Service of notice of settling case on complainant instead of solicitor of record. *McCurdy v. Bowman*, 27 Mich. 214. As to how record should be made up, see *Andrews v. Lavery*, 159 Mich. 31. A suit may be appealed before the settlement of the record is made. *Breen v. Breen*, 159 Mich. 390. The only way a case can be tried upon the facts in the supreme court, when testimony is taken in open court, is by settling a case as provided by statute. *Wright v. Dudley*, 8 Mich. 76. The judge's minutes of the evidence taken on the trial will not be received unless settled by him on notice to the solicitors of the parties. *Id.* Nor will a transcript of the stenographer's notes be received, unless settled as required by statute. *Moote v. Scriven*, 33 Mich. 500; *Peoples Ice Co. v. Steamer Excelsior*, 43 Mich. 339. See *McBride v. Rea*, 33 Mich. 347. Objection to the correctness and sufficiency of a case proposed for settlement on appeal must be raised by proposing amendments to the same. *Hamilton v. Wilcox*, 167 Mich. 551. Settlement of case after judge resigns. *Tucker v. Tucker*, 26 Mich. 443. See *Scribner v. Gay*, 5 Mich. 511; *Hewlett v. Shaw*, 9 Mich. 346. Compare Compilers' Section (12636), and notes. The forty days within which an appeal must be taken run from the date of the settlement of the case. *Gale v. Gould*, 40 Mich. 62. If no case is settled, the appeal will be heard on the pleadings. *Wright v. Dudley*, 8 Mich. 74. Effect of the act of 1895 on pending cases. *Beebe v. Birkett*, 108 Mich. 234.

**EXTENSION OF TIME FOR SETTling CASE:** An extension for settling and filing a case can be made, if the time allowed does not exceed the statutory three months. *Tilden v. Wayne Circuit Judge*, 44 Mich. 515. But where the appellant was delayed by causes beyond his control, after having used due diligence, the appeal will not be dismissed, although the case was not settled within the time limited by law. *Cameron v. Calkins*, 43 Mich. 191. In such cases the supreme court will extend the time to perfect the appeal. *Gram v. Wasey*, 45 Mich. 223. As to delay in perfecting an appeal due to the stenographer's failure to furnish a transcript of the testimony, see *City of Kalamazoo v. Kalamazoo Light & Power Co.*, 122 Mich. 489.

Limit to time for making and settling case for appeal, see *Nolan v. Garrison*, 149 Mich. 56; *Tinker v. Piper*, 149 Mich. 338; *City of Detroit v. Wayne Circuit Judge*, 144 Mich. 698. The supreme court has no jurisdiction to consider an appeal where the settlement of the case was delayed without the fault of the circuit court or its officers, until the statutory time for settlement, including extensions, had expired. *Waterman v. Bailey*, 111 Mich. 571. And such jurisdictional question can not be waived. *Id.* As to the discretionary power exercised by the circuit judge in denying application for an extension of time, see *Stockwell v. Eaton Circuit Judge*, 172 Mich. 167; See *McBride v. Rea*, 33 Mich. 347; *Lohrstorfer v. Lohrstorfer*, 140 Mich. 556. *Winegar v. Fritz*, 164 Mich. 427; *Commercial National Bank v. Gaukler*, 164 Mich. 215; *Macomber v. Cottrell*, 162 Mich. 720; *Hulan v. Wayne Circuit Judge*, 159 Mich. 608.

**AUTHENTICATION:** Where evidence has been taken, a case must be settled and signed by the trial judge; but, where no testimony has been taken, the case is heard on the record, which is authenticated by the clerk. *Thompson v. Hurson*, 206 Mich. 139.

### (13758). Stay of Proceedings.

**SEC. 23.** No stay of proceedings upon any final order or decree rendered in any circuit court in chancery shall hereafter be granted or allowed for the purpose of settling a case therein and taking and perfecting an appeal therefrom, for a longer period than twenty days from the entry of such decree or order, unless the party applying for such stay, if a decree shall have been rendered against him, shall execute to the adverse party a bond with sufficient surety or sureties in such sum as the circuit judge before whom the case was tried shall designate, conditioned for the performance and satisfaction of such decree or final order if the same be not set aside or reversed, and that if an appeal be taken from such decree or order, the appellant shall prosecute such appeal to effect, and shall perform and satisfy such decree as shall be rendered against him thereon. When the appeal is taken from a decree of foreclosure of a mortgage or land contract, the further condition of the bond shall be to pay to the appellee the damages which may result to the appellee from the stay of

proceedings, in which damages the appellant shall be held to have contemplated the fair rental value of the premises affected, which damages in the case of foreclosure of land contract shall be computed as starting within six weeks from the date of the decree which may be appealed from, and in the foreclosure of mortgages, as starting seven months and two weeks from the date of said decree: *Provided, however*, That in no event shall such damages be awarded the appellee in said cause under such a bond in a greater amount than the amount of the deficiency reported by the circuit court commissioner on the final sale of said premises if the order of sale be affirmed by the supreme court. Notice of the time and place when such bond will be presented to the circuit judge for approval shall be served upon the adverse party as on other motions: *Provided*, That in case the party applying for such stay of proceedings shall be unable to give such bond by reason of poverty, the judge may upon due proof of inability for such reason grant such stay without requiring such bond, for such reasonable time as the judge may determine: *Provided further*, That no other or further bonds shall be required to stay proceedings upon any appeal from such decree or final order by or on behalf of the party filing such bond.

**HISTORY:** Re-enacts Sec. 6 of Act 299 of '09 p. 703, Eff. Sept. 1, changing "forty days" to "twenty days." Modified, as to time.

**STAY OF PROCEEDINGS ON CHANCERY APPEALS:** The time during which a stay of proceedings can be allowed in chancery cases for the purpose of settling a case and taking an appeal without giving a bond, has been cut down from forty to twenty days, thus making the period uniform with the period allowed in law cases for staying proceedings for the purpose of settling a bill of exceptions.

**STAY OF PROCEEDINGS:** The appeal operates as a stay of all proceedings in the court below. *Daly v. Litchfield*, 11 Mich. 498; *Beal v. Chase*, 31 Mich. 492; *Day v. DeJonge*, 66 Mich. 551; *Petrie v. Muskegon Circuit Judge*, 98 Mich. 132. But this was prior to the statute of '11 which permits appeals without bond. As to the effect of an appeal from a decree granting an injunction, see *Wilkinson v. Dunkley-Williams Co.*, 141 Mich. 409. See also as a stay of proceedings, *Hulan v. Wayne Circuit Judge*, 159 Mich. 605. But unless an appealing defendant furnishes the bond the decree in favor of the complainant is not stayed and the supreme court cannot enjoin further proceedings on account of defendant's alleged poverty. *Pinel v. Pinel*, 172 Mich. 611, *Winegar v. Fritz*, 164 Mich. 427; *Commercial National Bank v. Gaukler*, 164 Mich. 215; *Macomber v. Cottrell*, 162 Mich. 720. .

**(13759). Duty of Clerk.**

SEC. 24. It shall be the duty of the clerk of such court, upon payment to him of the said sum of five dollars as his fees, by the appellant, to attach together the original bill, process, answer, and all other proceedings, processes, motions, notices, orders and decrees which have been filed in said cause, together with the testimony as settled in the said cause, and also a copy of all journal and calendar entries and all other proceedings of record in the cause not embraced in the original papers hereinbefore mentioned, and transmit the same, together with his certificates of the genuineness of the said originals and the correctness of said copies of such journal and calendar entries and records, to the supreme court within fifteen days after such appeal shall be perfected. Such appeal shall be deemed to be perfected, upon the filing of the claim of appeal, and payment of the clerk's fee, as hereinbefore provided, unless it shall be necessary to settle a case. In such event, said appeal shall be deemed to be perfected when such case shall be settled and signed.

HISTORY: Re-enacts Sec. 7 of Act 299 of '09, p. 703, Eff. Sept. 1, changing "register" to "clerk," omitting "replication," and adding the last two sentences as above. Modified as above.

See note to section 19 under black letter title.

REGISTER'S RETURN: The whole proceedings should be certified in full. The transcript should present everything which appears in the court below. *Wright v. Dudley*, 8 Mich. 117. A copy of the appeal bond should also be sent up. *Maynard v. Hoskins*, 8 Mich. 81. The register should return the entire record and not attempt to determine what is or is not material. *Brown v. Thompson*, 29 Mich. 73. See also *Riopelle v. Doellner*, 26 Mich. 102, as to what the record should contain. The court has jurisdiction of an appeal notwithstanding an imperfect return, and the party interested in making it more complete should take the proper steps in due season. *Verplank v. Hall*, 21 Mich. 471. And the appeal will not be dismissed for imperfections in the record returned. *Id.* *Snyder v. Washtenaw Circuit Judge*, 80 Mich. 516. Nor will it be dismissed for the failure of the register to send up a copy of the appeal bond. *Maynard v. Hoskins*, 8 Mich. 81. When transcripts from partnership books in case of accounting, and when the books themselves should be sent up. *Harrison v. Dewey*, 46 Mich. 173. The supreme court cannot grant leave to supply, by a sworn copy, papers discovered to have been lost from the files of the court below; but the application should be made to the court of chancery to supply the defect. *Sears v. Schwarz*, 1 Doug. 504. See *Verplank v. Hall*, 21 Mich. 469. The jurisdiction of the supreme court is confined to an examination of the errors found in the transcript and it cannot assume as part of the case, facts not appearing in the transcript, although assumed by counsel in the argument and treated as part of the case in the court below. To assume facts which do not appear in the record would

be to exercise original as well as appellate jurisdiction. *Bailey v. DeGraff*, 2 Doug. 169. Nor is it competent for parties, by stipulation, to determine for review in an appellate court what were the rulings or the judicial action of the judge, of which a review is sought. Such information must come, in some way, under the sanction of the judge himself. *Duffield v. Detroit*, 15 Mich. 477. See *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 10. As to the remedy in the case of the register's failure to transmit books and exhibits constituting a part of the testimony, see *Hughes v. Love*, 136 Mich. 169. See *Thompson v. Hurson*, 206 Mich. 139.

**DELAY IN RETURN:** The supreme court will not dismiss an appeal for the failure to cause a copy of the record to be transmitted within the time provided by the statute, if such copy is actually filed before the motion to dismiss is made. *Snyder v. Washtenaw Circuit Judge*, 80 Mich. 516, citing *Garratt v. Litchfield*, 10 Mich. 451; *Beebe v. Young*, 13 Mich. 221; *Babcock v. Twist*, 16 Mich. 282. (But see *Merriman v. Jackson Circuit Judge*, 95 Mich. 280.) where the foregoing cases are examined and held not to have construed the latter clause of this section, since that clause was not added until the amendment of '71, and those cases, as well as *Verplank v. Hall*, 21 Mich. 469, were decided before that time. And a similar limitation of time for filing a certified copy of the record in case on an appeal from an order of the probate court, see *Compilers' Section* (14154), was held mandatory.) As to permission to file after expiration of time, see *Boardman v. Taylor*, 16 Mich. 62; *Ball v. Ball*, 18 Mich. 380. As to the time for returning the record referred to in supreme court rule No. 15, see *Byrne v. Gypsum Plaster & Stucco Co.*, 141 Mich. 92.

**REGISTER'S FEE.** As to the effect of the neglect to pay the register's fee, see *Bennett v. Hickey*, 110 Mich. 628; *Trombley v. Klersy*, 139 Mich. 311; *Lohrstorfer v. Lohrstorfer*, 140 Mich. 551; *Col-lat v. Ives*, 141 Mich. 500; *Thompson v. McKay*, 154 Mich. 288; *Lum v. Fairbanks*, 155 Mich. 23. *Winegar v. Fritz*, 164 Mich. 427; *Commercial National Bank v. Gaukler*, 164 Mich. 215; *Macomber v. Cottrell*, 162 Mich. 720; *Hulan v. Wayne Circuit Judge*, 159 Mich. 608.

### (13760). Action of Supreme Court.

**SEC. 25.** Upon any order or decree of the circuit court in chancery being brought by appeal to the supreme court, that court shall examine all errors that may be assigned or found in such order or decree, and shall hear and determine such appeal, and all matters concerning the same, and shall have power to reverse, affirm or alter such order or decree, and to make such other order or decree therein as shall be just.

**HISTORY:** Re-enacts Sec. 147, R. S. '46, Ch. 90, being C. L. '57, (3600); C. L. '71, (5183); How. 6741; C. L. '97, (553). Unchanged.

**CONSTRUED:** *Stevens v. Townsend*, 1 Doug. 82; *Seadrs v. Schwartz*, 1 Doug. 505; *Hurlbut v. Britian*, 2 Doug. 191; *Wing v. Warner*, 2 Doug. 289.



**(13761). Records to be Remitted to Circuit Court in Chancery.**

SEC. 26. When an appeal shall have been so heard and determined, the records and files sent from the circuit courts in chancery, together with the proceedings and decree or order of the supreme court therein, and all things concerning the same shall be remitted to the circuit court in chancery, for the proper county, when such further proceedings shall be thereupon had as may be necessary to carry such decree or order into effect.

**HISTORY:** Re-enacts Sec. 148, R. S. '46, Ch. 90, being C. L. '57, (3601); C. L. '71, (5184); As Am. '79, p. 25, Act 30, Imd. Eff. Apr. 3; How. 6742; C. L. '97, (554). Unchanged.

*City of Eaton Rapids v. Horner*, 126 Mich. 52.

**APPEAL AND ERROR:** A chancery appeal is heard in the Supreme Court *de novo*, and the decree entered is a finality: therefore the trial court has no power to reopen the case, change or modify the decree, where the case is remitted to be there enforced, unless leave from the Supreme Court be first obtained. *White v. Wadhams*, 206 Mich. 608. Where a decree was made before the judicature act took effect, the trial court had no authority after it became operative, to permit a cause to be transferred from the chancery to the law side of the court. *Schook v. Iron Circuit Judge*, 192 Mich. 104.

**• MISCELLANEOUS PROVISIONS.****(13762). Bond Not Required of State.**

SEC. 27. In any suit or proceeding in which the state, or any state officer duly authorized for that purpose, or any corporate body in charge of any state institution, or any municipal corporation, is a party, no bond shall be required to be given by any such party as a prerequisite to the issuance of a writ of error or the taking of an appeal, or the making of an order staying proceedings.

**HISTORY:** New section. Supersedes and re-enacts in part Act 153 of '03, p. 194, Eff. Sept. 17. Changed, regarding bonds to be given.

**(13763). When Judgment Not to be Set Aside.**

SEC. 28. No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, af-

ter an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

**HISTORY:** New section.

**JUDGMENT OR VERDICT NOT TO BE SET ASIDE:** The following provision has been made:

"No judgment or verdict shall be set aside or reversed or a new trial be granted by any court in any civil case on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure unless in the opinion of the court after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

**MISCARRIAGE OF JUSTICE:** In speaking of this section in *Montgomery v. Estate of Montgomery*, 181 Mich. 394; 158 N. W. 117, 23 D. L. N. 284, the court said: "There can scarcely be a situation where the requirements of this statute are more clearly applicable. The substance of all the evidence taken upon the trial seems to have the character of the assignments of error made, if necessary that this should be so. After an examination of the entire cause, we cannot say that it affirmatively appears that the errors complained of have resulted in a miscarriage of justice."

Where the court erroneously instructed the jury that the burden of proof was on plaintiff to show that there had been no delivery of a deed recorded in the name of the defendant, the judgment will not be reversed where there is hardly a fair inference in opposition to the testimony of delivery to the defendant, and therefore it cannot be said affirmatively that there was a miscarriage of justice. *Barras v. Barras*, 191 Mich. 473; 159 N. W., 147. *Barras v. Barras*, 192 Mich. 585.

Where the affidavits of twelve jurymen stated that the verdict they arrived at was not from any understanding or a compulsion to do so, but that it was the individual and collective judgment of each and every one of them, freely, voluntarily and conscientiously given, in view of the size of the verdict, it was not prejudicial error, as it could not be said that it was made affirmatively to appear that what was said in the charge resulted in a miscarriage of justice. *Snowden v. Detroit & M. Ry. Co.*, 194 Mich. 87, 160 N. W., 414.

Prejudicial error in admitting testimony calculated, notwithstanding the advice of the trial court to the jury, to induce the conclusion of fact which was reached, when, if it had been excluded, a different conclusion might have been reached, is always a miscarriage of justice under this act. *People v. Lahuala*, 193 Mich. 144, 159 N. W., 352.

Where plaintiff by the expenditure of \$600 to \$800 within a reasonable time could have placed himself *in statu quo*, a judgment obtained for \$3500 damages was clearly a miscarriage of justice. *Wallace v. H. W. Noble & Co.*, 203 Mich. 64. As to what under this statute, did not constitute a miscarriage of justice. See *Sparks v. Lord*, 198 Mich. 416; *Sullivan v. Fidelity & Casualty Co. of N. Y.* 208 Mich. 68; *Black v. Spears*, 209 Mich. 8; *Jaukowski v. Skupny*, 209 Mich. 227; *Rayner v. Blake*, 209 Mich. 378; *City of Big Rapids v. Big Rapids Mnf g Co.*, 210 Mich. 158.



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